



**United States of America  
Federal Trade Commission**

**Antitrust on the Antiques Roadshow:  
Appraising U.S. Antitrust Laws in a Modern Economy**

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Remarks for NetChoice “Defining the Digital Market” Event

\* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. Many thanks to my Attorney Advisor Adam S. Cella for his assistance in the preparation of these remarks.

Good afternoon! Thank you to NetChoice for inviting me to speak today. Before I begin, I must give the standard disclaimer that the views I will share today are my own and do not necessarily reflect the views of the Federal Trade Commission or of any other Commissioner.

“Big Tech” has brought antitrust law to center stage, making it more important than ever for us to come together, discuss, and debate the future of antitrust enforcement. Of course, when I say, “come together,” I mean virtually. The past year cut short sports seasons, sent students home for remote learning, and even cancelled the entire 2020 tour for Antiques Roadshow<sup>1</sup>—making us wait to discover the value of old family heirlooms. But if there is anything we have learned from the last year, it is that we can hold an excellent virtual event and discuss the future of antitrust.

Many advocates of reform question whether our existing antitrust framework has what it takes to promote healthy competition in today’s world. The House Judiciary Committee’s Majority Staff Report—published last fall after the committee’s investigation of the GAFAs companies—argues that Congress must modernize the antitrust laws for the economy of the digital age.<sup>2</sup> In the same spirit, House Antitrust Subcommittee Chairman Cicilline criticized the antitrust laws because they were created during the time of railroad monopolies and consequently were ill-suited for today’s economy.<sup>3</sup> (As an aside, it is unclear to me why this “old is not good” argument does not apply to the railroad regulation cited in the Majority Staff Report as a model for Big Tech.<sup>4</sup>)

These critics are referring to the Sherman Act, passed in 1890; the Clayton Act, passed in 1914; and the FTC Act, also passed in 1914. We cannot bring these laws onto Antiques Roadshow to appraise their value. I would argue, though, that they are not dusty, useless trinkets

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<sup>1</sup> 2020 Tour — Knock Our Socks Off!, PBS (Aug. 25, 2020), <https://www.pbs.org/wgbh/roadshow/koso/>.

<sup>2</sup> MAJORITY STAFF OF H. COMM. ON THE JUDICIARY, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGIT. MKTS. 7 (2020) [hereinafter MAJORITY STAFF REPORT], [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf) (“...Congress must lead the path forward to modernize [the antitrust laws] for the economy of today, as well as tomorrow. Our laws must be updated to ensure that our economy remains vibrant and open in the digital age.”).

<sup>3</sup> James Rowley, *Facebook, Google Monopoly Fears Prompt House Antitrust Scrutiny*, BLOOMBERG GOVERNMENT (July 11, 2019), <https://about.bgov.com/news/facebook-google-monopoly-fears-prompt-house-antitrust-scrutiny/> (“A House Judiciary subcommittee is studying the digital market’s ‘absence of competition’ to determine ‘how did it get to this place,’ the panel’s chairman, David Cicilline (D-R.I.), told reporters. Antitrust laws were mostly written ‘during the railroad monopolies and in the time of the oil barons,’ he said. ‘It’s a different economy now.’”).

<sup>4</sup> MAJORITY STAFF REPORT, *supra* note 2, at 380 (“In the railroad industry, for example, a congressional investigation found that the expansion of common carrier railroads into the coal market undermined independent coal producers, whose wares the railroads would deprioritize in order to give themselves superior access to markets. In 1893, the Committee on Interstate and Foreign Commerce wrote that ‘[n]o competition can exist between two producers of a commodity when one of them has the power to prescribe both the price and output of the other.’ Congress subsequently enacted a provision to prohibit railroads from transporting any goods that they had produced or in which they held an interest.”); *id.* at 382 (“The 1887 Interstate Commerce Act, for example, prohibited discriminatory treatment by railroads.”); *id.* at 383 (“Historically, Congress has implemented nondiscrimination requirements in a variety of markets. With railroads, the Interstate Commerce Commission oversaw obligations and prohibitions applied to railroads designated as common carriers”).

pulled from someone's attic—instead, they are priceless heirlooms that continue to hold great value. I would note, for those concerned with the value of antiques, that the most expensive item ever appraised on Antiques Roadshow is a pocket watch that sold for over \$1.5 million.<sup>5</sup> The pocket watch was made in 1914, the same year that the FTC was created.

I plan to focus my remarks today on three areas where Big Tech has altered the nature of the antitrust debate: (1) attacks on the consumer welfare standard; (2) the politicization of antitrust; and (3) a push for competition rulemaking.

First, critics of modern antitrust enforcement argue that the consumer welfare standard is inadequate for today's economy. Commentators point to many supposed failings of the consumer welfare standard and seek to incorporate additional policy goals into antitrust analysis. To the contrary, the consumer welfare standard has a proven track record of addressing the harms that concern these critics.

Second, the critics are clever to keep the focus on Big Tech, which has fallen out of favor these days. The result has been the politicization of antitrust law—something that not too long ago, everyone would have agreed is suboptimal. But it has been a successful tactic for advocates of greater antitrust enforcement who seek to change the rules for the entire economy, not just for Big Tech. Experience teaches us that our antitrust laws can tackle today's challenges. We should—at a minimum—wait for the outcome of pending litigations and investigations before rushing to change our laws.

