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**Why They Built the Fence:
Understanding Modern Antitrust Law**

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

Good afternoon. Thank you to the Dickson Poon School of Law for inviting me to participate in the Global Competition Law lecture series. While I wish we could be together in person, it remains a privilege to speak with this distinguished group, even virtually.

I begin with the standard disclaimer: The views I express today are my own, and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction.

You may have noticed that antitrust has become a hot topic recently. The intense focus on antitrust that we are currently experiencing is a phenomenon I haven't seen at least since the Microsoft litigation in the 1990s. Even then, discussions were largely about whether governments should bring that particular case. The foundations of antitrust, built on a consensus that had evolved during the 20th century – specifically, determining whether conduct is anticompetitive based on microeconomic analysis and an application of what we call the consumer welfare standard – were not much debated during the years surrounding the Microsoft trial.

In the past several years, though, the soundness of antitrust and competition law fundamentals has been called into question. The Obama Administration's Council of Economic Advisers issued a white paper finding that, based on macroeconomic analysis, the U.S. economy had become highly concentrated.¹ (As an aside, I'll note that those findings have been subject to critical empirical review – but they nevertheless have fueled a movement in the U.S.) The chairman of that council, Jason Furman, then came to the UK to lead a review, together with Philip Marsden and others, to recommend changes to competition policy designed to “unlock the opportunities of the digital economy.”²

As people spend an increasing amount of time online – socializing, working, learning, shopping, being entertained – many have become concerned about the potential harms of the digital economy. Several of those concerns focus on important non-competition issues, like privacy and children's exposure to inappropriate material. Because the FTC also has a consumer protection mandate, I do work on those issues, but they are distinct from the work I do on competition. But those who are unhappy with what we colloquially call “Big Tech” have built a large tent that shelters many and varied constituencies. As you may know, there is widespread suspicion of and dissatisfaction with Big Tech. In a December 2019 poll of adults in the U.S., 56% said they do not trust social media sites and online search engines.³ This lack of trust can have material consequences, including an unwillingness to use Covid-19 infection-tracing apps due to skepticism that tech companies would protect the privacy of health data. One poll found that

¹ See BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER, COUNCIL OF ECONOMIC ADVISORS ISSUE BRIEF 5–6 (Apr. 2016),

https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

² Jason Furman et al., Unlocking Digital Competition: Report of the Digital Competition Expert Panel (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf

³ See National Tracking Poll #191253 1, 156–60 tbl.CES5_7, MORNING CONSULT (Dec. 11-14, 2019) https://morningconsult.com/wp-content/uploads/2020/01/191253_crosstabs_CES_Adults_v3_JB.pdf.

while 57% of smartphone users report trust in public health agencies, only 43% trust tech companies.⁴ This environment has created an opportunity for politicians and other commentators to begin calling for the breakup of Big Tech and a more general overhaul of the antitrust laws.

It is against this backdrop that I would like to discuss the sweeping recommendations made in a staff report released by the Antitrust Subcommittee of the Judiciary Committee of the United States House of Representatives.⁵ These quite aspirational recommendations suggest full-scale revisions to the U.S. antitrust laws. But before we dive into the substance, I would like to underscore the fact that these recommendations do not change the current shape of U.S. antitrust law. Instead, the House Staff Report reflects the recommendations of the staff of one political party in one House of our bicameral legislature, not the view of the U.S. government as a whole.

Nonetheless, the report merits close attention. Congressman David Cicilline, the chairman of the House Antitrust Subcommittee, said last week that the “report and recommendations will be the center of gravity for our agenda to reinvigorate the antitrust laws and antitrust enforcement.”⁶ The Democrats’ “next steps will be to consider legislation in line with the recommendations laid out in the report.”

During our time together today, I will first provide the historical context for the House Staff Report. I then will describe some of my concerns about its recommendations. To end on a positive note, I will close by identifying some of the themes in the report with which I agree.

II. The Context

The House Antitrust Subcommittee issued the staff’s 450-page report last month after more than a year of investigating the online platforms Facebook, Google, Amazon, and Apple. The House Staff Report includes many recommendations to rewrite the antitrust laws, but it typically frames these recommendations as returning antitrust to its origins.

