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Remembering Regulatory Misadventures: Taking a Page from Edmund Burke to Inform Our Approach to Big Tech

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I. Introduction

Liza, thank you for your kind introduction and to the Institute for having me here today. It is truly an honor to be here with all of you. Before I begin, I must give the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the U.S. Federal Trade Commission or any other Commissioner.

I would like to spend our time today talking about regulatory principles for the digital economy. When we think of digital firms, we often think first of tech hubs like Silicon Valley, and for good reason. But when thinking about the principles that should guide our policy toward those firms, I submit we should start here in London, and specifically at 37 Gerrard Street in Leicester Square. Although the site now houses a Chinese restaurant called the Golden Phoenix, it was once the London home of the great political philosopher Edmund Burke.[1]

Among his many noteworthy contributions, Burke receives credit for explaining the importance of history to policymaking. In a 1791 book discussing the foundation of our civil liberties, Burke said that "[p]eople will not look forward to posterity, who never look backward to their ancestors."[2] Or, as the American George Santayana put it more than one hundred years later, "[t]hose who cannot remember the past are condemned to repeat it."[3]

Heeding both my countryman (Santayana) and yours (Burke), I submit that our past regulatory adventures – and misadventures – should inform whether and how we as a society decide to regulate Big Tech. Although many of today's policy prescriptions – such as "non-

[1] English Heritage, Burke, Edmund (1729 – 1797), https://www.english-heritage.org.uk/visit/blue-plaques/edmund-burke/ (last visited June 27, 2019).
[2] III Edmund Burke, Reflections on the Revolution in France 274 (1791), *available at* https://sourcebooks.fordham.edu/mod/1791burke.asp
[3] I George Santayana, The Life of Reason: Reason in Common Sense 284 (1905).

discrimination" requirements or bans on vertical integration – are described as novel solutions to emerging problems, they are actually old solutions to old complaints.

Once upon a time in a land far, far away, which is to say in the United States in the middle of the Twentieth Century, two all-mighty regulators imposed similar regulations to address similar complaints. Yet the industry back then was transportation, and the regulators in question were the Interstate Commerce Commission (ICC) and the Civil Aeronautics Board (CAB). Echoing today's proposals, those regulators banned firms from owning upstream or downstream businesses and imposed a number of "non-discrimination" requirements aimed at ensuring any and all customers – from farmers to manufacturers, and from short-distance journeys to cross-country ones – received "fair" service at "non-discriminatory" prices.

Although simple in theory, these requirements proved devilishly complex in practice. Starting in the 1970s, scholars increasingly recognized that the regulations distorted competition in the marketplace, reduced economic efficiency, and harmed the very consumers they ostensibly protected.[4] Both agencies were subsequently disbanded with broad political support, the CAB in 1978 and the ICC in 1996.

With the passage of time, fewer and fewer of today's policymakers were personally involved in those events. As a new generation takes their place, we hear increasingly insistent calls to regulate competition in the Big Tech space in the same way we used to regulate railroads and airlines. I worry that we are now forgetting our last failed experiment, and therefore risk being condemned to repeat it.

As I will explain more fully in a few minutes, I believe America's experience with the ICC and CAB taught us three important lessons. First, provisions that sound simple in theory,

[4] THOMAS K. MCCRAW, PROPHETS OF REGULATION: CHARLES FRANCIS ADAMS; LOUIS D. BRANDEIS; JAMES M. LANDIS; ALFRED E. KAHN (1984) (reviewing the deregulatory work of Kahn).

like a “non-discrimination” requirement, seldom prove simple in practice. Second, effective regulation requires clarity, particularly regarding the “what,” “why,” and “how.” Specifically, “what” is the problem? Why is *this* proposal the best way to solve it? And *how* may an agency regulate – and how may it not? This kind of clarity is needed not just at the outset, but also over time, as changed circumstances and mission creep may later confuse matters and lead to perverse and unintended results. Third and finally, given the substantial consumer benefits that flowed from the elimination of ICC and CAB regulations, we should be mindful of the very real cost that regulations – however well-intentioned – can impose on consumers.

Many of today’s proposals to regulate Big Tech forget these important lessons. Proposed digital regulations are sold to the public as simple and beneficial. Behind the curtain, however, there is little clarity on what the problem is, let alone why a given proposal is the best solution or how the agency would operationalize it. Indeed, we may not even get past the first question, as we need proof that there is a problem – anticompetitive conduct that harms consumers – before proposing a solution.[5] Nor is there any recognition that burdensome new regulations may distort markets and harm consumers. In short, given the tarnished history of the ICC and CAB, we should know better than to do the same thing again today and expect a different result.

