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Competition and Liberty

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I. Introduction

Many thanks for your kind introduction and for inviting me to speak at the Fordham International Antitrust Law Conference. This event gives us the opportunity to discuss the issues we face globally as antitrust enforcers and practitioners, including some of the core principles of antitrust.

As the Acting Chairman of the U.S. Federal Trade Commission, it has been my privilege to lead the agency during what, by any standards, are dynamic times in the practice of antitrust. Given the intense interest on the role of antitrust, it bears repeating that the agency's central mission is to protect consumers by protecting competition.

As the U.S. Supreme Court has explained, "The heart of our national economic policy long has been faith in the value of competition."² The Court further described the antitrust laws

¹ 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.

² *Standard Oil Co. v. FTC*, 340 U.S. 231, 248, 71 S. Ct. 240 (1951).

as being “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”³

Thus, protecting and promoting competition is an important job, one that is tied to another foundational principle of our government: the protection of individual liberty. Today, I would like to examine this link between competition and liberty, and how I have sought to pursue these principles during my tenure at the FTC.

II. What is Competition and Why Does it Matter

At first blush, competition may seem like a relatively straightforward concept. After all, we all know a competitive market when we see it. Adam Smith described it as a market where goods and services are sold at their natural prices.⁴ Two of America’s leading industrial economists, Dennis Carlton and Jeffrey Perloff, have described the indicia of a market operating under “perfect competition” as having homogenous output, perfect information among buyers and sellers, no transaction costs, price taking by buyers and sellers, and no externalities.⁵ But these indicia do not explain what competition is, any more than saying that it is sunny today explains what weather is. Instead, these observations give a snapshot of an ideal outcome, rather than the process that tends toward that particular outcome. Too often the output of the competitive process— low prices, wider choice—gets confused with the process itself. My focus today is on that process and on its connection to liberty.

Competition is the activity of individuals pursuing their economic self-interest by convincing others to buy the good or service they sell. Of course, buyers are *also* pursuing their self-interest. The exchange between a buyer and a seller leaves both better off, even though each

³ *U.S. v. Topco Assocs.*, 405 U.S. 596, 610, 92 S. Ct. 1126 (1972).

⁴ *See generally*, ADAM SMITH, WEALTH OF NATIONS 48-51 (Knopf 1991) (1776).

⁵ DENNIS W. CARLTON AND JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 57 (4th ed. 2005).

is pursuing their own interest. As Adam Smith explained, “It is not from the benevolence of the butcher, the brewer, or the baker that we expect our dinner, but from their regard to their own interest.”⁶ As Smith further explained, it is the vigorous pursuit of a person’s individual interests that “naturally, or rather necessarily, leads him to prefer that employment which is most advantageous to the society.”⁷ Or as modern commentators have observed, “[T]he entrepreneur has a central role as the agent of change who prods and pulls the markets in new directions.”⁸

I believe that, at its heart, competition is a product of an individual’s liberty to pursue their desires. Many of you visiting New York for this conference likely have seen an image of the Statue of Liberty during your visit. That she stands amidst a great hub of commerce is only fitting.

Thanks to the liberty preserving protections of limited government and individual rights, we are free to pursue our self-interests, to pursue happiness as the founding fathers so eloquently stated.⁹ Individuals exercising liberty in the pursuit of self-fulfillment and prosperity collectively gives rise to competition, which benefits everyone.

As Alexis de Tocqueville observed about America nearly two centuries ago, our society lacks a central philosophy, save one: “each American appeals only to the individual effort of his own understanding.”¹⁰ Because of our self-reliance, de Tocqueville described our young nation as being one of near constant industry; where even the already rich, are “constantly haunted by the desire of obtaining wealth.”¹¹ In trying to satisfy their self-interests, Americans “naturally

⁶ ADAM SMITH, WEALTH OF NATIONS 13 (Knopf 1991) (1776).

⁷ *Id.* at 397.

⁸ MATTHEW D. MITCHELL AND PETER J. BOETTKE, APPLIED MAINLINE ECONOMICS 36 (2017).

⁹ *See generally*, THE DECLARATION OF INDEPENDENCE (U.S. 1776).

¹⁰ ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 143 (Penguin Putnam 2001) (1835).

¹¹ *Id.* at 214.

turn their attention to trade and manufacturing, which appear to offer the readiest and most efficient means of success.”¹²

And while entrepreneurs pursue their own welfare maximizing endeavors, the “invisible hand” of the competitive market steers the producers in directions that maximize social welfare.¹³

Once undertaken, competition takes on a dynamic that is neither stagnant nor stationary for any participant. The desire to sell more drives innovation, which drives competition. Once an entrepreneur develops a better mousetrap, someone is right there offering an even better one at a lower price. When someone comes along and invents a stronger carriage, the next entrepreneur invents the automobile.