The Subcommittee calls on Congress to “restore the antimonopoly goals of the antitrust laws.”⁷ The report declares that “the courts have significantly weakened these laws” and that the Federal Trade Commission and the Antitrust Division of the Department of Justice have taken “an approach to antitrust that has significantly diverged from the laws that Congress enacted.”⁸

As I am speaking to a British audience, it seems appropriate to quote the writer G.K. Chesterton – although he was a dropout of your rival University College London. In his essay “The Drift

⁴ Craig Timberg et al., *Most Americans are not willing or able to use an app tracking coronavirus infections. That’s a problem for Big Tech’s plan to slow the pandemic*, WASH. POST (Apr. 29, 2020, 1:03 PM), <https://www.washingtonpost.com/technology/2020/04/29/most-americans-are-not-willing-or-able-use-an-app-tracking-coronavirus-infections-thats-problem-big-techs-plan-slow-pandemic/>.

⁵ See H. COMM. ON THE JUDICIARY, SUBCOMM. ON ANTITRUST, COMMERCIAL, AND ADMINISTRATIVE LAW, 116TH CONG., INVESTIGATION OF COMPETITION IN DIGITAL MARKETS: MAJORITY STAFF REPORT AND RECOMMENDATIONS (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf [hereinafter “HOUSE STAFF REPORT”].

⁶ David Cicilline, Chairman, H. Subcomm. on Antitrust, Com., & Admin. L., Remarks at the UBS European Virtual Conference (Nov. 10, 2020).

⁷ See HOUSE STAFF REPORT, *supra* note 5, at 391.

⁸ *Id.*

from Domesticity,” he outlined a principle that’s now often called “Chesterton’s Fence” or “Chesterton’s Gate.”⁹ He analogized institutions and laws to a fence or gate that has been in place for years. One kind of reformer walks up to the fence “and says, ‘I don’t see the use of this; let us clear it away.’ To which the more intelligent type of reformer will do well to answer: ‘If you don’t see the use of it, I certainly won’t let you clear it away. Go away and think. Then, when you can come back and tell me that you *do* see the use of it, I may allow you to destroy it.’”

Chesterton offers this principle with the understanding that the fence was not built by sleepwalkers. “Some person had some reason for thinking it would be a good thing for somebody. And until we know what the reason was, we really cannot judge whether the reason was reasonable.” Chesterton’s insight does not mean that all fences should be left up forever. If someone understands how a law or rule came to be, “and what purposes it was supposed to serve, he may really be able to say that they were bad purposes, or that they have since become bad purposes, or that they are purposes which are no longer served.”¹⁰

Why walk through this parable today, other than to find common ground with my very kind hosts? I’d like you to imagine that the antitrust consensus in the United States is a carefully and soundly constructed fence, like the fence surrounding Buckingham Palace. That is to say, we have arrived at the antitrust standards we now employ not by accident, but incrementally and carefully. The common law tradition that the U.S. inherited from the UK enables this evolution, in which courts grapple with real situations to determine whether a merger or conduct is anticompetitive.

Invoking the man for whom the Sherman Antitrust Act is named has become popular, so I’ll quote Senator John Sherman’s explanation in 1890 for why the law is written so broadly, even vaguely: “I admit that it is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case.”¹¹

The courts then spent almost 90 years devising a workable standard to help them determine what conduct should be illegal under the federal antitrust laws. They quickly discarded any attempt to apply the literal language of the Sherman Act, because banning every contract that restrains trade would lead to banning most contracts.¹² The whole point of a contract is to agree on a commitment that restrains trade. For example, even if your landlord meets someone who would be willing to pay a higher rent than you do, your rental contract restrains the landlord from trading you for another tenant whenever he feels like it. And that restraint provides important benefits to both parties to the contract.

⁹ G.K. Chesterton, *The Drift from Domesticity*, in 3 THE COLLECTED WORKS OF G.K. CHESTERTON 157 (Ignatius Press, 1986).

¹⁰ *Id.*

¹¹ 21 CONG. REC. 2460 (1890) (statement of Sen. Sherman).