II. OUR PAST – THE ICC AND CAB

So let us start in the past.

[5] For example, the last administration issued an Executive Order seeking to promote competition that recognized the need to increase competition when “certain business practices” cause consumer harm in the form of “higher prices and poorer service for customers, less innovation,” and other harms. *See, e.g.*, Executive Order 13725, Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy, 81 FED. REG. 23,417 (Apr. 20, 2016).

A. The ICC

In the late Nineteenth Century, the Age of Steam, the railroad was considered both cutting edge technology and big business. In the United States, ribbons of steel opened the American West to development, with farms, mines, towns, and factories developing in their wake. With new development came new economic patterns. What we might now call geographic markets expanded, as products could be shipped in from far away. For example, wheat grown in North Dakota was shipped by rail to Minneapolis, where it was milled into flour, and shipped by rail again to bakeries in Chicago, St. Louis, and even New York City.

Given the important role that railroads played in connecting buyers to sellers, they naturally elicited complaints from all sides. Farmers complained that they often had only one choice, whichever railroad ran closest to their property, on which to ship their produce, thereby forcing them to pay supra-competitive rates. Many merchants made similar complaints. Both groups called for new regulation at both the state and federal level to ensure that this service – which they deemed essential – was offered at fair rates on non-discriminatory terms.[6]

The railroads, too, were dissatisfied. When more than one railroad served a given route, as occurred on the important grain routes from Chicago to ports on the East Coast, the railroads themselves complained of "ruinous competition." Railroads often formed "pools" – which today we would simply call cartels – to allocate traffic and prop up prices. And like today's cartels, each firm had an incentive to cheat by giving powerful customers – such as Standard Oil – secret rebates to secure additional traffic.[7]

[6] For this section, see RICHARD D. STONE, THE INTERSTATE COMMERCE COMMISSION AND THE RAILROAD INDUSTRY: A HISTORY OF REGULATORY POLICY, ch. 1 (1991).
[7] *See* Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 32-33, 42-43 (1911).

Eventually, both camps struck upon the idea of regulation to cure all that ailed them. Customers envisioned comprehensive state and federal regulations that would set the terms of service and prohibit price discrimination. The railroads envisioned targeted regulations that would use the coercive power of the state to end secret rebating and thereby ensure the stability of their cartels.

So in 1887 the U.S. Congress passed the Interstate Commerce Act.[8] To those of you following today's digital markets proposals, its provisions may sound eerily familiar. Section 1 of the Act required railroads to charge rates that were "reasonable and just,"[9] whereas Sections 2, 3, and 4 prohibited "unjust discrimination" in the setting of rates or terms of service.[10] Using language that echoes the Sherman Act, Section 5 banned "any contract, agreement, or combination … for the pooling of freight."[11] The Act also created an independent agency, the Interstate Commerce Commission, to enforce the Act.[12]

Yet public optimism soon evaporated; new regulation was not the magic elixir all had hoped. The answer, obviously, was more regulation. So in 1903 Congress passed the Elkins Act, which banned railroad rebates to large industrial customers but not small ones, and therefore

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[8] Pub. L. 49-104, 24 Stat. 379 (1887).
[9] *Id.* § 1 ("All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, or for the receiving, delivering, storage, or handling of such property, shall be reasonable and just; and every unjust and unreasonable charge for such service is prohibited and declared to be unlawful.").
[10] *Id.* § 2 (banning "unjust discrimination" among passengers or freight transported contemporaneously "under substantially similar circumstances and conditions"); *id.* § 3 (banning "undue or unreasonable preference or advantage to any particular person" and requiring common carriers to interchange traffic); *id.* § 4 (banning carriers from charging a higher rate, "under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance")
[11] *Id.* § 5 ("That it shall be unlawful for any common carrier subject to the provisions of this act to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense.").
[12] Some scholars believe incumbents favored the creation of the ICC because they believed it would allow them to engage in rent seeking. *See, e.g.*, Thomas W. Gilligan, William Marshall & Barry Weingast, *Regulation and the Theory of Legislative Choice: The Interstate Commerce Act of 1887*, 32 J. L. & ECON. 35 (1989).

supposedly leveled the playing field.[13] This step, too, was insufficient, so in 1906 Congress passed the Hepburn Act,[14] which strengthened the ICC's rate-setting powers and banned vertical integration. In 1910 Congress granted the ICC the authority to suspend railroad rates during an investigation,[15] and in 1920 Congress added the authority to set minimum rates for the explicit purpose of protecting financially weaker railroads from stronger ones.[16] The 1920 Act also allowed firms to pool traffic – in other words, to form a cartel – if the agency determined that service would be improved and competition not "unduly" restrained.[17]

And when new forms of transportation began to compete with the railroads, Congress granted the ICC the authority to regulate most of them, as well.[18] Over time, the ICC acquired jurisdiction over many other forms of transportation, from trucking and barge traffic to natural gas pipelines, leading to conflicting priorities. Only airlines and international shipping escaped, regulated instead by their own specialist agencies.

