



UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, DC 20580

**Prepared Remarks of Chairman Joseph Simons¹
Fordham University's 47th Conference
on International Antitrust Law and Policy
October 9, 2020**

I. Introduction

Good morning, and thank you to Fordham University for hosting the 47th Conference on International Antitrust Law and Policy. I want to thank our moderators for putting this panel together, and James Keyte for organizing the conference, especially under less than ideal circumstances. It is unfortunate that we cannot see each other in person this year, but I appreciate the opportunity to join you for what I have always found to be an outstanding program.

After nearly two and a half years as FTC Chairman, I marvel at how much has happened over the course of my tenure. In late 2018/early 2019, we faced a government shutdown that kept much of the Commission staff out of work for about a month. This year, we have had to deal with an unprecedented global pandemic and virtually 100 percent telework. Yet, despite this adversity, the FTC has remained resilient and aggressive. In fact, as an example, our Bureau of Competition has had a record-setting year, with more merger enforcement actions in FY2020

¹ These remarks reflect my own views. They do not necessarily reflect the views of the Commission or any other individual Commissioner.

than any year since 2000. I am grateful to our dedicated staff for the amazing work that they continue to do on behalf of American consumers, especially during these challenging times.

One of the best parts of being at the FTC has been the opportunity to work with our team of bright and dedicated economists in the Bureau of Economics (BE). BE provides tremendous value to our agency's mission by supporting our casework and conducting independent research that sheds light on difficult competition questions. Needless to say, I strongly believe that economic analysis is a powerful tool for informing policymaking, and I welcome efforts by economists at the FTC and outside the agency that help in that regard. Nevertheless, I think we have to be disciplined and careful in using economic studies for policymaking, especially when we consider major changes.

Over the past few years, many critics have called for drastic changes in competition policy. As support for their positions, they have cited a variety of economic studies as allegedly justifying the need for such changes. But I have noticed three types of problems with how economics has been deployed in efforts to justify these changes. First, economic studies with methodological limitations have been used to support overly broad conclusions. Second, economic studies have been cited to support propositions without accounting for more obvious, alternative explanations. Third, new economic models or tools have been widely incorporated into everyday practice without rigorously testing them. Although I am encouraged that people are looking to the best available research to support their views, we need to be careful in how we use research to advocate for policy changes—particularly significant policy changes.

II. Citing Studies With Methodological Limitations

Let us start with the problem of drawing broad conclusions from studies with methodological limitations. As I said earlier, economics can be a powerful tool for studying

competition policy questions, but there still can be serious limitations in doing so even after decades of advances. Data may not be available to study certain questions. The sample size might be too small. There may not be an appropriate control group. Even the most sophisticated techniques cannot overcome some of these limitations.

For instance, Professor John Kwoka prepared a monograph that conducted a meta-analysis of a whole set of merger retrospective studies to assess how well U.S. antitrust merger enforcement is working.² His study concluded that merger enforcement has been too narrowly focused, which has allowed price increases to occur following certain decisions not to block a merger.³ Also, he found that merger remedies—particularly conduct remedies—were not adequately eliminating harm to competition.⁴ Professor Kwoka’s monograph is an important contribution. These are the kinds of questions that we should be studying, and I am thankful that he has been seriously looking at these issues. But the study has its limits.

FTC economists Michael Vita and David Osinski raised some serious questions about the study.⁵ They point out that some of the retrospective studies that Professor Kwoka relies upon predate much of modern merger enforcement. For instance, three of the analyzed mergers predate the issuance of the 1982 Merger Guidelines, and one predated the enactment of the Hart-

² JOHN KWOKA, *MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY* (2015).

³ *Id.* at 114, 120-21, 126; *see also* JOHN KWOKA, *CONTROLLING MERGERS AND MARKET POWER: A PROGRAM FOR REVIVING ANTITRUST IN AMERICA* 120 (2020) (“[Mergers, Merger Control, and Remedies] came to a number of notable findings, some of which have already been cited. Prominent among these have been the fact that merger enforcement has substantially narrowed its focus over time, that increases in price followed from most mergers, and that merger remedies (and especially conduct remedies) have often proven ineffective. The significance of these results underscores the potential of merger retrospectives to inform and improve policy.”).

⁴ KWOKA, *supra* note 2, at 120.

⁵ Michael Vita & F. David Osinski, *John Kwoka’s Mergers, Merger Control, and Remedies: A Critical Review*, 82 *ANTITRUST L.J.* 361 (2018), https://www.ftc.gov/system/files/documents/biographies/michael-g-vita/10_vita_osinski_alj_82-1_final_pdf.pdf.