¹² See *United States v. Trans-Missouri Freight Ass’n.*, 166 U.S. 290, 327–28 (1897). On how antitrust overcame void for vagueness problems, see *Nash v. United States*, 229 U.S. 373, 376–78 (1913).

Looking back to the common law that pre-dated the Sherman Act, the courts said this new federal statute must be intended to ban only *unreasonable* restraints of trade.¹³ Over time, as the government and private plaintiffs brought cases, the courts ascertained that certain kinds of restraints were always unreasonable and anticompetitive, so those were per se illegal. In other words, even if one could imagine some benefit from this conduct, judicial efficiency weighed in favor of labeling it unlawful without examining those purported benefits. All other restraints had to be judged under what we call the rule of reason, which assesses both the benefits and the harms of the conduct at issue.

Some commentators would have us turn antitrust into a series of rules that forbids various practices and mergers without examining their actual or likely effects. These commentators refer to themselves as neo-Brandeisians.¹⁴ Ironically, it was Justice Louis Brandeis who gave us a classic formulation of the rule of reason, in his opinion for the Supreme Court in *Chicago Board of Trade v. United States*:

The legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.¹⁵

Again, this current common law of antitrust was achieved slowly, through the process of litigating many cases, both by the government and by private plaintiffs. Antitrust rulings early in the 20th century tended to favor declarations of per se illegality for vertical restraints, and once a Supreme Court precedent was established, it generally could be eroded only slowly. For example, the court ruled in 1911 that a manufacturer setting minimum prices was always illegal.¹⁶ As late as 1968, the Supreme Court held that setting maximum prices was always illegal.¹⁷ But also by 1968, such rulings drew dissent both within the court and outside it.¹⁸ More than a decade before the publication of his 1978 book *The Antitrust Paradox*, Robert Bork was

¹³ See *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890.”).

¹⁴ See, e.g., Open Markets, *Restoring Antimonopoly Through Bright-Line Rules*, THE PROMARKET BLOG (Apr. 26, 2019), <https://promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules>; Lina Khan, *The New Brandeis Movement: America’s Antimonopoly Debate*, 9 J. EUR. COMPETITION L. & PRAC. 131, 131–32, (2018).

¹⁵ 246 U.S. 231, 238 (1918).

¹⁶ See *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408–09 (1911), *overruled by* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 881 (2007).

¹⁷ See *Albrecht v. Herald Co.*, 390 U.S. 145, 152–53 (1968), *overruled by* *State Oil Co. v. Khan*, 52 U.S. 3, 7 (1997).

¹⁸ *Id.* at 156 (Harlan, J., dissenting).

arguing in legal journals against the per se illegality of any vertical restraints, on the grounds that these restraints could increase total output.¹⁹

While Bork referred to this concern about output as “consumer welfare,” the prevailing consumer welfare standard seeks to maximize consumer surplus or, in economic terms, the difference between what each consumer actually pays and what he or she would be willing to pay.²⁰ This standard is sometimes misunderstood to mean that the consumer welfare standard cares only about prices. But if consumers’ willingness to pay goes up based on quality, innovation, or other factors, then the improved version of a product increases consumer surplus even if the price does not decrease.²¹ By 1979, the U.S. Supreme Court described the Sherman Act as a “consumer welfare prescription.”²²

The courts came to the consumer welfare standard after decades spent trying to balance a mix of economic, social, and political goals for antitrust. Economic research found benign explanations for highly concentrated markets, which broke from prior work that was suspicious of concentration.²³ The research raised important arguments undercutting the Structure-Conduct-Performance paradigm that had guided antitrust policy and many judicial decisions.²⁴

In the 1970s, the courts became increasingly focused on the market impact of the challenged restraint to determine whether it was anticompetitive and thus illegal. In other words, the courts concluded a thorough analysis of the practice was necessary, rather than merely taking notice of its form and applying a conclusory label. This evolution led the Supreme Court to overturn several of its own precedents that had deemed various kinds of mergers or practices to be per se illegal, and instead to apply the rule of reason. For example, in *Continental T.V. v. GTE Sylvania*, the Supreme Court relied on economic reasoning to hold that nonprice vertical restraints, including the territorial restraints on franchisees at issue in the case, should be evaluated under the rule of reason.²⁵ The Court declared that the rule of reason standard must be based upon demonstrable economic effect.²⁶

¹⁹ See Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950, 950–64 (1968).