Although the ICC engaged in many regulatory misadventures, I will limit myself to three.

First, as I mentioned a moment ago, the 1906 amendments prohibited railroads from vertically integrating. Populists at that time were concerned that railroads – which were the only economical way to ship coal – were vertically integrating into the coal mining business, thereby hurting less efficient independent producers. So a U.S. senator introduced a bill that would become the Hepburn Act, which proposed to ban vertical integration in that industry. The cause was soon taken up by others, however, who broadened the bill over the objection of its original sponsor. In what became known as the Commodities Clause, this additional provision made it a

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[13] 57 Cong. Ch. 708, 32 Stat. 847 (1903).
[14] 59 Cong. Ch. 3591, 34 Stat. 584 (1906).
[15] 61 Cong. Ch. 309, 36 Stat. 539 (1910) (Mann-Elkins Act).
[16] 66 Cong. Ch. 91, 41 Stat. 456 (1920) (Transportation Act of 1920).
[17] *Id.* § 5.
[18] *See, e.g.*, Motor Carrier Act of 1935, 74 Cong. Ch. 498, 49 Stat. 543 (1935).

criminal offense for a railroad to carry any product – other than timber, whose lobbyists got a special exemption – that it either had produced or in which it had an economic interest.[19]

Thankfully all sides soon realized how economically damaging such a ban would be. In early litigation involving this provision, the Supreme Court adopted a narrow interpretation that rendered it inapplicable in most cases.[20] In a subsequent case against U.S. Steel, the provision was further cabined, in essence applying only to the coal industry.[21] And in those rare instances when the U.S. government did assert the clause, it was typically subsidiary to a Sherman Act claim, thereby suggesting that the antitrust laws were sufficient to correct any abuses.[22]

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[19] Much has been written about the so-called Commodities Clause. *See, e.g.*, L.C. Marshall, *The Commodities Clause*, 17 J. POL. ECON. 448 (1909) (summarizing the adoption of the clause and early Supreme Court precedent and questioning in conclusion "[w]hether that clause, as popularly interpreted, employed a wise method"); Eliot Jones, *The Commodity Clause Legislation and the Anthracite Railroads*, 27 Q. J. ECON. 579 (1913) (decrying early Supreme Court precedents narrowly interpreting the Act but nonetheless concluding that effective enforcement of the Clause against anthracite railroads would not restore competitive conditions, but instead would induce the newly independent miners to organize "a coal trust, or at least some form of agreement among the coal companies to restrict output or to fix prices," which would ultimately lead to additional regulation up to and including nationalization).

[20] *See, e.g.*, Marshall, *supra* note 19; Thomas LeDuc, *Carriers, Courts, and the Commodities Clause*, 39 BUS. HIST. REV. 57 (1965) (tracing the history of the clause, noting that for its first thirty years "the government invoked the commodities clause of the Hepburn Act only against anthracite carriers," and that the failed attempt to expand its scope in the New Deal-era *U.S. Steel* case effectively spelled its end).

[21] *See* United States v. Elgin, Joliet & Eastern Ry. Co., 298 U.S. 492 (1936); *see also id.* at 512 (Stone, J., dissenting) (observing that "[i]f the commodities clause permits control such as is exhibited here, one is at a loss to say what scope remains for the operation of the statute"); United States v. South Buffalo Ry. Co., 333 U.S. 711 (1948); LeDuc, *supra* note 20, at 72 (recounting these cases as the only times the commodities clause was asserted against an industrial firm that had vertically integrated by purchasing a common carrier).