And third, some proponents of increased antitrust enforcement seek to circumvent the courts and Congress through FTC competition rulemaking. Many experts question the legality of competition rulemaking. Regardless of Congressional support or judicial approval, I believe competition rulemaking is an unwise endeavor.

## **1. The Consumer Welfare Standard**

I would first like to discuss claims that the consumer welfare standard only prevents higher prices and fails to measure other harms to competition.<sup>6</sup> Proponents of reform argue that judges and enforcers cannot measure consumer welfare.<sup>7</sup> Some even say that the consumer

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<sup>5</sup> 1914 Patek Philippe Pocket Watch, PBS, <https://www.pbs.org/wgbh/roadshow/season/9/st-paul-mn/appraisals/patek-philippe-pocket-watch-ca-1914--200401A52/>, (“This watch ultimately sold at Sotheby's in 2006 for \$1,541,212 USD including buyer's premium.”).

<sup>6</sup> Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust*, 87 U. CHI. L. REV. 595, 596 (2020), <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=6188&context=uclrev> (“...that harm to competition within the legal meaning of the antitrust laws consists solely of harm to consumers and their welfare, as measured almost exclusively by price and quantity effects in output markets.”).

<sup>7</sup> Tim Wu, *After Consumer Welfare, Now What? The “Protection of Competition” Standard in Practice*, COMPETITION POLICY INTERNATIONAL 2 (2018), [https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty\\_scholarship](https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=3294&context=faculty_scholarship) (“The maximization of a value, particularly one as abstract as ‘welfare,’ necessarily puts enforcers and the judiciary in a challenging position, given that welfare is abstract and ultimately unmeasurable.”).

welfare standard is the main contributor to market concentration.<sup>8</sup> These critics want to inject other goals into antitrust analysis, like protecting jobs, increasing fairness, and reducing income inequality.<sup>9</sup> These proposals threaten economy-wide ramifications and risk three fundamental aspects of sound antitrust enforcement: administrability, predictability, and credibility.<sup>10</sup>

These criticisms of the consumer welfare standard garnered increased attention following the Senate Democrats’ Better Deal proposal in 2017.<sup>11</sup> The Democrats’ recent Majority Staff Report and its focus on Big Tech amplified these calls for reform.<sup>12</sup> The report claims that “traditional assessments” are difficult to apply to Big Tech partly because “online platforms rarely charge consumers a monetary price.”<sup>13</sup>

To dispel inaccurate claims about the consumer welfare standard, let’s be honest and clear about what we measure. The consumer welfare standard seeks to maximize consumer surplus or, in other words, the difference between what each consumer actually pays and what he is willing to pay.<sup>14</sup> Any judge or enforcer can apply this standard: if prices increase for an

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<sup>8</sup> *Restoring Antimonopoly Through Bright-Line Rules*, OPEN MARKETS INST. (Apr. 26, 2019), <https://openmarketsinstitute.org/op-eds-and-articles/restoring-antimonopoly-bright-line-rules/> (“The ‘consumer welfare’ approach to antimonopoly is the main contributor to the extreme and dangerous concentrations of power that Americans face today. In place of this vague, subjective, easily manipulated, and fundamentally corrupt framework, we propose a system of simple rules that is true to the original American approach to building and protecting an open and democratic society.”).

<sup>9</sup> SENATE DEMOCRATS, *A BETTER DEAL: CRACKING DOWN ON CORPORATE MONOPOLIES*, 1 (2017), <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> (“A Better Deal on competition means that we will revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come[s] [sic] before big corporations that are getting even bigger.”).

<sup>10</sup> See Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435, 1452 (2019) (discussing the importance these three criteria on alternative standards).

<sup>11</sup> Matthew Yglesias, *Democrats’ push for a new era of antitrust enforcement, explained*, VOX (July 30, 2017), <https://www.vox.com/policy-and-politics/2017/7/31/16021844/antitrust-better-deal> (“Democrats are saying, with increasing clarity, that they want to overthrow a legal paradigm that’s existed for about 40 years and which held that consumer welfare — typically as measured by consumer prices — is the sole relevant metric for making antitrust policy.”).

<sup>12</sup> Lauren Feiner, *Congress just finished its Big Tech antitrust report — now it’s time to rewrite the laws*, CNBC (Oct. 7, 2020), <https://www.cnn.com/2020/10/07/after-congress-big-tech-antitrust-report-its-time-to-rewrite-the-laws.html>.

<sup>13</sup> MAJORITY STAFF REPORT, *supra* note 2, at 51 (“Scholars and market participants have noted that even as online platforms rarely charge consumers a monetary price—products appear to be ‘free’ but are monetized through people’s attention or with their data—traditional assessments of market power are more difficult to apply to digital markets.”) (citations omitted). See also *id.* at 18 (“Online platforms rarely charge consumers a monetary price—products appear to be ‘free’ but are monetized through people’s attention or with their data.”); *id.* at 391 (“By adopting a narrow construction of ‘consumer welfare’ as the sole goal of the antitrust laws, the Supreme Court has limited the analysis of competitive harm to focus primarily on price and output rather than the competitive process”).

<sup>14</sup> Herbert Hovenkamp, *Implementing Antitrust’s Welfare Goals*, 81 FORDHAM L. REV. 2471, 2471-72 (2013).

otherwise unchanged product, consumer welfare is harmed; if quality decreases, subsequently lowering the amount a consumer is willing to pay, consumer welfare is likewise harmed; if innovation is stalled and a consumer will be delayed in buying a new or better product, consumer welfare is again harmed.