Market competition should determine the winners and losers. Competition, like liberty, is not for the meek: it requires grit, determination, and stamina. Competition’s creative destruction is a dynamic cycle that, while uncertain for the competitor, motivates the entrepreneur and gives rise to new inventions that benefit society overall.¹⁴ Competition driven innovation resulted in smartphones, which displaced the once revolutionary cell phones, which displaced the once revolutionary land-lines. And competition driven innovation yields something that will one day displace the smartphone. It is a wonderful cycle.

III. What is the Role of Government in Protecting Competition?

Notably, government planning did not create the smart phone nor the mass-produced automobile. Rather, as soon as Alexander Graham Bell called his assistant Watson with a

¹² *Id.*

¹³ *See generally*, ADAM SMITH, WEALTH OF NATIONS (Knopf 1991) (1776).

¹⁴ *See* JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY 83 (3d ed. 1950).

request to come at once, and Henry Ford started rolling out mass-produced cars, the wheels of competition turned to get us where we are today.

Government does not create or drive competition. Government instead provides a framework in which competition can thrive. As Milton Friedman described, the purpose of government in the free economy is to do what markets cannot do. That is, serve as an umpire, create money, build roads and parks. The role of government is not to dictate outcomes of the market process.¹⁵

In a perfect world, there would be no need for government to involve itself with the marketplace. As James Madison explained in the Federalist Papers, “If men were angels, no government would be necessary.”¹⁶ And because government is manmade, Madison went on to say, “If angels were to govern men, neither external nor internal controls on government would be necessary.”¹⁷ Consequently, Madison advocated for a government designed to restrain itself from trampling on liberty.

Returning to the role of a government antitrust agency, I agree with the description of our role as an umpire, making sure that the competitors fairly compete on the merits. We should not dictate outcomes, however, or even prevent one superior competitor from running up the score on the other. But we should make sure that the sides are not agreeing to shave points, prevent better players from playing, colluding, or combining teams to undermine the nature of the contest.

¹⁵ MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962).

¹⁶ THE FEDERALIST No. 51 (James Madison).

¹⁷ *Id.*

IV. Principles in action.

So what do these grand principles mean for an actual agency agenda? Here is how I have tried to put them into action:

My first major initiative as Acting Chairman was to establish a task force to advance economic liberty, with a particular focus on occupational licensing reform.¹⁸ In the past 50 years, the U.S. has experienced a tremendous growth in occupational licensing, which has created barriers for low- and middle-income Americans seeking new job opportunities. This happens because of government overreach, or at the behest of incumbent market participants. I've spoken about what I call the "Brother, May I" problem.¹⁹ That problem occurs when a competitor controls the market entry of others, often through some kind of regulatory permission.

I formed the Economic Liberty Task Force to help shine a spotlight on the harms of unnecessary or overreaching occupational licensing and to partner with state leaders and other stakeholders to try to remove and reform these regulations. The task force has done a lot in the last seven months. We've held one public roundtable session during which experts from across the country gathered in Washington to discuss ways to facilitate license portability—where a worker licensed in one state can practice in another state without having to obtain a new

¹⁸ See Maureen K. Ohlhausen, Acting Chairman, Fed. Trade Comm'n, *Advancing Economic Liberty* (Feb. 23, 2017), https://www.ftc.gov/system/files/documents/public_statements/1098513/ohlhausen_-_advancing_economic_liberty_2-23-17.pdf; FTC Press Release, "FTC Launches New Website Dedicated to Economic Liberty," Mar. 16, 2017, <https://www.ftc.gov/news-events/press-releases/2017/03/ftc-launches-new-website-dedicated-economic-liberty>.

¹⁹ See Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control over Market Entry*, 4 J. ANTITRUST ENFORCEMENT 111 (2015), https://www.ftc.gov/system/files/documents/public_statements/801861/150917brothermayi.pdf.

license.²⁰ We announced this week a second public roundtable for November 7th to discuss empirical evidence of the effects occupational licensing has on consumers and workers.²¹ We've created a centralized resource at [ftc.gov/econliberty](https://www.ftc.gov/econliberty), for licensing reform efforts. We've drawn significant media attention to the problem and its harmful effects on middle- and low-income Americans and military families. And we've received a terrific response from a coalition of the willing—legislators and governors and other citizens who want to bring jobs and talent to their states and cities. Furthermore, the task force has held dozens of informational meetings with outside parties to learn about the extent of the problem and potential solutions. I also testified on this topic before the House of Representatives just a few days ago.²²

Along with the Task Force, the FTC's long-standing competition advocacy program continues to do yeoman's work in highlighting the potential anticompetitive effects of occupational licensing and other government restraints on competition. One example is an advocacy letter FTC staff sent to Nebraska related to four proposed bills designed to reduce or eliminate certain occupational licensing requirements.²³ Our staff explained the competitive benefits of loosening unnecessary and overbroad licensing restrictions, which include not only benefits to consumers of products and services offered by licensed professionals, but also to workers who have been kept out of those professions because of such restraints.

²⁰ Fed. Trade Comm'n, Streamlining Licensing Across State Lines: Initiatives to Enhance Occupational License Portability, <https://www.ftc.gov/news-events/events-calendar/2017/07/streamlining-licensing-across-state-lines-initiatives-enhance>.