Scott-Rodino Act.⁶ They also note that he studies a small number of industries—primarily petroleum, airlines, and academic journals—limiting the conclusions that can be drawn about the overall effectiveness of merger enforcement.⁷ Also, in the portion of the study that considers the efficacy of merger remedies, the study is only able to use seven merger retrospectives to estimate price effects after the merger.⁸ And one of those studies only relied upon data for the period prior to a remedy being imposed.⁹ Of course, that is not to say that we should ignore Professor Kwoka’s work. But we also should not rush to conclude that we need wholesale changes in our merger policy. Instead, I think we should dedicate more resources to studying some of the questions that his study leaves open.

Professor Jon Baker recently published a book called *The Antitrust Paradigm: Restoring a Competitive Economy*.¹⁰ In March 2019, I gave the keynote address for the release of Jon’s book at a conference at American University.¹¹ At that event, I noted that Jon’s book represents a significant contribution, and I stand by that assessment. But Jon appears to draw broader conclusions from some of the studies than I think are warranted. For instance, Jon cites a working paper that aims to estimate the empirical effects of the Supreme Court’s *Leegin*

⁶ *Id.* at 366.

⁷ *Id.* at 367.

⁸ *Id.* at 369-73.

⁹ *Id.* at 369.

¹⁰ JONATHAN B. BAKER, *THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY* (2019).

¹¹ Joseph J. Simons, Chairman, Fed. Trade Comm’n, Keynote Address at the American University Washington College of Law Conference on Themes of Professor Jonathan Baker’s New Book, *The Antitrust Paradigm: Restoring a Competitive Economy* (Mar. 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1515179/simons_-_jon_baker_speech_3-8-19.pdf.

decision.¹² The *Leegin* decision reversed an old precedent that treated resale price maintenance (“RPM”) agreements as *per se* unlawful and instead applied a rule-of-reason framework to those agreements.¹³ Even though *Leegin* changed the treatment of RPM agreements under federal antitrust law, some states continued to prohibit RPM agreements *per se*. The study compared the price and output effects in states where RPM followed *Leegin*’s rule-of-reason analysis against states that prohibited RPM agreements *per se*. The study found that prices were higher and quantity was lower for some products in the *Leegin* states. But the products experiencing a price increase were rarely the same products that experienced a decrease in quantity. And where prices go up but quantity does not decrease, the most likely explanation is an outward shift in the demand curve, which likely enhances consumer welfare. In addition, others have pointed out that this study was not able to identify which firms actually imposed RPM agreements in the *Leegin* states.¹⁴ In fact, many of the products covered by the study, such as produce and everyday consumables, typically do not even use RPM agreements. Rather, RPM is generally applied to complex, expensive products sold partly or completely through specialty retailers. It is very difficult to draw broad conclusions about the effects of RPM agreements from this particular study.

Finally, a number of economists have published studies showing an increase in markups and citing that as evidence that market power is growing across the economy.¹⁵ These studies all

¹² BAKER, *supra* note 10, at 16 n.43 (citing Alexander MacKay & David Smith, *The Empirical Effects of Minimum Resale Price Maintenance* (June 16, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513533).

¹³ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

¹⁴ Thomas A. Lambert & Michael Sykuta, *Why the Evidence on Minimum Resale Price Maintenance Does Not Justify a Per Se or “Quick Look” Approach*, CPI ANTITRUST CHRON. (Nov. 2013), <https://www.competitionpolicyinternational.com/assets/Uploads/LambertSykutaNOV-131.pdf>.

¹⁵ See, e.g., Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and Macroeconomic Implications*, 135:2 Q. J. OF ECON. 561 (May 2020), <https://academic.oup.com/qje/article/135/2/561/5714769>.

appear to show consistently increasing markups—though the magnitude of the effect varies significantly among studies. Although the results initially may appear concerning, there are at least two methodological limitations to those studies. First, some studies rely on North American Industry Classification System (“NAICS”) codes to study effects.¹⁶ NAICS codes are industry classifications¹⁷ that are simply too broad to be useful for analyzing anticompetitive conduct or mergers.¹⁸ Second, many of the markup studies rely on accounting profits—not economic profits.¹⁹ But when we think about increases in market power, we need to focus on economic profits.²⁰ When evaluating these markup studies, we ultimately have to consider how these limitations affect the studies’ conclusions.