Guidelines that explain the DOJ and FTC’s approach to merger analysis confirm that price is not the only important measure. The 2010 Horizontal Merger Guidelines state that market power can be manifested in non-price terms, including reduced quality or innovation.<sup>15</sup> The 2010 Guidelines also explain that for simplicity, competitive effects are generally discussed as price effects.<sup>16</sup> Any criticism that the 2010 Guidelines are not persuasive to judges ignores Carl Shapiro and Howard Shelanski’s recent evaluation that found the 2010 Guidelines have influenced case law and strengthened merger enforcement.<sup>17</sup>

The newly enacted Vertical Merger Guidelines show that the agencies examine whether a firm can deter a rival’s innovation as one possible anticompetitive effect.<sup>18</sup> The FTC recently applied these guidelines when challenging the proposed vertical acquisition by Illumina of Grail.<sup>19</sup> The complaint focuses on harms to innovation and highlights that Grail is one of several competitors racing to develop non-invasive, early detection liquid biopsy tests that can screen for multiple types of cancer.<sup>20</sup> There are no commercial products on the market, making this a vertical case focused on non-price harms.<sup>21</sup>

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<sup>15</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 1 (Aug. 19, 2010) (“Enhanced market power can also be manifested in non-price terms and conditions that adversely affect customers, including reduced product quality, reduced product variety, reduced service, or diminished innovation. Such non-price effects may coexist with price effects, or can arise in their absence.”).

<sup>16</sup> *Id.* (“For simplicity of exposition, these Guidelines generally discuss the analysis in terms of such price effects.”).

<sup>17</sup> Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. OF INDUSTRIAL ORGANIZATION 51, 53 (2020), <https://link.springer.com/article/10.1007/s11151-020-09802-x> (“These fears have not been borne out over the past decade. To the contrary, the 2010 Guidelines have continued to be well accepted by the courts and to assist the case law’s (slow) incorporation of new economic learning and agency experience in analyzing the impact of mergers on competition. In particular, we find that the richer explanation of how the Agencies use qualitative and quantitative evidence to assess competitive effects has favorably influenced the case law and strengthened merger enforcement.”).

<sup>18</sup> U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, VERTICAL MERGER GUIDELINES § 4.a. (June 30, 2020) (“In identifying whether a vertical merger may diminish competition ... the Agencies generally consider whether ... the merged firm would likely be able to cause [rivals] to lose significant sales in the relevant market (for example, if they are forced out of the market; if they are deterred from innovation[.]”).

<sup>19</sup> Complaint at ¶ 48, *FTC v. Illumina*, No. 9401 (March 30, 2021), [https://www.ftc.gov/system/files/documents/cases/redacted\\_administrative\\_part\\_3\\_complaint\\_redacted.pdf](https://www.ftc.gov/system/files/documents/cases/redacted_administrative_part_3_complaint_redacted.pdf) (“As the Vertical Merger Guidelines explain, a vertical merger may diminish competition by leaving the merged firm with the ability and incentive to use its control of the related product to weaken or remove the competitive constraint from one or more of its actual or potential rivals in the relevant market.”).

<sup>20</sup> *Id.* at ¶¶ 42-48.

<sup>21</sup> *Id.* at ¶¶ 39-41.

The FTC’s horizontal merger enforcement record also demonstrates that measures of non-price competition are critical in antitrust analysis. For example, hospital mergers are one of the most active areas for enforcement at the FTC.<sup>22</sup> When reviewing these deals, courts focus on non-monetary factors of competition, including “clinic hours, convenience of location, available services, technology, and quality.”<sup>23</sup> The FTC is not going to win every merger challenge.<sup>24</sup> But as recent and ongoing hospital challenges show, the FTC is not afraid to stop mergers when measures of non-price competition harm consumers.

Even a superficial review of merger law and policy reveals that the consumer welfare standard measures more than just prices. So why do critics make this allegation anyway?<sup>25</sup> I think they hope to discredit the consumer welfare standard so that a favored replacement will be chosen—a replacement that will inject non-competition considerations into antitrust analysis.

This change would impact every sector of our economy and risk three fundamental aspects of sound antitrust enforcement: administrability, predictability, and credibility. I have previously argued that the consumer welfare standard is preferable to many alternatives because it is administrable, predictable, and credible.<sup>26</sup> Like a Babe Ruth rookie card, you don’t even need Antiques Roadshow to know those three criteria will never decrease in value. Diminishing these three core values undermines antitrust analysis by creating inconsistency, inefficiency, and erosion of public trust.<sup>27</sup>

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<sup>22</sup> The FTC challenged three hospital mergers in 2020. *See* In re. Thomas Jefferson University, No. 9392, <https://www.ftc.gov/enforcement/cases-proceedings/181-0128/thomas-jefferson-university-matter> (filing an administrative complaint filed February 27, 2020); In re. Methodist Le Bonheur Healthcare, No. 9396, <https://www.ftc.gov/enforcement/cases-proceedings/191-0189/methodist-le-bonheur-healthcare-matter> (filing an administrative complaint on November 13, 2020 and the parties announce publicly that they abandoned the acquisition on December 23, 2020); In re. Hackensack Meridian Health, No. 9399, <https://www.ftc.gov/enforcement/cases-proceedings/2010044/hackensack-meridian-health-inc-englewood-healthcare-foundation> (filing an administrative complaint on December 4, 2020).

