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Federal Trade Commission

"Looking Back to the Future: What the Past Can Tell Us About the Future of Antitrust"

Prepared Remarks of Commissioner Noah Joshua Phillips

Technology Policy Institute:
Is the Platform Economy Forcing Us to Reconsider Antitrust Enforcement?

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Thank you for that introduction, Scott. And thanks to the Technology Policy Institute for hosting this excellent event today, and to everyone here for joining us. Quick reminder that the remarks I give today represent my own thoughts, not those of the Federal Trade Commission or any of my fellow Commissioners.

The fortieth anniversary of *The Antitrust Paradox* coincides with a renewed nationwide interest in U.S. antitrust law and policy, occasioned in no small part by the rise of the "Platform Economy", in the title of today's event. As we consider the questions of today, we must understand the lessons of yesterday—*i.e.*, the historical and economic facts and circumstances that animated the robust debate over antitrust some forty years ago. Those who propose to change antitrust must answer not only how their solutions would address the ills they perceive, but also how they would avoid past mistakes.

Robert Bork published *The Antitrust Paradox* at a time of economic malaise, widespread concern over faltering U.S. competitiveness and internal doctrinal inconsistencies plaguing antitrust law and, with that, merger strategy. U.S. firms were bloated and inefficient, hurting consumers and workers alike, while foreign firms—often bolstered by the domestic industrial policies of their home countries—were competing aggressively. American corporations needed new management; new governance; and new antitrust.

The crux of the criticism 40 years ago was that, while purporting to promote the competition America so desperately needed, antitrust law had developed in such a way that it actually condemned the very efficiency, innovation, and other competition it purported to protect. Courts condemned mergers among competitors with very small market shares—some with under 3% in relevant markets—that would have allowed for lower prices to consumers.[1] They condemned as unlawful monopolies firms that were admittedly offering better prices and quality to consumers. Following decades of rigorous debate among Nobel Laureates, economists, jurists, scholars and other experts across the political spectrum—including Robert Bork—antitrust law acknowledged these internal inconsistencies and responded to them.[2] It embraced a consumer welfare standard, which, tethered

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[1] *See, e.g.,* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[2] *See, e.g.,* Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 178 (2007) (characterizing 1960s and 1970s antitrust as "standardless and unduly hostile to business" and the consumer welfare standard as "an immense improvement" over the big is bad era); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44 (2000) ("Most economists in the late 19th century scorned the Sherman Act. . . . At worst, the law would impede attainment of superior efficiency promised by new forms of industrial organization. Few economists lauded the statute as a useful tool for controlling abusive business conduct."); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."); Note, Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case, 58 YALE L.J. 969, 971 (1949) ("When the courts looked at monopoly power in the *Alcoa, Tobacco* and *Movie* cases, they were dealing with power that shackled

to current economic learning, provided a clarity and cohesion that was previously absent, and permitted transactions that would help consumers. For forty years, in the main, that was the consensus.

Today, critics are challenging that consensus. Their challenges go to the heart of where antitrust law should aim and what it must do to achieve that ambition.[3] Much has been said and will continue to be said, about the theory, economics, and politics of these critiques. Elsewhere, I've expressed my skepticism that many of the economic phenomena attributed to the consumer welfare standard are properly linked to antitrust law and policy.[4] As much as some antitrust experts may not like to hear it, there is more—a great deal more—to economic policy and to the development of American business than antitrust. The antitrust laws are powerful tools when properly targeted, but they are not and have never been a panacea.

I want to leave aside for today the debate about what antitrust should aim to do, or whether we need new antitrust laws. Instead, I want to focus on some of the ideas about how a new antitrust regime might function. Much of the rhetoric (and punditry) regarding the supposed failings of modern antitrust is taking place without due regard for how a different regime would look—pithy op-eds without

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the forces of a free market. But in *United States v. N. Y. Great Atlantic & Pacific Tea Co*., the Court of Appeals for the Seventh Circuit has upheld a criminal conviction in a situation where the defendant corporation represented the forces of competition, efficiency and change. The potential contradiction in the New Sherman Act is sharply exposed.").