III. Failing to Account for Alternative Explanations

Even after we account for methodological issues, we also need to think carefully about what conclusions to draw from studies. A study may show an increase in markups,²¹ a decline in

¹⁶ See, e.g., Gustavo Grullon, Yelena Larkin & Roni Michaely, *Are U.S. Industries Becoming More Concentrated?* 23:4 REV. FIN. 697 (2019); Germán Gutiérrez & Thomas Philippon, *Declining Competition and Investment in the U.S.* (Nat’l Bureau Econ. Rsch. Working Paper, Paper No. 23583, July 2017), <https://www.nber.org/papers/w23583>; Simcha Barkai, *Declining Labor and Capital Shares*, 75:5 J. FIN. 2421 (Oct. 2020), <https://onlinelibrary.wiley.com/doi/10.1111/jofi.12909>.

¹⁷ U.S. Census Bureau, Introduction to NAICS (accessed Oct. 5, 2020), <https://www.census.gov/eos/www/naics/>.

¹⁸ See, e.g., Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33:3 J. ECON. PERSPECTIVES 44, 45, 53 (Summer 2019) (“By their nature, detailed industry studies will tend to produce estimates and explanations for markups that are more complex than those advanced in studies making use of broad-based financial accounting data or Census data aggregated across large numbers of firms in very different industries.”), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/jep.33.3.44>.

¹⁹ See, e.g., De Loecker, et al., *supra* note 15.

²⁰ See, e.g., Berry et al., *supra* note 18, at 46-47; Loukas Karabarbounis & Brent Neiman, *Accounting for Factorless Income* (Nat’l Bureau Econ. Rsch. Working Paper, Paper No. 24404 at 4, revised June 2018) (expressing skepticism that De Loecker is actually measuring a rise in economic profits), <https://www.nber.org/papers/w24404>.

²¹ See, e.g., De Loecker et al., *supra* note 15; Gauti B. Eggertsson, Jacob A. Robbins & Ella Getz Wold, *Kaldor and Piketty’s Facts: The Rise of Monopoly Power in the United States* (Nat’l Bureau Econ. Rsch. Working Paper, Paper No. 24287, Feb. 2018), <https://www.nber.org/papers/w24287.pdf>; Robert E. Hall, *Using Empirical Marginal Cost to Measure Market Power in the US Economy* (Hoover Inst. Econ. Working Papers, Paper No. 18118, Nov. 6, 2018), <https://www.hoover.org/sites/default/files/research/docs/18118-hall.pdf>.

labor share,²² diminished start-up activity,²³ or a reduction in capital stock²⁴ across the economy. But before we link those effects to weak antitrust enforcement, we need to rule out other—potentially more obvious—explanations.

First, many of these studies look at markets that are so broad as to be irrelevant for antitrust purposes. In addition, many of these studies consider changes in concentration that may be totally unrelated to antitrust enforcement. For instance, a study may find increasing concentration among hospitals in particular geographic regions, but if the study does not account for hospital closures, then it may incorrectly attribute increasing concentration to weakened antitrust enforcement.

Second, broader trends in the economy or society may provide better explanations. For instance, changes in aggregate markups may reflect technological changes, globalization, the shift from manufacturing to services, and other broader macroeconomic trends that can lead to increased fixed costs and lower marginal costs.²⁵ Indeed, a working paper from Harvard economists Anna Stansbury and Larry Summers estimates that a decline in workers' share of

²² See, e.g., David Autor, David Dorn, Lawrence F. Katz, Christina Patterson & John Van Reenen, *The Fall of the Labor Share and the Rise of Superstar Firms*, 135 Q. J. ECON. 645 (Feb. 3, 2020), <https://academic.oup.com/qje/article-abstract/135/2/645/5721266?redirectedFrom=fulltext>.

²³ See, e.g., John Haltiwanger, *Top Ten Signs of Declining Business Dynamism and Entrepreneurship in the U.S.*, Working Paper (Aug. 2015), http://econweb.umd.edu/~haltiwanger/Haltiwanger_Kauffman_Conference_August_1_2015.pdf.

²⁴ THOMAS PHILIPPON, *THE GREAT REVERSAL: HOW AMERICA GAVE UP ON FREE MARKETS* 68 (2019) (“But you can also see that after 2000, the investment rate seems to be lower than what one would predict based on q . In fact, if we cumulate the residual difference between the investment rate and q , we find that, by 2015, the capital stock is about 10 percent lower than it should be.”).