<sup>23</sup> *FTC v. Sanford Health*, No. 17-cv-0133, 2017 WL 10810016, at \*7 (D.N.D. Dec. 15, 2017) (“[S]econd-stage competition generally focuses on non-monetary factors which include, e.g., clinic hours, convenience of location, available services, technology, and quality.”).

<sup>24</sup> *FTC v. Thomas Jefferson Univ.*, No. CV 20-01113, 2020 WL 7227250 (E.D. Pa. Dec. 8, 2020).

<sup>25</sup> In addition to the examples discussed, one study from 2004-2014 found that FTC has alleged harms to innovation in 54 of 164 transactions. Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1931-32 (2015), <http://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-1919.pdf>.

<sup>26</sup> Administrability assesses whether businesses and antitrust enforcement agencies can feasibly and cost effectively use the standard with the evidence available. Predictability evaluates whether enforcement decisions are likely to be consistent in similar cases, which enables business planning and effective use of enforcement resources. Credibility considers whether outcomes are inconsistent with legal or economic norms, such as Type I or Type II errors that can erode popular respect and trust in enforcement decisions.

<sup>27</sup> Christine S. Wilson, Thomas J. Klotz & Jeremy A. Sandford, *Recalibrating the Dialogue on Welfare Standards: Reinserting the Total Welfare Standard into the Debate*, 26 GEO. MASON L. REV. 1435, 1452-53 (2019) (discussing the three criteria to analyze each alternative standard).

## 2. The Politicization of Antitrust Law

Let's turn now to politicization of antitrust law. Advocates of reform use Big Tech as a foil to push for change that will have a sweeping impact beyond the tech sector. This spotlight, to quote one Senator, is "making antitrust cool again."<sup>28</sup> Although Big Tech is the most obvious target, proponents of reform admit it is part of a larger effort to transform the economy as a whole.<sup>29</sup> The Majority Staff Report, for example, followed an investigation of digital platforms and focused on the practices of only four companies, but made calls for antitrust reform that have economy-wide implications.<sup>30</sup> Attempts to undermine the consumer welfare standard and inject additional objectives into the analysis make antitrust enforcement more susceptible to political whims and influence.<sup>31</sup>

The appearance of political influence can erode the credibility of antitrust enforcement decisions. Even the occasional rumor of political influence, regardless of whether there exists any evidence of meddling, can lead to questions of impropriety. President Trump was criticized for allegedly encouraging the DOJ to block the AT&T acquisition of Time-Warner.<sup>32</sup> Google's access to the Obama Administration caused some to call into question the FTC's decision not to sue Google and instead end the investigation.<sup>33</sup> Similar allegations may have tarnished the

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<sup>28</sup> Ashley Gold, *Amy Klobuchar steps into the antitrust spotlight*, AXIOS (March 11, 2020), <https://www.klobuchar.senate.gov/public/index.cfm/amy-in-the-news?ID=4644621C-162A-4305-B1C2-DC116B772238> ("We have gotten more interest in antitrust and we are making antitrust cool again[.]").

<sup>29</sup> *Id.* ("We're starting big in terms of talking about the economy as a whole ... Tech is the most obvious, with the gateway issues and all the consolidation. But you've also had consolidation in everything from cat food to caskets and online travel and cable, you name it."); Elizabeth Warren, *Lina Khan*, TIME (Feb. 17, 2021), <https://time.com/collection/time100-next-2021/5937715/lina-khan/> ("As Google, Apple, Facebook and Amazon face growing scrutiny, we have a huge opportunity to make big, structural change by reviving antitrust enforcement and fighting monopolies that threaten our economy, our society and our democracy.").

<sup>30</sup> MAJORITY STAFF REPORT, *supra* note 2, at 396-398 (calling for changes to the law governing predatory pricing, product design, and the essential facilities doctrine).

<sup>31</sup> Joshua D. Wright, Univ. Professor, Antonin Scalia Law School at George Mason University, Statement Before the U.S. Senate Comm. on the Judiciary, Subcomm. on Antitrust, Competition Policy and Consumer Prot., Hearing on "The Consumer Welfare Standard in Antitrust Law: Outdated or a Harbor in a Sea of Doubt?" 5 (Dec. 13, 2017) ("Rejecting the consumer welfare standard in favor of a multi-dimensional alternative would, however, increase agency discretion to justify any regulatory decision as consistent with the law. This increases the incentive and ability of rent seeking firms to exert control over agencies. Indeed, history has shown us time and again that establishing amorphous standards in antitrust law and enforcement invite rent seeking ...").

<sup>32</sup> Peter Kafka, *Trump wants to punish CNN by breaking up the AT&T/Time Warner deal*, VOX (Nov. 8, 2017), <https://www.vox.com/2017/11/8/16624946/trump-punish-cnn-att-time-warner> ("What would it look like if the President of the United States punished American businesses he didn't like, or news organizations that reported things he didn't like? It would look like this: Trump's Department of Justice is threatening to scuttle AT&T's purchase of Time Warner unless the merged companies dump CNN and Turner, the cable unit that houses CNN, according to a source familiar with the DOJ's review.").