[22] *See* LeDuc, *supra* note 17, at 59-60 ("Doubt may be expressed whether the drastic prohibition embodied in the commodities clause was needed to protect either the consumer or the remaining independent producers. Existing law, had it been enforced, afforded adequate remedies. So far as the railroads were discriminating in favor of their captive producers, all that was needed was energetic enforcement of the kind that in 1906 had been successfully used against the Chesapeake & Ohio Railroad. As to oligopoly, events had already shown that the Sherman Act could be effectively invoked against the railroads, and later suits would show that it provided the chief weapon in dealing with the anthracite carriers. . . . As will later be apparent, the courts in deciding the anthracite cases relied more on the antitrust laws than on the Hepburn Act."); Eugene V. Rostow & Arthur S. Sachs, *Entry into the Oil Refining Business: Vertical Integration Re-Examined*, 61 YALE L.J. 857, 875 (1952) (arguing "the primary basis for the Court's determination [in the first *Anthracite* case] was its construction of the Sherman Act, without reference to the policy of the commodities clause"). *But see* Robert Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157, 168-69 (1954) (arguing that in the last two *Anthracite* cases, "[t]he evasions of the law were not evasions of the Sherman Act but of Pennsylvania law and the "Commodities Clause" of the Interstate Commerce Act").

Congress apparently agreed, time and again rejecting legislative attempts to override the narrow interpretation adopted by the Supreme Court.

Second, in the 1950s the Southern Railroad developed a new kind of railcar for grain that was much more efficient than earlier cars. When the railroad sought to lower rates by 60 percent to reflect these new efficiencies, the ICC denied the request pending its investigation. It ultimately rejected the railroad's proposed rate on the grounds that the rate was so low it would harm shipments by barge, instead authorizing a 53.5 percent reduction.[23] The case – generally known as the "Big John" matter – went to the Supreme Court, which sided with the railroad, but only after customers had been forced to pay the higher ICC-imposed rate for four years.[24]

Third, in 1965 two railroads lowered their rate for shipping steel between Pittsburgh and a downstream factory in Kentucky to match the competing rate charged by barges and trucks. In a proceeding called the *Ingot Molds* decision, the ICC disallowed the rate as too low to both cover its costs and produce what the ICC believed to be a "fair" profit.[25] The Supreme Court affirmed the ICC's Order.[26] Remarkably, it also commended the ICC for "properly" avoiding "a rate war" because the competing barge-truck rate was not "in need of being driven down by competitive pressure."[27]

Decrying these and other obvious mistakes, in 1971 a professor at the Massachusetts Institute of Technology (MIT) aptly summarized the situation in an op-ed in the *New York*

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[23] *Grain in Multiple-Car Shipments—River Crossings to the South*, 318 ICC 641, 683 (1963); *Grain in Multiple-Car Shipments—River Crossings to the South*, 325 ICC 752, 758-59, 770-76 (1965); Big John*: ICC Cuts Against the Grain*, RAILWAY AGE, July 22, 1963, at 32; I ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 165 n.12 (1970; reprinted 1988); II ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 23 (1971; reprinted 1988).
[24] *See* Arrow Transp. Co. v. Southern Ry. Co., 372 U.S. 658, 659-662 (1963) (summarizing the four-year history).
[25] *Ingot Molds, Pa. to Steelton, Ky.*, 326 ICC 77, 82, 85 (1965); *see also* I KAHN, *supra* note 23, at 165 n.12; II KAHN, *supra* note 23, at 24.
[26] American Commercial Lines, Inc. v. Louisville & Nashville R. Co., 392 U.S. 571 (1968).
[27] *Id.* at 593-94.

Times: "The heavy hand of regulation, which [Congress] has laid on the industry through the Interstate Commerce Commission, has stifled innovation, discouraged industry, [and] driven many of the capable and imaginative men out of it."[28]

That year, thirty U.S. senators called for the abolition of the ICC.[29] Soon after, politicians of all stripes concluded that deregulation was necessary. The rail and trucking industries were significantly deregulated starting in the late 1970s, and the ICC was disbanded entirely in 1996 by a Democratic President and a Republican Congress.

Freed from restrictive price and service rules, railroads optimized their networks. They pared unproductive routes and reduced labor costs, increasing efficiency markedly on their remaining routes.[30] Rail rates eventually fell across the board,[31] and declines were particularly steep for bulk commodities like grain, lumber, and coal that could be moved much more effectively using methods that ICC regulations had heretofore discouraged.[32]

Trucking rates also fell precipitously, at least in those areas where state-level regulations did not survive. For example, a 1989 study by the U.S. Federal Trade Commission found that

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[28] A. Scheffer Lang, *Point of View: For Congress and the Railroads, a Last Chance*, N.Y. TIMES, Jan. 10, 1971, at NER10, *available at* https://www.nytimes.com/1971/01/10/archives/for-congress-and-the-railroads-a-last-chance.html

[29] *Id.*

[30] James M. MacDonald & Linda C. Cavalluzzo, *Railroad Deregulation: Pricing Reforms, Shipper Responses, and the Effects on Labor*, 50 ILR REV. 80, 90 (1996) (concluding that because of deregulation, "shippers switched to low-cost methods of transport, productivity measures grew sharply, shipping rates fell, and carrier profits grew").