[3] Other criticisms relate to the current level of enforcement within our existing regime. The FTC also takes these criticisms seriously, including through our ongoing Hearings on Competition and Consumer Protection in the 21st Century.

[4] Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the U.S. Chamber of Commerce: *Post Hoc, Ergo Propter Hoc* (Oct. 17, 2018), https://www.ftc.gov/public-statements/2018/10/prepared-remarks-commissioner-phillips.

adequate recognition of history, economics, or antitrust law, bemoaning the state of an industry, or the working class, or democracy, and so on.

This is a real debate, with real consequences. We've gotten it wrong in the past, and the national interest has suffered. It deserves treatment in depth. That doesn't mean we shouldn't have the debate—but it's on critics to propose a better way, and on those defending the status quo to engage with those proposals. To their credit, some of the antitrust critics have made proposals, and that is some of what I want to discuss today.

One proposal, which some call "neo-structuralism", is, in many ways, a return to the antitrust paradigm that preceded the economically-grounded consumer welfare standard.[5] The structure-conduct-performance (or SCP) paradigm, for instance, theorized that concentration correlated to competitive measurements like prices and margins, and undergirded a consensus that concentration, alone, was to be prevented. Courts and enforcers based decisions on the era's leading economics, as expressed in cases like *Philadelphia National Bank*[6] and guidance like the 1968 merger guidelines.[7]

The earlier regime was generally characterized largely by a "big is bad" mentality. Much of it was based on intuitions, like those being expressed today, that

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[5] *See, e.g.*, Tim Wu (@superwuster), TWITTER (Oct. 19, 2018, 10:58 AM), https://twitter.com/superwuster/status/1053299367938007040 ("#antitrust 'Neo-structuralists' is not a bad academic name for the current antitrust revival").
[6] United States v. Philadelphia National Bank, 374 U.S. 321 (1963).
[7] U.S. Dep't of Justice, 1968 Merger Guidelines, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

if firms were permitted to grow too large, average Americans would suffer harms to their dignity, independence, or other socio-political values.

Neo-structuralism finds expression today in such proposals as banning outright or presumptively condemning transactions over a certain size or of a certain structure.[8] Such laws would offer enforcers and merger lawyers simple rules. But would they be good ones? The rationale for bringing structuralism back focuses on consolidation that has since occurred—a result, the theory goes, of lax antitrust enforcement caused by the consumer welfare standard—and that should be avoided, for economic, social, or political reasons. What this nostalgia neglects, I fear, is a thorough consideration of why such a consensus emerged decades ago to bring antitrust to where it is today.

First, there was little dispute that many procompetitive transactions—that is, deals that would help shareholders, employees and customers alike—were barred.[9] We know today that size and even concentration may—and often do—result from efficiency and healthy competition, as firms achieve economies of scale,

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[8] *See, e.g.,* Consolidation Prevention and Competition Promotion Act of 2017, S. 1812, 115th Cong. (2017); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 792-97 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontent*, 11 HARV. L. & POL'Y REV. 234 (2017); Matt Stoller, *The Return of Monopoly*, NEW REPUBLIC (July 13, 2017), https://newrepublic.com/article/143595/return-monopoly-amazon-rise-business-tycoon-white-housedemocrats-return-party-trust-busting-roots; Senate Democrats, *A Better Deal: Cracking Down on Corporate Monopolies*, https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf.

[9] *See* George J. Stigler, THE ECONOMIST AS PREACHER AND OTHER ESSAYS 41 (1982); Averitt & Lande, *supra* note 2, at 178; Kovacic & Shapiro, *supra* note 2, at 44.

or reinvent offerings to consumers.[10] Real people—especially the less fortunate—benefit from competition, getting goods and services, for less.