²⁰ See Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 LOY. CONSUMER L. REV. 336, 336 (2010).

²¹ This antitrust principle has long been understood. See, e.g., *United States v. Am. Can Co.*, 230 F. 859, 901–04 (D. Md. 1916). For a general review of populist claims, see D. Daniel Sokol, *Antitrust’s “Curse of Bigness” Problem*, 118 MICH. L. REV. 1259 (2020).

²² *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

²³ See, e.g., Harold Demsetz, *Two Systems of Belief about Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 945 (1979) (summarizing this work in economics).

²⁴ The Structure-Conduct-Performance paradigm claimed that higher industry concentration was correlated with higher prices and profit margins. See generally Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing 1936–1940*, 65 Q.J. ECON. 293 (1951). The new economic learning challenged the basis for decisions like *FTC v. Procter & Gamble*, 386 U.S. 568, 575 (1967) (upholding the Commission’s decision against Procter’s acquisition of Clorox on the grounds that Procter’s “huge assets and advertising advantages . . . would dissuade new entrants and discourage active competition from the firms already in the industry due to fear of retaliation by Procter”).

²⁵ 433 U.S. 36, 54–57 (1977).

²⁶ *Id.* at 58–59.

A move toward effects-based analysis is by no means unique to the United States. Multiple jurisdictions around the world began with inflexible, rule-oriented competition enforcement but evolved toward a less form-based approach. It's now been eight years since the publication of the book *Ten years of effects-based approach in EU competition law*, so outside the U.S. that approach is an adult and old enough to drink. In the first essay in the collection, Damien Gerard speculates that this shift in the EU followed the typical “two to three decades lag between the development of ideas in economics and their impact on the formulation of competition policy,” and cites the Supreme Court opinion in *Sylvania* and Bork's *Antitrust Paradox* as milestones in that development.²⁷ He also points to “the introduction of merger control in 1989 and the strengthening of the transatlantic dialogue” as leading in the EU “to a greater awareness of the tools of economic analysis and to an overall reappraisal of the objectives of competition policy.”²⁸

The international convergence on merger analysis is evident in Asia, as well. Japan's merger control policy was long described by local scholars as essentially regulatory, but in 2007, the Fair Trade Commission revised its merger guidelines to harmonize more closely with international best practices and economic theory. The JFTC began focusing more “on the reality of market competition instead of market share” in mergers, and showing its economic thinking.²⁹ Even the area with the least international convergence, anti-monopoly law or unilateral conduct – or what non-U.S. jurisdictions usually term “abuse of dominance” – has trended toward an effects-based approach.³⁰

Much of this international harmonization took place because of the hard work done in multilateral organizations like the Competition Committee of the OECD and the International Competition Network, whose members are competition agencies. Other important convergence arose in bilateral relationships, like the important U.S./EU collaboration. Each step toward harmonization and convergence around best practices was hard-won. I may be biased, but I believe the U.S. played a key role in this process.

But even as the world has evolved toward competition enforcement based on economic analysis of effects, the bipartisan consensus on antitrust in the U.S. may now be ending. It was reached after decades of pendulum swings between intense antitrust enforcement and very little enforcement. Sometimes these reversals would occur under the same president – the Franklin

²⁷ Damien M.B. Gerard, *The effects-based approach under Article 101 TFEU and its paradoxes: modernisation at war with itself?* in TEN YEARS OF EFFECTS-BASED APPROACH IN EU COMPETITION LAW ENFORCEMENT (J. Bourgeois & D. Waelbroeck eds., 2012), 18, 21-22.

²⁸ *Id.* at 19.

²⁹ Koki Arai, *Merger Assessment in Japan: The Declining Importance of Market Shares*, 6 J. EUR. COMPETITION L. & PRAC. 337, 344, (2015).