[31] Wesley W. Wilson, *Market-Specific Effects of Rail Deregulation*, 42 J. INDUS. ECON. 1, 20 (1994) ("The evidence suggests that the majority of commodities prices initially rose under deregulation, reflecting greater market power and modest cost savings. By 1988, however, deregulation produced lower prices in most commodity classifications and did not increase prices in other classifications, suggesting that advances in productivity have dominated any adverse market power effects…. With price decreases and cost savings from deregulation, welfare gains from deregulation are likely positive.").

[32] *See* MacDonald & Cavalluzzo, *supra* note 30, at 83 ("Railroads moved aggressively in the post-Staggers era to offer volume discounts, and particularly large discounts to unit trains, to shippers of 'bulk' products, such as grain, lumber, coal, and other minerals. Because shippers must invest in specialized loading and storage facilities for unit trains, they will not do so without lower rates or improved services."); STONE, *supra* note 6, at 52 ("Other ICC rate policies forced the railroads to postpone the use of unit trains (a whole trainload of cars permanently coupled and shuttling back and forth from producer to consumer – most frequently from coal mines to power plants) in the East for years.").

trucking rates in deregulated markets were roughly 40 percent lower than the rate on a regulated, but otherwise equivalent, route in Texas.[33] Depending upon the type of trucking service, prices and costs fell between 35 and 75 percent,[34] yielding consumer benefits of "more than $18 billion" in 1996 dollars.[35] A 2010 joint study by the Federal Trade Commission and the Antitrust Division of the U.S. Department of Justice concluded that "deregulation of the trucking industry … has been entirely beneficial for consumers."[36]

B. The CAB

The story of airline regulation in the United States is much the same. Airline regulation began in 1926 with the formation of the Aeronautics Branch of the Commerce Department, which focused principally on air safety. In 1938 Congress created a special regulator just for airlines. Thus, the CAB was born.

Like the ICC, the CAB was directed to place other "public interest" values ahead of competition, which was allowable "to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States."[37] Given this directive, once one airline served a given route, such as Chicago to Memphis, the CAB typically refused to allow any other carriers to fly the same route on the grounds that the competition was not necessary to develop that route.[38] When multiple

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[33] *See* Submission of the United States to the Ibero-American Competition Forum at 2-3, Sept. 2007, https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/ibero-trucking.pdf (*citing* Letter from Thomas Carter, Regional Director, Federal Trade Commission, to Raymond Bennett, Transportation/Gas Utilities Division, Railroad Commission of Texas, Oct. 2, 1989)
[34] *Id.* at 4 (*citing* Clifford Winston, *U.S. Industry Adjustment to Economic Deregulation*, 12 J. ECON. PERSP. 89, 94 (1998)).
[35] *Id.* at 5 (*citing* Stephen Morrison & Clifford Winston, *Regulatory Reform of U.S. Intercity Transportation*, *in* ESSAYS IN TRANSPORTATION ECONOMICS AND POLICY 477 (Gomez-Ibanez et al. eds., 1999)).
[36] *Id.* at 8.
[37] Civil Aeronautics Act of 1938, *formerly codified at* 49 U.S.C. § 1302d (1964).
[38] *See* Edward M. Kennedy, *Airline Regulation by the Civil Aeronautics Board*, 41 J. AIR L. & COM. 607, 614-15 (1975) (reprinting the Summary of Report of the Senate Subcommittee on Administrative Practice and Procedure) (describing how "entry into the industry has been effectively blocked" by the CAB's route entry policy).

airlines were allowed to compete on the same route, the CAB rarely allowed the carriers to cut their prices and the carriers rarely asked.[39] These high prices depressed demand, with airlines often flying planes that were less than 60 percent full.[40]

To fill those empty seats, carriers increasingly competed on service. Air carriers that could not compete on price instead competed by offering carved chateaubriand on rolling silver carts and piano lounges on the upper decks of Boeing 747s.[41] Yet the CAB increasingly intervened here as well to avoid any changes that might permit "unfair" competition on quality. At the top end, competitor complaints caused it to deny TWA's request to add lie-flat sleeper seats to its trans-Atlantic first class service.[42] On the bottom end, it initially protected first-class flights by permitting coach-class flights only at off-peak times.[43] The airlines' industry group also got into the act, making industry-wide agreements that, as economist Alfred Kahn described them, "prescribe[ed] the maximum allowable knee-room …, dictat[ed] that meals be limited to sandwiches … and requir[ed] a uniform supplementary charge for in-flight motion pictures."[44]

As with the ICC, the inefficiencies built until the public could bear them no longer. In 1977, President Carter appointed Alfred Kahn, a leading critic of the CAB, as its Chairman.