We want U.S. firms to be competitive, especially in the face of global commerce. And I fear that U.S. competitiveness—often expressed in scaled firms or innovative and creative destruction—is now being offered up as sacrifice to return to the regime described by Supreme Court Justice Stewart in *Von's Grocery*, as one in which "the government always wins".[11] The trouble was, most others—notably, the American consumers—lost.

Second, the result wasn't reduced corporate power or better competition among firms on any level of the supply chain. It wasn't clearly *fewer* mergers or less consolidation, but *worse* mergers and consolidation. Disfavoring both horizontal and vertical mergers left firms to turn to conglomeration for growth, and that was bad for everyone.[12] Skewing market incentives should be expected to yield the unexpected, often bad, results.

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[10] *See* Harold Demsetz, *Two Systems of Belief about Monopoly, in* INDUS. CONCENTRATION, THE NEW LEARNING 167 (Harvey J. Goldschmid et al. eds., 1974); *see also* Submission of the United States, Hearing on Market Concentration, OECD Doc. DAF/COMP/WD(2018)59, ¶ 4 (May 27, 2018), https://one.oecd.org/document/DAF/COMP/ WD(2018)59/en/pdf ("Concentration never tells the whole story about competition, and the proper delineation of the relevant market is critical if concentration is to tell any part of the story."); United States v. Baker Hughes, 908 F.2d 981 (D.C. Cir. 1990) ("Evidence of market concentration simply provides a convenient starting point for a broader inquiry into future competitiveness".).

[11] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[12] *See, e.g.,* Gerald F. Davis, Kristina A. Diekmann & Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of the Organizational Form*, 59 AM. SOC. REV. 547, 547 (1994); Laurence Capron, *Historical Analysis of Three Waves of Mergers and Acquisitions in the United States (1887-1904, 1916-1929, 1950-1970): Triggering Factors, Motivations, and Performance*, at 3 (1996), https://faculty.insead.edu/laurence-capron/documents/historical-analysis-of-three-waves-of-mergers.pdf; Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 2148 (2008); Greg N. Gregoriou & Luc Renneboog, *Understanding Merger and Acquisitions: Activity Since 1990*, *in* INTERNATIONAL M&A ACTIVITY SINCE 1990: RECENT RESEARCH AND QUANTITATIVE ANALYSIS 1, 2 (2007).

Third, modern economics do not support the wholesale bans that some neo-structuralists have proposed.[13] While the SCP paradigm was not the only basis for the previous model, it was the leading economic basis—and it was largely debunked. Modern economics demonstrates that many mergers—the vast majority of both horizontal and vertical mergers—are not harmful to competition or consumers. So while concentration has a role in modern enforcement, it is far more nuanced.

Which brings me to one of the most concerning new idea for antitrust: rejecting economics itself.[14] As a threshold matter, calls to reject antitrust's connection to economics often mischaracterize two things about the consumer welfare standard. First, it does not focus only on short-term price effects. Price and output effects are often more observable and measurable; and, since no plaintiff—not even the FTC—is omniscient, short-term effects are often emphasized. The further into the future we are trying to predict, they less certainty we can have. I

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[13] Demsetz, *supra* note 10; Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON L. REV. 303, 303-06 (1997); Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank: *Bad Economics, Bad Law, Good Riddance*, 80 ANTITRUST L.J. 201-02 (2015) ("The SCP paradigm is now dead and has been for quite some time. Its intellectual influence on modern economics is nil. It is no longer taught in graduate economic courses in economics.").