<sup>33</sup> Brody Mullins, *Google Makes Most of Close Ties to White House*, WALL ST. J. (March 24, 2015), <https://www.wsj.com/articles/google-makes-most-of-close-ties-to-white-house-1427242076> ("Google's access to high-ranking Obama administration officials during a critical phase of the antitrust probe is one sign of the Internet giant's reach in Washington. Since Mr. Obama took office, employees of the Mountain View, Calif., company have visited the White House for meetings with senior officials about 230 times, or an average of roughly once a week,

settlement of DOJ's suit challenging the merger of American Airlines and US Airways.<sup>34</sup> To be clear, I have no knowledge of whether politics influenced any of these decisions, but I do know that even rumors and the potential for political influence undermine law enforcement decisions. Justice Powell once said that “[e]qual justice under law is not merely a caption on the facade of the Supreme Court. It is perhaps the most inspiring ideal of our society[.]”<sup>35</sup> If we fail to insulate antitrust enforcement from political influence, the rule of law erodes.

Some members of Congress have recognized the risks. Senator Mike Lee said in a statement in 2019 that “antitrust is a highly technical inquiry, not something that lends itself to easy generalizations or blanket condemnations.”<sup>36</sup> Members on the left *and* right have warned that politicizing antitrust law puts at risk the innovation and other benefits brought to us by leading tech companies. For example, Democratic Representative Ro Khanna argued that “[w]e can’t have this become a political football. We need sober minds to prevail and to hold tech accountable without forfeiting our innovation and entrepreneurial advantage.”<sup>37</sup> Republican Representative Ken Buck said he “would rather see targeted antitrust enforcement over onerous and burdensome regulation that kills industry and innovation.”<sup>38</sup>

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according to the visitor logs reviewed by the Journal. ... The staff recommended a lawsuit, which would have triggered one of the highest-profile antitrust cases since the Justice Department sued Microsoft Corp. in the 1990s. FTC commissioners voted unanimously to end the probe. Visitor logs and internal emails reviewed by the Journal describe meetings involving Google, senior White House advisers and top FTC officials between the staff's recommendation in August 2012 and the vote in January 2013.”).

<sup>34</sup> Justin Elliott, *The American Way*, PROPUBLICA (Oct. 11, 2016), <https://www.propublica.org/article/airline-consolidation-democratic-lobbying-antitrust> (“[Rahm Emanuel, former Obama White House Chief of Staff] lunched with the CEOs of American and US Airways at a suite in the St. Regis hotel in Washington. The next stop on his schedule: the White House, for meetings with President Obama and Chief of Staff Denis McDonough. Later that day, Emanuel met with Secretary of Transportation Anthony Foxx, whose agency also had a hand in reviewing the merger. (The White House and Department of Transportation declined to comment on the meetings.) Meanwhile, the airlines dispatched another valuable asset: An adviser on the deal, Jim Millstein, was both a former high-level Obama administration official at Treasury and a friend of Deputy Attorney General James Cole, the No. 2 at the Justice Department. Millstein said Cole told him that the government was open to settling the case – a position at odds with the Justice Department’s public stance. The two spoke about the case on social occasions, such as ‘after finishing a round of golf,’ Millstein said in an interview. The five meetings and phone calls between Millstein and Cole – all within two months in late 2013 – shocked Justice Department staff attorneys who worked on the case, with one describing them as a sign of ‘raw pressure and political influence.’ Cole declined to comment in detail, but said in a statement that ‘nothing inappropriate occurred.’”).

<sup>35</sup> Justice Lewis Powell, Jr., Remarks to the Nation Conference on Law and Poverty, (June 25, 1965), [https://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechLawandPoverty\\_June25,1965.pdf](https://law2.wlu.edu/deptimages/powell%20archives/PowellSpeechLawandPoverty_June25,1965.pdf).

<sup>36</sup> Office of Senator Mike Lee, Sen. Lee Comments on Antitrust Investigation (Jun. 4, 2019), <https://www.lee.senate.gov/public/index.cfm/2019/6/sen-lee-comments-on-antitrust-investigations>.

<sup>37</sup> Dean DeChiaro, *Big Tech now squarely in the sights of antitrust forces*, ROLL CALL (Jun. 6, 2019), <https://www.rollcall.com/2019/06/06/big-tech-now-squarely-in-the-sights-of-antitrust-forces/>.

<sup>38</sup> Office of Congressman Ken Buck, Rep. Buck Pens Antitrust Report that Presents a “Third Way” to Take on Big Tech (Oct. 6, 2020), <https://buck.house.gov/media-center/press-releases/rep-buck-pens-antitrust-report-presents-third-way-take-big-tech>.

Antitrust precedent demonstrates that the consumer welfare standard can and does work to stop anticompetitive conduct by tech companies. For instance, the famous Microsoft case is largely credited as successful enforcement against the tech giant of its time, clearing a path for the tech giants of today.<sup>39</sup>

Recent actions demonstrate the will of enforcers to be aggressive in this space. The DOJ, FTC, and state attorneys general filed suit against Google and Facebook using existing antitrust law.<sup>40</sup> The Commission initiated an antitrust case against Surescripts, a multi-sided platform that facilitates electronic prescribing, alleging monopolization of two markets.<sup>41</sup> Sober minds would await the result of these efforts before jumping to conclusions with sweeping changes to antitrust law.