³⁰ See, e.g., Hwang Lee, *Development of Competition Laws in Korea*, in ERIA DISCUSSION PAPER SERIES 1, 8 (2015) (“In addition to efforts to improve the structurally monopolistic markets, tools to correct the abusive acts of market-dominating enterprises were actively implemented. The most important landmark case was the 2001 POSCO case, in which the Supreme Court of Korea departed from a long history of enforcement based on principles of unfairness and moved forward to the direction to require sophisticated showing of the anticompetitive effects and intent of the acts concerned. It was established that the mere proof of unfairness was not enough to support the violation of abuse of market dominance. Since then, the general practice in Korea's competition community has been to regulate cases of abuse of market-dominating positions using an effects-based approach instead of form-based approach.”).

Roosevelt administration first encouraged companies to cooperate to stabilize prices during the Great Depression, then prosecuted them for doing so.³¹

At its worst, instability of that kind might sap confidence in antitrust policy and legitimize more radical solutions at both ends of the ideological spectrum. Measuring competition by the consumer welfare standard is small-d democratic, because everyone is a consumer, whereas not everyone is a business owner, a shareholder or even an employee.³²

In that context, I will next address some of the House Antitrust Subcommittee's recommendations. Among other proposals, the staff report advances as a potential model for the regulation of Big Tech the Interstate Commerce Commission and Congress's methods of regulating railroads more than a century ago.³³ For example, the report explains that Congress passed a law in 1906 that banned railroads from transporting any goods that they had produced or in which they held an interest.³⁴ It connects railroads to technology companies by saying both are dominant intermediaries in network industries.³⁵

Notably, the report does not mention that this regulatory regime, and the ICC itself, were eventually abolished – as was a similar regulatory regime governing airlines.³⁶ In fact, a bipartisan consensus that encompassed Democrat politicians like President Jimmy Carter and Senator Ted Kennedy and liberal industrial organization economists like Alfred Kahn drove this

³¹ See Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTI-TRUST STORIES 94 (Eleanor Fox & Daniel Crane eds., 2007) (“The 27 oil companies and 56 of their employees were shocked to be criminally indicted in Madison, Wisconsin for violating Section 1 of the Sherman Act. After all, the misconduct alleged was participating in a petroleum stabilization program that had originated in the highest echelons of the very federal government that was now bringing the indictment. But such is the political nature of antitrust enforcement. Today’s dogma is tomorrow’s relic. The historical volatility of antitrust may come [as] a surprise to those weaned on the Chicago School consensus of the past thirty years, which has largely driven dissenting voices to the margins of the antitrust conversation. With few exceptions, competition policy has come to be perceived as technocratic, conservative, and incremental. But it was not always this way. The Sherman Act’s history is Hegelian, a history of clashing paradigms, ideologically dominated epochs, and sharp departures from preexisting norms. One can never get too comfortable with the status quo, for the rug is quickly pulled out from under it.”).

³² See President John F. Kennedy, Special Message to the Congress on Protecting the Consumer Interest (Mar. 15, 1962) (“Consumers, by definition, include us all. They are the largest economic group in the economy, affecting and affected by almost every public and private economic decision. Two-thirds of all spending in the economy is by consumers. But they are the only important group in the economy who are not effectively organized, whose views are often not heard.”).

³³ See HOUSE STAFF REPORT, *supra* note 5, at 383.

³⁴ See HOUSE STAFF REPORT, *supra* note 5, at 380; see also Hepburn Act, Pub. L. No. 59-337, 34 Stat. 584 (1906), <https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/34/STATUTE-34-Pg584.pdf>.

³⁵ HOUSE STAFF REPORT, *supra* note 5, at 383.

³⁶ The House Staff Report notes that in 1958, the Antitrust Subcommittee “exposed the behind-the-scenes anticompetitive campaign that incumbent air carriers and their advocacy group, the Air Transport Association of America (ATA), had been waging to prevent the Civil Aeronautics Board (CAB) from approving market entry by new air carriers,” and recommended an investigation by the Antitrust Division. HOUSE STAFF REPORT, *supra* note 5, at 34. As for international air transportation, the report concluded that Pan American’s dominance in the market was the “result of its use of devices to foreclose competition in order to secure and maintain control over markets in which it does business,” and recommended that the CAB undertake a broad investigation of the company. *Id.* It does not acknowledge that the CAB, and its market-regulating power to approve or disapprove entry, no longer exists.

deregulatory effort.³⁷ After decades of hearing complaints from their constituents about high prices and insufficient service, members of Congress realized that the constraints imposed on the railroad and airline industries were harming the very consumers they were designed to protect.³⁸ Congress preserved the regulations for health and safety, but decided that customers' wishes, not a Washington bureaucrat's, would determine which kinds of railroad cars would be produced and which routes an airline would serve.