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[39] II KAHN, *supra* note 23, at 210-11.
[40] *Id.* at 212 (citing RONALD E. MILLER, DOMESTIC AIRLINE EFFICIENCY: AN APPLICATION OF LINEAR PROGRAMMING 108-114 (1963)).
[41] Madhu Unnikrishnan, *A Law that Changed the Airline Industry Beyond Recognition (1978)*, AVIATION WEEK, June 4, 2015, *available at* https://aviationweek.com/blog/law-changed-airline-industry-beyond-recognition-1978; *see also* II KAHN, *supra* note 23, at 211 ("In part because the doors to price competition are closed, airline companies compete very strenuously among themselves in the quality of service they offer.").
[42] *Trans World Airlines Siesta Sleeper-Seat Service*, 27 CAB 788, 790 (1958) (Opinion); *see also* II KAHN, *supra* note 23, at 215 (discussing same).
[43] II KAHN, *supra* note 23, at 214 (*citing* CAVES, AIR TRANSPORT AND ITS REGULATORS).
[44] *Id.* at 212.

Kahn pushed for radical deregulation, and policymakers agreed. With the passage of the Airline Deregulation Act of 1978,[45] the CAB ceased to exist.[46]

Unrestrained competition has had profound effects. By any measure, air travel prices have fallen and output has increased. By 1990, twelve years after deregulation, economists estimated that airline deregulation was already increasing U.S. consumer surplus by more than $6 billion *per year*, or $20 billion annually in 2019 dollars.[47] And the benefits continue to grow. In 2011 Supreme Court Justice Stephen Breyer, who early in his career had pushed the Airline Deregulation Act while working for Senator Ted Kennedy, noted that "the number of airline passengers increas[ed] from 207.5 million in 1974 to 721.1 million" in 2010.[48] Over that same time "[a]irline revenue per passenger mile … declined from an inflation-adjusted 33.3 cents … to 13 cents," and the cost of a flight from New York to Los Angeles fell, again in inflation-adjusted terms, from $1,442 to $268.[49]

III. LESSONS LEARNED

So what have we learned from earlier American efforts to require "just," "reasonable," and "non-discriminatory" pricing and service in network industries? I draw three conclusions.

First, no matter how simple the regulatory principle, implementing the regulations day-to-day is almost always devilishly complex. In the ICC context, the framers of the original 1887

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[45] Pub. L. 95-504, 92 Stat. 1705 (1978).
[46] *See, e.g.*, Bradley Behrman, *Civil Aeronautics Board*, *in* THE POLITICS OF REGULATION 75 (James Q. Wilson ed., 1980) ("Few regulatory agencies – if any – have ever altered their policies as rapidly or radically as did the Civil Aeronautics Board (CAB) between 1974 and 1978.").
[47] Steven A. Morrison & Clifford Winston, *The Dynamics of Airline Pricing and Competition*, 80 AM. ECON. REV. 389, 390 (1990) ("On average, deregulated fares are lower than regulated fares by 18 percent, amounting to an average annual savings to travelers of roughly $6 billion (1988 dollars).").
[48] Stephen Breyer, *Airline Deregulation, Revisited*, BLOOMBERG, Jan. 20, 2011, *available at* https://www.bloomberg.com/news/articles/2011-01-20/airline-deregulation-revisitedbusinessweek-business-news-stock-market-and-financial-advice
[49] *Id.* On Breyer and airline deregulation, see Robert H. Nelson, *The Economics Profession and the Making of Public Policy*, 25 J. ECON. LIT. 49, 62 (1987).

Act thought their commandment of "just" and non-discriminatory rates would be straightforward. Yet policymakers felt it necessary to clarify and augment the Commission's authority in major new statutes in 1903, 1906, 1910, and 1920. Similarly, the CAB found that regulating entry alone was insufficient, leading it to regulate prices and (with amusing but likely inefficient results) service levels.

Second, effective regulation requires a clear "what," "why," and "how." More specifically, we must first ask *what* problem regulation is necessary to solve. If we cannot find a problem, then the inquiry must end. If we can clearly identify a real problem, we must then ask *why* the proposed regulation is the best option. And once those items are clear, we must finally ask ourselves *how* the new agency may achieve this solution and, at least as importantly, how it may not.