[14] Such calls manifest in various forms, some more explicit and some more implicit, including calls to replace or supplement the economically-grounded consumer welfare standard with "citizen interest" or public interest standards, calls to regulate firms' "power", promote democracy, or otherwise to further socio-political rather than economic goals, and calls to impose other rules or standards that modern economics consensuses do not support. *See generally The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt? Before the Subcomm. on Antitrust, Competition, and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. (2017) (testimony of Barry C. Lynn, Executive Director, Open Markets Initiative), https://www.judiciary.senate.gov/imo/media/doc/12-13-17%20Lynn%20Testimony.pdf; Barry C. Lynn, *Antitrust: A Missing Key to Propserity, Opportunity, and Democracy*, *in* NEW ECONOMIC PARADIGMS: CORE CHALLENGES & EMERGING Perspectives 23 (2013); K. Sabeel Rahman & Lina Khan, *Restoring Competition in the U.S. Economy*, *in* UNTAMED: HOW TO CHECK CORPORATE, FINANCIAL, AND MONOPOLY POWER 18 (Nell Abernathy et al. eds., Roosevelt Inst. 2016), http://rooseveltinstitute.org/wp-content/uploads/2016/06/ Untamed-Final-5.10.17.pdf; Stoller, *supra* note 8.

think several of us are still disappointed that it is now 2018, and we still do not have the flying cars *Back to the Future II* promised us.

But while near-term price and output effects are an appropriate focus in reviewing mergers and conduct, they are by no means the sole focus. The antitrust agencies routinely consider effects on additional metrics critical to consumers, including quality and innovation, in both the short and the long run. The consumer welfare standard not only allows, but requires, this analysis.

Second, the consumer welfare standard is not merely the concoction of a few ideologues at the University of Chicago. While scholars at the “Chicago School”—from Aaron Director and Ed Levi, to Richard Posner, Frank Easterbrook and, yes, Robert Bork—played an impressive role in helping develop antitrust economics, they were among many. In the last several decades, economists of many schools (including several whom you should not call Chicagoans unless you’re looking for a fight) have contributed critically to developing our understanding of antitrust economics.

Mischaracterizations aside, moving antitrust law away from economics would erode coherence and predictability, critical features of any legal regime. Not only did the pre-consumer welfare regime prevent efficient transactions, it did so inconsistently, blocking deals that would help consumers, chilling the market for corporate control and preventing effective business planning.

Economics provides a common language for analyzing competitive behaviors. Plaintiffs and defendants can argue as to the magnitudes or likelihoods of various effects, but everyone knows what the ground rules are. And, at the end of the day, everyone knows how the winner will be decided. This clear rule of decision provides strong protection against agency capture—as courts and the public can observe when an agency action does or does not align with the law. It is also essential to global commerce, as antitrust regimes proliferate internationally, including in countries where the rule of law is not as strong.

Another common proposal to reform antitrust has been to supplement or replace the consumer welfare standard with a multi-pronged standard that incorporates various socio-political goals. Advocates have proffered various such additional factors, including effects on employee incomes or wages, new business creation, inequality, and political control.[15] The Roosevelt Institute's "Effective Competition" standard, for instance, instructs "Agencies and courts [to] use the preservation of competitive market structures that protect individuals, purchasers, consumers, and producers; preserve opportunities for competitors; promote individual autonomy and well-being; and disperse private power..."[16]

Ambitions like these for antitrust remind me of Donald Turner's 1965 quip about merger defenses:

> In the brief time that I have been head of the Antitrust Division I have had proponents defend a contemplated merger on the grounds that it would promote the national defense, assist in solving the balance of payments problem, reduce unemployment and contribute to the Administration's anti-poverty program. I fully expect to hear before

[15] *See, e.g.,* Khan, *supra* note 8; Lynn, *supra* note 14; Rahman & Khan, *supra* note 14; Stoller *supra* note 8.

[16] Marshall Steinbaum & Maurice E. Stucke, *The Effective Competition Standard: A New Standard for Antitrust* 29 (Roosevelt Inst. 2018), http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-Effective-Competition-Standard-FINAL.pdf.

> long that a merger should be allowed because it will contribute to the President's program for making America beautiful.[17]

Whatever the factors, a multi-factor approach—in particular one that contemplates amorphous goals—presents several risks.