These gaps in the report's historical perspective are important because they leave as a mystery how U.S. antitrust law evolved to its current state. So far as the report is concerned, there was no fence in 1890, and there should be no fence today. However, I see good reasons for many of those fences to have been built, and for them to remain standing.

III. The Text

By my count, the House Staff Report makes a score of proposals. Some deal with conduct, others with mergers, and yet others with procedural issues. Unfortunately, I do not have time today to address them all. Each recommendation deserves a lecture of its own, primarily to understand why the fences that stand today were built. Some of these fences stand tall and proud, while others might be getting a bit shabby and could stand to be replaced, or at least given a fresh coat of paint. But the important task is to understand who built the fence, and why. It is this perspective that I would like to provide as I discuss these recommendations.

As an aside, it is important to note that while the report ostensibly focuses on tech – the investigation examined competition in digital markets – many of its recommendations would apply to other sectors of the economy.

It is also worth noting that the report takes a very static view of markets. A sweeping set of proposals, ranging from the revitalization of the essential facilities doctrine to prohibitions on various type of mergers, looks solely at a snapshot in time. The recommendations do not consider the incentives that led to or that will lead in the future to the creation of facilities, technologies, and platforms. This static approach runs contrary to the dynamic perspective taken by American lawmakers going all the way back to the Founding. The Constitution specifically rationalizes the government grant of the copyright and patent monopolies – “securing for limited

³⁷ See, e.g., William H. Jones, *Carter Backs Airline Regulation Reform*, WASH. POST, Feb. 24, 1977, at C13 (“President Carter indicated yesterday that his administration plans to support broad reform of federal airline regulations, as proposed recently by Sens. Edward M. Kennedy (D-Mass.) and Howard W. Cannon (D-Nev.)”); Nancy L. Rose, *After Airline Deregulation and Alfred E. Kahn*, 102 AM. ECON. REV., 376, 376 (2012) (“Alfred E. ‘Fred’ Kahn is widely remembered as ‘The Father of Airline Deregulation.’ Though he consistently redistributed credit for the reform, Kahn’s candor, wit, and willingness as chairman of the Civil Aeronautics Board to step outside the ‘regulation as usual’ box established him as the face at its forefront. This legacy is enormous, as the 1978 Airline Deregulation Act may be one of the greatest microeconomic policy accomplishments of the past fifty years.”).

³⁸ Christine S. Wilson & Keith Klovers, *The growing nostalgia for past regulatory misadventures and the risk of repeating these mistakes with Big Tech*, 8 J. ANTITRUST ENF’T 10, 13–14 (2020).

times to authors and inventors the exclusive right to their respective writings and discoveries” – because it would “promote the progress of science and useful arts.”³⁹

One such short-sighted proposal in the House Staff Report seeks to reduce a company’s so-called “conflicts of interest” through structural separations and restrictions on the lines of business into which it could go.⁴⁰ The report calls for Congress to prohibit a dominant intermediary from operating in markets that place the intermediary in competition with the firms dependent on its infrastructure, and to limit the markets in which a dominant firm can operate. This prohibition would bar companies that run operating systems, such as Microsoft’s Windows, Google’s Android, and Apple’s iOS, from competing in the market for applications that run on those systems. Similarly, it would preclude Amazon from simultaneously being a retailer and operating an online Marketplace with third-party sellers.