So how we design institutions and what we ask them to do matters a great deal.[50] For example, the ban on vertical integration embodied in the Commodities Clause was not the best way to solve perceived abuses in the coal industry, as most agree that antitrust enforcement forced the industry to change its practices.[51] Indeed, vertical integration typically enhances economic efficiency, making forced vertical disintegration economically inefficient and reducing consumer surplus in the long run.[52] Moreover, even if there had been some legitimate need for ICC regulation, it should not have been permissible for the agency to use rate-setting policies to

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[50] *See, e.g.*, D. Daniel Sokol, *Explaining the Importance of Public Choice for Law*, 109 MICH. L. REV. 1029, 1033 (2011). This principle particularly holds true in the area of competition policy. See William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019 (2012).

[51] *See supra* note 22.

[52] On the economic effects of vertical integration, see Francine LaFontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629 (2007); James C. Cooper, Luke M. Froeb, Dan O'Brien, & Michael G. Vita, *Vertical Antitrust Policy as a Problem of Inference*, 23 INT'L J. INDUS. ORG. 639 (2005); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & Econ. 233 (1979); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978); Ronald H. Coase, *The Nature of the Firm*, 4 Econometric 386 (1937).

protect less efficient producers – such as the barges in *Ingot Molds* – from more efficient producers. As the ICC's expanding jurisdiction illustrates, mission creep – often driven by technological change – only exacerbates these problems.

And third, as our experience after deregulation shows, even the most well-intentioned regulations come at a steep cost. Removing ICC and CAB regulations significantly reduced consumer prices and increased output, generating billions of dollars in consumer surplus.

IV. APPLICATION TO TODAY'S PROPOSALS

Reading the headlines today, I fear that we are forgetting these valuable and hard-won lessons. I am particularly alarmed by some of the more radical calls to regulate Big Tech.

Many of these proposals forget the first lesson, selling railroad-style regulations as simple and beneficial. For example, the Open Markets Institute, a left-leaning Washington think tank, argues that "online intermediaries have emerged as the railroad monopolies of the 21st century."[53] To fix this alleged problem, one scholar at the Institute argues that "the best way to preserve fair and open competition" is "simply to completely ban any network monopolist from owning businesses that place it in competition with the companies that depend on it to reach [the] market," which "is what previous generations did with railways."[54] Similarly, based on what she believes to be the success of previous railroad regulations, Senator Elizabeth Warren would like to impose similar "structural separation" and demand "that the network offer fair and non-discriminatory service."[55] I should be clear that this enthusiasm is not universally held; for

[53] OPEN MARKETS INSTITUTE, FREE PRESS & PLATFORM MONOPOLIES, https://openmarketsinstitute.org/issues/free-press-platform-monopolies/ (last visited June 27, 2019).
[54] Kevin Carty, Leah Douglas, and Lina Khan, *6 Ideas to Rein in Silicon Valley, Open Up the Internet, and Make Tech Work for Everyone*, N.Y. MAGAZINE, Dec. 11, 2017, http://nymag.com/intelligencer/2017/12/open-markets-institute-antitrust-for-silicon-valley.html (Idea #6, authored by Lina Khan).
[55] Elizabeth Warren, *Here's How We Can Break Up Big Tech*, MEDIUM, Mar. 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c ("A century ago, in the

example, the U.K.'s Furman Report notes that many have called for regulating digital markets "in the same way as electricity, gas, or railway networks," but found that it was "too early to conclude" that such regulation would be necessary or appropriate.[56]

Other proposals forget the second lesson, arguing for the re-imposition of regulations like the ICC's old Commodities Clause without considering whether there is a problem that needs to be solved and, if so, whether imposing that policy again is the best option available. For example, an opinion piece published in the *Financial Times* last week traced the early history of the Commodities Clause and argued that "[i]t seems obvious … that we should apply these same standards to the digital giants of today."[57] Lina Khan similarly touts the potential of imposing a regime like the Commodities Clause on technology platforms,[58] although she at least acknowledges doing so may "sacrifice certain cost savings, resulting in higher prices."[59]

Khan's honesty – that imposing heavy new regulations on Big Tech may result in higher prices – is refreshing but rare. Indeed, most have also forgotten the third lesson. For example, in

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Gilded Age, waves of mergers led to the creation of some of the biggest companies in American history – from Standard Oil and JPMorgan to the railroads and AT&T. . . . Instead of nationalizing these industries – as other countries did – Americans in the Progressive Era decided to ensure that these networks would not abuse their power by charging higher prices, offering worse quality, reducing innovation, and favoring some over others. We required a structural separation between the network and other businesses, and also demanded that the network offer fair and non-discriminatory service. In this tradition, my administration would restore competition to the tech sector by taking two major steps…. First, by passing legislation that requires large tech platforms to be designated as "Platform Utilities" and broken apart from any participant on that platform….Platform utilities would be required to meet a standard of fair, reasonable, and nondiscriminatory dealing with users.").