Instead of politicizing antitrust law, consider the kinds of incentives we want to create with our system. Antitrust policy benefits consumers when it incentivizes investing in R&D, introducing new products, and charging low prices. Other concerns such as political influence, content moderation, and privacy can and should be addressed through separate and targeted legislation.

### **3. Competition Rulemaking**

In March, Acting Chair Slaughter announced a new rulemaking group within the Office of the General Counsel that centralizes the rulemaking roles and skills previously scattered

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<sup>39</sup> Elizabeth Warren, Here’s how we can break up Big Tech (March 8, 2019), <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c> (“In the 1990s, Microsoft — the tech giant of its time — was trying to parlay its dominance in computer operating systems into dominance in the new area of web browsing. The federal government sued Microsoft for violating anti-monopoly laws and eventually reached a settlement. The government’s antitrust case against Microsoft helped clear a path for Internet companies like Google and Facebook to emerge.”). *But see* Robert W. Crandall & Charles L. Jackson, *Antitrust in High-Tech Industries*, 38 REV. INDUS. ORG. 319, 358 (2011) (concluding that the Section 2 case brought against Microsoft did not stimulate entry or innovation).

<sup>40</sup> Press Release, U.S. Dep’t of Justice, Justice Department Sues Monopolist Google For Violating Antitrust Laws (Oct. 20, 2020), <https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws>; Press Release, Ken Paxton, Texas Attorney General, AG Pax-ton Sues Google for Illegally Maintaining Monopolies in Internet Search and Search Advertising Services (Oct. 20, 2020), <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-sues-google-illegally-maintaining-monopolies-internet-search-and-search-advertising>; Press Release, Fed. Trade Comm’n, FTC Sues Facebook for Illegal Monopolization (Dec. 9, 2020) <https://www.ftc.gov/news-events/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization>; Press Release, Letitia James, N.Y. Attorney General, Attorney General James Leads Multistate Lawsuit Seeking to End Facebook’s Illegal Monopoly (Dec. 9, 2020), <https://ag.ny.gov/press-release/2020/attorney-general-james-leads-multistate-lawsuit-seeking-end-facebooks-illegal>.

<sup>41</sup> Press Release, Fed. Trade Comm’n, FTC Charges Surescripts with Illegal Monopolization of E-Prescription Markets (Apr. 24, 2019), <https://www.ftc.gov/news-events/press-releases/2019/04/ftc-charges-surescripts-illegal-monopolization-e-prescription> (“The FTC alleges that Surescripts intentionally set out to keep e-prescription routing and eligibility customers on both sides of each market from using additional platforms (a practice known as multihoming) using anticompetitive exclusivity agreements, threats, and other exclusionary tactics.”).

across the agency.<sup>42</sup> The FTC took similar action under Chairman Majoras “to coordinate more effectively the full range of the FTC’s international activities.”<sup>43</sup> I applaud this effort to examine the organizational structure of the agency to look for better and more efficient ways of carrying out our mission. But substantively, I am concerned.

The FTC’s historical rulemaking has been focused on consumer protection issues, but this new rulemaking group has been given a broader mandate that includes competition rules.<sup>44</sup> This broader mandate aligns with calls by critics of the existing antitrust framework to rely less on effects-based analysis and more on bright-line rules.<sup>45</sup> I am concerned about both the wisdom and legality of FTC rulemaking in the competition arena.

Peeking into the FTC’s dusty attic sheds light on the issues surrounding the legality of competition rulemaking. In 1914, Congress gave the FTC authority to make rules for the purpose of carrying out the FTC Act.<sup>46</sup> The FTC issued few rules until 1962,<sup>47</sup> and then issued a series of rules over the next decade.<sup>48</sup> Throughout this time it was unclear whether the FTC had authority to issue substantive rules.<sup>49</sup> In fact, the FTC testified eight times that it had only procedural rulemaking power before reversing course in 1967.<sup>50</sup>

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<sup>42</sup> Press Release, Fed. Trade Comm’n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group>.

<sup>43</sup> Press Release, Fed. Trade Comm’n, FTC Chairman Announces New International Affairs Office (February 5, 2007), <https://www.ftc.gov/news-events/press-releases/2007/02/ftc-chairman-announces-new-international-affairs-office>.

<sup>44</sup> Press Release, Fed. Trade Comm’n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (March 25, 2021), <https://www.ftc.gov/news-events/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group> (“It is also time for the Commission to activate its unfair methods of competition rulemaking authority in our increasingly concentrated economy, and I am excited for this new rulemaking group to explore all the possibilities.”).

<sup>45</sup> Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. CHI. L. REV. 357 (2020), [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\\_Rulemaking\\_87UCLR357.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf).

<sup>46</sup> Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1860.

<sup>47</sup> *Id.*

<sup>48</sup> Special Committee to Study the Role of the Federal Trade Commission, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 88 (1989).

<sup>49</sup> Daniel A. Crane, *Debunking Humphrey’s Executor*, 83 GEO. WASH. L. REV. 1835, 1860 (“... but it remained unsettled until 1973 whether this general provision applied only to procedural or noninvestigatory rulemaking, or whether it also applied to substantive rules fleshing out the open-ended prohibition of Section 5 of the FTC Act.”).

<sup>50</sup> Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University Law School, Fed. Trade Comm’n, *Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues* 295-96 (Jan. 9, 2020) (“You’ve got the problem that on eight different occasions the Federal Trade Commission had testified before Congress that it did not give them the power to issue anything but procedural rules. That had been the position of the FTC from 1914 until 1967 when, for the first time, it said, oh, now we think it, okay.”).