First, it takes time and effort fully to flesh out the boundaries of any standard, and more so where complex factors are at play. The courts and the antitrust agencies have spent decades developing the consumer welfare standard—which is comparatively well-established and well-understood today. Any new, multi-faceted standard would introduce significant uncertainty into antitrust enforcement, encouraging, among other things, rent seeking by corporations eager to exploit unclear standards—say, by touting their contribution to the national defense. A new rule that proposes to balance several potentially competing interests provides an excellent opportunity for just such exploitation.

Second, consider the proverb that "he who serves two masters serves none". There's something like that in the Book of Matthew, but they didn't teach us that at the Solomon Schechter Day School of Greater Boston. In considering antitrust questions, how are we—businesses, lawyers, enforcers—to trade off competing interests? Consider, for instance, a merger that would allow the combined firm to: increase worker wages significantly; raise prices to purchasers; take political power from a larger competitor; and hamper new business creation. Assuming we could reliably identify all these effects, which in itself is a sizeable task, how would an

[17] Donald F. Turner, *Antitrust Enforcement Policy*, 29 A.B.A. SECTION OF ANTITRUST L. 187, 191 (1965); *see also* Gregory J. Werden, *Back to School: What the Chicago School and New Brandeis School Get Right*, Symposium on Re-Assessing the Chicago School of Antitrust Law (2018), https://ssrn.com/abstract=3247116 (citing same).

enforcer trade off these competing values? How could a court provide a meaningful check on such an amorphous decision?

Third, trading off consumer welfare against competing interests necessarily decreases consumer welfare. Embracing a multi-pronged approach would signal that we are willing to accept some amount of harm to consumers—including, necessarily, some higher prices, lower quality, and slower innovation—in exchange for other values. Maybe it's an insurance company that charges more because, now, doctor groups can collude to charge more and increase the cost of care. Court decisions before the economically-grounded consumer welfare standard did indeed protect smaller, inefficient competitors, at the expense of the average American who was less able to afford, for instance, groceries.[18]

Allowing harm to consumer welfare most significantly impacts those less well-off, with the least purchasing power, who are in less of a position to absorb an increase in price or other harms. Forgive the biases of a consumer protection enforcer: we should keep the consumer top of mind.

Finally, many of the socio-political goals being considered as potential candidates for inclusion within antitrust analysis are key issues facing our society today. I worry about inviting courts and enforcers to imbue decisions with their views on these varied goals. Beyond the issues themselves, a lack of clarity invites decision makers—judges, agencies, enforcers like me—to substitute their preferences for the law. Among other things, that injects politics into the equation,

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[18] *See, e.g.,* Note, *supra* note 2, at 971; United States v. N.Y. Great Atlantic & Pacific Tea Co., 173 F.2d 79 (7th Cir. 1949); *Von's Grocery Co.*, 384 U.S. 270.

which no one should want. Should it matter whether I believe that a firm has too much political power, or maybe not enough? I worked on Capitol Hill, and witnessed industries vie over legislative fights. If I saw tech losing—and they do, a lot—does that mean we should favor their mergers? That would be absurd. How we structure politics; how we distribute the gains of growth; what level of bargaining protection the law should offer labor vis-à-vis capital—these are real questions, important questions. I very much doubt antitrust could solve them, even if it sought to. Because these are such important questions, they deserve resolution through the democratic process. They should be given the political attention they deserve.

As there were forty years ago when *The Antitrust Paradox* was first published, there are important discussions today regarding the appropriate goals for antitrust law, and how enforcers can best achieve them. I have focused my remarks today on some of the proposals, and some concerns I have with them. Acting deliberately and with solid foundation for changes is critical to a successful antitrust regime. Antitrust enforcers still have much to learn, and we are actively continuing our educational efforts, and adapting our enforcement priorities and efforts as appropriate. I invite you all to join me in that effort. Thank you.