[56] JASON FURMAN ET AL., UNLOCKING DIGITAL COMPETITION: REPORT OF THE DIGITAL COMPETITION EXPERT PANEL ¶ 2.4 -.5, Mar. 2019, *available at* https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf ("Some assessments see digital markets as raising no particular issues and needing nothing beyond existing competition frameworks to continue delivering the benefits of well-functioning markets. Others have argued they are natural monopolies that need regulating in the same way as electricity, gas or railway networks. The Panel's assessment is that, while they share some important characteristics with natural monopolies, it is too early to conclude that competition within and for digital markets cannot be achieved.").

[57] Rana Foroohar, *Big Tech is America's New 'Railroad Problem,"* FINANCIAL TIMES, June 16, 2019, https://www.ft.com/content/ec3cbe78-8dc7-11e9-a1c1-51bf8f989972

[58] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. (2019), *available at* https://columbialawreview.org/content/the-separation-of-platforms-and-commerce/.

[59] *Id.*

2017 an Open Markets scholar argued that we should "stop Amazon from selling groceries" – which sounds suspiciously like the kind of entry restrictions the CAB imposed on airlines – because banning Amazon from the market would somehow *increase* competition.[60] The same scholar also argued the FTC must "ban Amazon from engaging in any price discrimination in food products, anywhere, ever,"[61] something else the CAB tried and failed. Even today the Open Markets Institute argues that CAB regulation was preferable to today's marketplace, because "regulation by the CAB prevented airlines from abusing their market power while also ensuring that citizens in cities of comparable size received roughly equal service, in terms of both quality and price."[62] That claim is strictly true, at least in the sense that a much smaller number of customers paid the same much higher price and ate chateaubriand. Given the Institute's populist instincts, this claim is also ironic, as it would return us to an age when flying was only for the very wealthy.

V. CONCLUSIONS

In conclusion, those who cannot remember history are condemned to repeat it. Many years ago, in a land far, far away, regulators enunciated a simple requirement that the platform industry of the day – railroads – must charge rates that are "reasonable and just" and not engage in "unjust discrimination." These apparently simple requirements turned out to be highly

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[60] Carty et al., *supra* note 54 (Idea #5, Leah Douglas) ("Just as the giant corporation has used its power to engage in predatory pricing and to avoid paying sales tax to drive thousands of retail stores across America out of business, [Amazon] could now do the same to many local and regional groceries. This would result both in greater concentration of power over food retailing, and even fewer physical stores…. To prevent these harms, Amazon should not only be blocked from future grocery acquisitions but its purchase of Whole Foods should be unwound. And while regulators at the Federal Trade Commission are taking care of this business, they should also ban Amazon from engaging in any price discrimination in food products, anywhere, ever. Without these safeguards, we risk handing over a huge swath of our food economy to one giant corporation, and having that giant harm our well-being in fundamental ways.").

[61] *Id.*

[62] OPEN MARKETS INSTITUTE, MONOPOLY BASICS: AIRLINES & MONOPOLY, https://openmarketsinstitute.org/explainer/airline-monopoly/ (last visited June 27, 2019).

complex, prompting the growth of a regulatory leviathan that banned price and non-price competition alike on the grounds that competition might harm smaller, less efficient firms. The credo also spread to airlines. Ultimately policymakers found that those regulations, however noble, were costing consumers tens of billions of dollars a year. In other words, regulation – not competition – was the problem. Broad political support duly emerged in favor of a new solution, deregulation.

Today, many of those lessons have been forgotten. We are told that railroad and airline regulations were simple and beneficial, and therefore a great model for how to regulate Big Tech. We are told that, whatever the problem, imposing railroad-style regulations upon Big Tech firms is the "obvious" solution. And perhaps worst of all, we are told that banning some firms from the market and imposing strict pricing rules will surely increase competition and reduce prices. These mistaken ideas have all been tried before. I fear that, unless we learn from those mistakes, we are doomed to repeat them.