In the 1973 *Octane Postings* case, the D.C. Circuit held that the FTC did have the power to promulgate rules with the effect of substantive law.<sup>51</sup> Congress stepped in only two years later, passing the Magnuson-Moss Act, which gave the FTC substantive consumer protection rulemaking power under a new Section 18 of the FTC Act.<sup>52</sup>

Is it possible that Congress never meant to grant substantive competition rulemaking power to the FTC? As former FTC Chairman Miles W. Kirkpatrick said, the law and legislative history can be interpreted both ways.<sup>53</sup> Is it also possible that Congress does not have the constitutional authority to delegate broad competition rulemaking power to the agency? During a recent FTC workshop on non-competes, rulemaking experts commented that the authority is not clear<sup>54</sup> and there is litigation risk.<sup>55</sup> The experts questioned whether the statutory authority outside of Section 18 only applies to rules of procedure<sup>56</sup> and whether broad substantive rulemaking authority is unconstitutional under the non-delegation doctrine.<sup>57</sup>

Aside from the legality, I also question the wisdom of competition rulemaking. For starters, our history teaches us that regulatory regimes frequently stifle innovation, raise prices, and lower output and quality without producing concomitant health, safety, and other benefits for consumers. I have spoken and written on the failures of the ICC to regulate railroad competition and the harms this government misadventure brought to consumers.<sup>58</sup> Although the Majority Staff Report held up railroad regulation as a model for Big Tech,<sup>59</sup> never in the approximately

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<sup>51</sup> Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 697–98 (D.C. Cir. 1973) (analyzing a rule promulgated under the FTC's consumer protection and competition authority).

<sup>52</sup> Daniel A. Crane, *Debunking Humphrey's Executor*, 83 GEO. WASH. L. REV. 1835, 1860.

<sup>53</sup> Miles W. Kirkpatrick, *FTC Rulemaking in Historical Perspective*, 48 ANTITRUST L. J. 1561, 1561 (“One of the most important aspects of the Magnuson-Moss Act was its granting, or confirmation, depending upon your reading of the law at that time, of the FTC's rulemaking powers.”).

<sup>54</sup> Howard Shelanski, Professor, Georgetown University Law Center, Fed. Trade Comm'n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 294 (Jan. 9, 2020) (noting there is some precedent supporting competition rulemaking authority but adding that today's Supreme Court would probably disagree).

<sup>55</sup> Aaron L. Nielson, Professor, Brigham Young University Law School, Fed. Trade Comm'n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 237 (Jan. 9, 2020) (“I'm just saying that there is litigation risk.”).

<sup>56</sup> Richard J. Pierce, Jr., Lyle T. Alverson Professor of Law, George Washington University Law School, Fed. Trade Comm'n, Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues 295 (Jan. 9, 2020) (stating that it is apparent that competition rulemaking authority only applies “to rules of procedure, which makes sense for an agency that was believed to have only the power to only adjudicate cases”).

<sup>57</sup> *Id.* at 309 (“So let me start with the nondelegation doctrine because I -- there are now five Justices who are on record as saying they are open to the possibility of figuring out a new way of applying it.”).

<sup>58</sup> Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>.

<sup>59</sup> See sources cited *supra* note 4.

450 pages and 2,500 footnotes did they mention the bipartisan repeal of that regulatory framework<sup>60</sup>—a stunning omission.

Second, rulemaking is inevitably a slow process—for example, narrow amendments to the Contact Lens Rule took more than five years to complete.<sup>61</sup> And enacted rules frequently fail to account for market dynamics, new sources of competition, and consumer preferences. The Care Labeling Rule is at least seven years out of date,<sup>62</sup> excluding wet cleaners from gaining a toehold to compete with dry cleaners and denying consumers several years of more refined care instructions that have been developed by the industry.<sup>63</sup> In contrast, antitrust laws require a fact-specific inquiry that can adapt as industries evolve and economic analysis advances.<sup>64</sup> Rulemaking will freeze the legal and economic analysis of any business conduct subject to a rule, preventing the nuanced inquiries that determine whether conduct actually harms consumers.

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<sup>60</sup> Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. ANTITRUST ENFORCEMENT 10, 12-14 (2019), <https://academic.oup.com/antitrust/article/8/1/10/5614371>.

<sup>61</sup> Contact Lens Rule: Supplemental notice of proposed rulemaking, 84 Fed. Reg. 24,664, 24,666-67 (May 28, 2019) (“The comment period closed on October 26, 2015. ... After a review of comments, surveys, other submitted information, and its own enforcement experience, the Commission determined that the overall weight of the evidence demonstrated need to improve compliance with the Rule's automatic prescription-release requirement, as well as a need to create a mechanism for monitoring and enforcing the Rule. ... The NPRM sought comment on this proposal, and also about the following issues: The provision of additional copies of prescriptions, the amount of time for a prescriber to respond to such a request, the use of patient portals to release prescriptions, and potential modifications to address concerns about automated telephone verification calls. The sixty-day comment period for the Commission's NPRM closed on January 30, 2017. ... To obtain additional input and more fully consider commenter concerns, the Commission solicited additional comments and held a public workshop on the Contact Lens Rule and the Evolving Contact Lens Marketplace on March 7, 2018. ... After reviewing the comments, the Commission now proposes to modify its prior proposal—put forth in the NPRM—that would have required prescribers to request a signed statement from their patients acknowledging receipt of the patient's prescription.”); Contact Lens Rule: Final Rule, 85 Fed. Reg. 50,668 (“The FTC is publishing a final rule to implement amendments to the Contact Lens Rule. ... This rule is effective October 16, 2020.”).