²¹ FTC Press Release, "FTC Announces Second Economic Liberty Public Roundtable," Sept. 11, 2017, <https://www.ftc.gov/news-events/press-releases/2017/09/ftc-announces-second-economic-liberty-public-roundtable>.

²² See *Prepared Statement of the Federal Trade Commission on Competition and Occupational Licensure, Hearing Before the H. Comm. on the Judiciary, Subcomm. on Regulatory Reform, Commercial and Antitrust Law*, (Sept. 12, 2017), <https://www.ftc.gov/public-statements/2017/09/prepared-statement-federal-trade-commission-competition-occupational>.

²³ FTC Staff Comments to the Nebraska State Senate Regarding A Number of Proposed Senate Bills That Would Loosen or Eliminate Certain Occupational Licensing Requirements In Nebraska, Mar. 2017, <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2017/03/ftc-staff-comments-nebraska-state-senate-regarding>.

We will continue speaking up for consumers through our competition advocacy program, and we're looking for additional ways to partner with interested policymakers to foster economic liberty.

Along with government-imposed restrictions, the abuse of government processes by private actors can also undermine competition. Although citizens have a First Amendment right to petition government, the Supreme Court has recognized that doing so, simply as a pretext to exclude rivals from the market, is not protected under the Constitution.²⁴ One example is the first case I brought as Acting Chairman. In our complaint, we charged that ViroPharma delayed generic competition to its branded prescription drug, Vancocin HCL Capsules, by allegedly waging a campaign of serial, repetitive, and unsupported filings with the FDA to delay the FDA's approval of a generic version.²⁵ ViroPharma made a total of 46 filings to the FDA, which is by far the most filings a firm has ever made to the FDA about a single drug product. We have alleged that this abuse of the FDA process caused generic entry to be delayed a number of years, costing consumers hundreds of millions of dollars.

Of course, market concentration can also have a chilling effect on competition and merger review is a core responsibility for agencies charged with protecting competition. The FTC's recent challenge to the Draft Kings/FanDuel merger involved a situation where market dynamics suggested a substantial risk to competition if the deal was allowed proceed.²⁶

²⁴ See *E. R.R. Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

²⁵ See FTC Press Release, "FTC Charges that Shire ViroPharma Inc. Abused Gov't Processes Through Serial, Sham Petitioning to Delay Generics and Maintain its Monopoly over Vancocin HCl Capsules," (Feb. 7, 2017), <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-charges-shire-viopharma-inc-abused-government-processes>.

²⁶ See *DraftKings, Inc. & FanDuel Ltd.*, F.T.C. Docket No. 9375 (2017), <https://www.ftc.gov/enforcement/cases-proceedings/161-0174/draft-kings-inc-fanduel-limited>.

Just to briefly sketch the facts, both companies operated online daily fantasy sports platforms, which allow users to potentially win money from each other based on their ability to assemble virtual sports teams composed of real athletes. These platforms were subject to various benefits of scale, including the fact that having more players allowed the operator to run larger contests with bigger prizes.

The parties made a number of arguments about market definition and the efficiencies that would flow from their combination. They particularly stressed that the product hadn't been around a long time, that it was a nascent industry, and that it was inappropriate to judge them by the same standards that applied to more established markets.

Our investigation showed that daily fantasy was indeed a distinct market, separate from "season-long" fantasy sports, which many friends or colleagues play socially. There was also abundant evidence of significant head-to-head competition between these two platforms, with competition directly benefitting consumers. It was also clear to us that no other provider could replace the quality and strength of the competition that these two firms provided to each other. In addition, the regulatory obstacles and the importance of scale that our investigation identified strongly suggested that successful, further entry into this market was unlikely. At the end of the day, what we were left with was, in effect, a 2-1 merger.

Like all antitrust matters, that case turned on its specific facts, though reasonable minds may differ on what those facts indicated about the likely future of competition in that market. But, on a broader point, it is a false dichotomy to suggest respect for the power and social utility of free markets must also lead competition enforcers to stand aside in situations where substantial consumer harm appears likely. Instead, it is the job of the antitrust enforcer to halt actions that would undermine the dynamic, growing process of competition. Likewise, it is the

job of the antitrust enforcer to allow transactions to occur if they seem likely to spur competition and benefit consumers, even if that competition will be disruptive to incumbent players in the market.

V. Conclusion

To sum up, I believe competition and liberty are strongly interconnected and interdependent. Markets and competition work because they channel the self-interest of the entrepreneur toward the greater good of society. Government's role is to protect the process and not dictate results. The examples I have shared show where we have worked to protect the competitive process by focusing on undue government restraints, abuse of government process, and transactions that will undermine competition in a particular market. The late Jack Kemp once said, "There are no limits to our future if we don't put limits on our people." Free workers, pursuing free enterprise in a free marketplace can accomplish just about anything. I'm optimistic our efforts at the FTC will continue to provide a firm foundation to safeguard the important link between competition and liberty. Thank you.