²⁵ See Berry et al., *supra* note 18, at 54 (“These patterns are consistent with the hypothesis that rising fixed sunk costs and lower marginal costs due to increases in information technology investments could be a significant driver of increasing markups.”); *id.* at 58-59 (“Firms with a global supply chain will have access to lower-cost inputs and may then achieve economies of scale, leading to a higher markup. If such a globalized firm gains market share at the expense of domestic rivals, industry markups will rise.”).

income can be accounted for by a decline in unionization, cost-cutting pressures at companies, globalization, and technological changes rather than by a decline in competition.²⁶

Another example involves studies that link a decline in business start-ups to rising market power.²⁷ But these studies do not rule out demographic changes as a cause—particularly in the U.S. economy, where the population is aging.²⁸ Also, if it is true that bigger companies are making more fixed-cost and sunk-cost investments, then start-ups may face higher hurdles to entering the market, which would reduce the number of start-ups. Other factors also may be involved, such as an increase in regulatory burdens that disproportionately affect potential new entrants.

In short, we need to consider carefully whether the broader effects that we are seeing in the marketplace really are linked to antitrust enforcement or whether other causes are at play. And if other explanations are more likely, the appropriate policy response is not to change antitrust. To make changes to antitrust under such circumstances runs a two-pronged risk. First, the so-called “fixes” to antitrust will not fix the problems of concern. And second, a misguided focus on antitrust may prevent implementation of real fixes from arenas other than antitrust.

²⁶ Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy and American Economic Performance*, (Nat’l Bureau Econ. Rsch. Working Paper, Paper No. 27193, May 2020), <https://www.nber.org/papers/w27193>.

²⁷ See, e.g., Haltiwanger, *supra* note 23.

²⁸ Hugo Hopenhayn, Julian Neira & Rish Singhana, *From Population Growth to Firm Demographics: Implications for Concentration, Entrepreneurship and the Labor Share* (Nat’l Bureau Econ. Rsch. Working Paper, Paper Number 25382, Dec. 2018), <https://www.nber.org/papers/w25382.pdf>; Dennis W. Carlton, *Some Observations on Claims That Rising Market Power is Responsible for U.S. Economy Ills and That Lax Antitrust is the Villain*, CPI Antitrust Chronicle 9 (Aug. 11, 2020), <https://www.competitionpolicyinternational.com/some-observations-on-claims-that-rising-market-power-is-responsible-for-u-s-economy-ills-and-that-lax-antitrust-is-the-villain/>.

IV. Relying on Models That Have Not Been Validated

Lastly, I want to touch briefly on a topic that I have written about extensively: the use of economic models in our enforcement work. One of the more difficult problems that we face is bringing precision to antitrust analysis. Theoretical economic work can help. But we have to be careful not to rely too heavily on tools that have not been empirically tested or that have not demonstrated predictive accuracy. For instance, I have raised questions about the use of generalized upward pricing pressure indices, merger simulations, and aggregate diversion critical loss analysis.²⁹ I will not restate those criticisms here, but I do want to encourage economists to evaluate how well these approaches perform at making predictions. Identifying mergers that we failed to challenge but resulted in price increases is only the first step. In order to improve our analysis, we need to understand why we were wrong—why did we miss blocking those mergers that resulted in price increases. This second step should be a key area of focus.

In support of that specific goal and our broader interest in evaluating the efficacy of our antitrust merger policy, we recently announced the launch of a more formalized and robust Merger Retrospectives Program at the FTC. As a part of this Program, we plan to allocate more staff time and resources to retrospective studies. We have launched a website devoted to highlighting retrospective studies that includes a searchable database to make it easier to find these studies.³⁰ Our Bureau of Economics plans to organize and support sessions at a major industrial organization economics conference on merger retrospectives. Every three years, the FTC's Annual Microeconomics Conference will include a session dedicated to recent

²⁹ See, e.g., Joseph J. Simons & Malcolm B. Coate, Should DOJ's Controversial Approach to Market Definition Control Merger Litigation, the Case of *U.S. v. H&R Block* (Oct. 24, 2013), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225395; Joseph J. Simons & Malcolm B. Coate, *Upward Pricing Pressure on Price Analysis: Issues and Implications for Merger Policy*, 6:2 *European Competition J.* 377 (Aug. 2010).

³⁰ See <https://www.ftc.gov/policy/studies/merger-retrospectives>.

retrospectives research. We will also explore initiatives to allow cooperation with outside academics. I am excited about this Program and hope it will inspire others to start programs of their own. We at the FTC should be devoting even more resources to this effort but unfortunately do not have the money to do so right now.

V. Conclusion

I will end my remarks today by re-emphasizing the value that economics brings to antitrust. I commend economists for their work in developing new studies and new tools to identify and deal with important antitrust issues and concerns. But as policymakers, we have an obligation to carefully evaluate new work and not move away from a strong bipartisan approach to antitrust without making sure we are confident that is the right thing to do.