<sup>62</sup> Trade Regulation Rule on Care Labeling of Textile Wearing Apparel and Certain Piece Goods: Supplemental notice of proposed rulemaking, 85 Fed. Reg. 44,485, 44,485-86 (July 23, 2020) (following multiple periods of comments and a roundtable in March 2014 and finding “the record suggests that the Rule may not be necessary to ensure manufacturers provide care instructions, may have failed to keep up with a dynamic marketplace, and may negatively affect the development of new technologies and disclosures.”).

<sup>63</sup> *Id.* at 44,491-92 (“Repeal would also eliminate any possibility the Rule negatively affects market innovation. Over the course of the proceeding, some commenters suggested that the Rule might have had a negative impact on the adoption of new cleaning technologies. For example, commenters and workshop participants explained that the Rule’s failure to address wetcleaning has placed professional wetcleaners at a competitive disadvantage and discouraged greater use of that technology. ... To the extent that current mandated labels may be imperfect or limited, a benefit of the Rule’s repeal would be to afford manufacturers and sellers the freedom to improve existing labels, to label new cleaning methods as they enter the market, and to use widely recognized care symbol systems without waiting for updates to the Rule.”).

<sup>64</sup> *Kimble v. Marvel Entertainment, LLC*, 135 S. Ct. 2401, 2412-13 (2015) (recognizing the “dynamic potential” of the antitrust laws and the flexibility to “revise our legal analysis as economic understanding evolves and ... to reverse antitrust precedents that misperceived a practice’s competitive consequences[.]”).

The type of rule that proponents envision promulgating under the FTC’s competition powers is very different from the typical rule formulated under the FTC’s consumer protection mandate. At their best, our consumer protection rules strive to provide consumers with accurate information about products or sectors. For example, the Funeral Rule adds transparency for grieving family members to make informed choices when planning funerals.<sup>65</sup> The Franchise Rule gives prospective franchisees the material information they need to weigh the risks and benefits of such an investment.<sup>66</sup>

Competition rulemaking, in contrast, would ban a specific type of business practice across the economy.<sup>67</sup> This approach is not compatible with current antitrust laws, which are fact-specific and evolve to embrace new economic learning. This approach allows procompetitive business conduct to continue, and anticompetitive conduct to be stopped.

It is important to note that some proponents of antitrust rulemaking point to the merger guidelines.<sup>68</sup> There is a big difference, though, between explaining how the agencies will apply the consumer welfare standard in a particular context and establishing bright-line rules that reject a harms-based and fact-specific analysis premised on economic principles. Transparency is constructive. Carving in stone a set of rules untethered from economic analysis is not.

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I have appraised the antitrust laws and found that they are not dusty, useless trinkets pulled from someone’s attic, but instead priceless heirlooms that continue to hold great value. Like the man who used a meteor as doorstep for 30 years, we can either view it as an old, worthless rock or look closely to see its true value.<sup>69</sup> Throughout my life, people have accused me of being a Pollyanna. In that vein today, I’d like to close with this admission—I hold out hope for the Antiques Roadshow to air a new season soon, and I hope that conversations like this

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<sup>65</sup> The FTC Funeral Rule, Fed. Trade Comm’n, <https://www.consumer.ftc.gov/articles/0300-ftc-funeral-rule>.

<sup>66</sup> Franchise Rule, Fed. Trade Comm’n, <https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/franchise-rule>.

<sup>67</sup> See, e.g., Non-Competes in the Workplace: Examining Antitrust and Consumer Protection Issues, Fed. Trade Comm’n (Jan. 9, 2020) (analyzing rulemaking to ban non-competes).

<sup>68</sup> Rohit Chopra & Lina M. Khan, *The Case for “Unfair Methods of Competition” Rulemaking*, 87 U. Chi. L. Rev. 357, 366-67 (2020), [https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan\\_Rulemaking\\_87UCLR357.pdf](https://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/ChopraKhan_Rulemaking_87UCLR357.pdf) (“‘Rulemaking’ often evokes the idea of government imposing some inflexible prescription upon the marketplace. This is not what we are suggesting. As former Commissioner Elman rightly noted, rulemaking can also be related to ‘standards, guidelines, pointers, criteria, or presumptions.’ Rules come from courts, legislative bodies, and agencies. While they were not promulgated as agency rules, certain elements of the merger guidelines eventually came to serve as rules once courts adopted them. The merger guidelines stipulate the analytical framework that the agencies rely on to enforce the merger law. Agency rulemaking could do the same for ‘unfair methods of competition.’”).

<sup>69</sup> *Man Uses Meteorite Worth \$100,000 As Doorstep for 30 Years Before Finding Out It's a Very Big Deal*, TIME (Oct. 5, 2020), <https://time.com/5416853/meteorite-in-michigan/>.

will bring a new season of respect for the antitrust framework we have carefully constructed over several decades.

Thanks again to NetChoice for inviting me to share my thoughts with you today.