Notably, this proposal fails to consider incentives for investment and innovation. It takes a static view of the economy, in which existing markets are taken as given, instead of considering how they came to be. For example, if a firm is already a popular seller of products – whether these are physical products or apps – why would it open a marketplace to third-party sellers, if doing so will mean that it is forbidden to operate in that marketplace itself? Yet the lack of such a marketplace makes both the third-party sellers and consumers worse off. Existing antitrust law already can police against actual anticompetitive conduct such as exclusion where it harms consumer welfare.⁴¹

Limiting the markets that a dominant firm can enter could have some downright absurd effects. For example, the popular left-leaning news channel MSNBC was founded in 1996 as a joint venture between one of the longstanding “big three” broadcast networks, NBC, and Microsoft, which had a near-monopoly over operating systems at the time.⁴² Allowing Microsoft to start MSNBC put a dominant firm in competition with CNN and Fox News, two companies that presumably used Microsoft’s operating system. MSNBC also benefited from borrowing NBC News content, a resource that rival CNN lacked.⁴³ Yet cable news was a tough, competitive market even for companies with such significant resources behind them. Microsoft’s CEO said

³⁹ U.S. CONST. art. I, §8, cl. 8; cf. “To James Madison from Thomas Jefferson, 28 August 1789,” *Founders Online*, National Archives, <https://founders.archives.gov/documents/Madison/01-12-02-0242>, (“I must now say a word on the declaration of rights you have been so good as to send me. I like it as far as it goes; but I should have been for going further. For instance the following alterations & additions would have pleased me . . . Art. 9. Monopolies may be allowed to persons for their own productions in literature & their own inventions in the arts, for a term not exceeding __ years but for no longer term & no other purpose.”).

⁴⁰ HOUSE STAFF REPORT, *supra* note 5, at 378.

⁴¹ *See, e.g.*, *United States v. Microsoft Corp.*, 253 F.3d 34, 58–80 (D.C. Cir. 2001).

⁴² *See id.* at 51–58 (upholding the finding that “Microsoft possesses monopoly power in the market for Intel-compatible PC operating systems”).

⁴³ *See* Steve Young, *MSNBC launches network; Joint venture has deep pockets*, CNN MONEY (July 15, 1996, 6:14 PM), https://money.cnn.com/1996/07/15/bizbuzz/msnbc_pkg/ (“Microsoft and NBC on Monday launched MSNBC, the biggest start-up in cable television history. The venture pits the software giant and the leading broadcast network against another once-upstart in news, CNN. MSNBC is the most serious challenge that CNN has faced. The alliance of the two companies has deep pockets, close to half a billion dollars at the start. It’s pouring on the NBC star power and the production look of network TV... CNN is taking the threat seriously, citing Microsoft’s marketing mastery and NBC News’ reputation. CNN has fought off competition before, namely the Satellite News Channel, backed by Westinghouse and ABC in the early ’80s.”).

five years after starting MSNBC that in hindsight, he would not do it again, and that Microsoft would not go further into the content market.⁴⁴

Success in one line of business is no guarantee of success in another. In a free market, firms can enter multiple lines of business and try their best to provide something that consumers want. That something may be broadly appealing, or it may target a niche. But restricting the lines of business in which firms can operate prevents them from even trying, which harms consumers who never get to see the innovations that those firms would have brought to the market.

One of the report's key suggestions for promoting innovation is to mandate interoperability – in other words, force dominant tech firms to enable competitors to interconnect with them, so users can communicate across services. The report optimistically declares “The implementation cost of requiring interoperability by dominant firms would be relatively low. Unlike interconnecting in traditional communications markets, there is little direct cost associated with interoperating with dominant platforms.”⁴⁵ It cites as support for this claim a paper by a lawyer and an economist, rather than an analysis by someone with software engineering expertise.⁴⁶

Some observers have pointed to the Federal Communications Commission's order on *AOL/Time Warner* as an instance in which the government successfully demanded that a dominant platform provide for interoperability.⁴⁷ When the web portal and online service provider America Online bought the publishing and entertainment company Time Warner at the turn of the century, AOL dominated the market for text-based messaging. The U.S. telecommunications regulator was concerned that the merged company would dominate the advanced IM-based high-speed services market. Thus, the FCC conditioned its approval for the merger on AOL implementing instant-messaging interoperability.⁴⁸ The people who cite the order generally do not mention that AOL eventually said it was unable to make instant-messaging interoperability work and had the order waived.⁴⁹ The moral of this story? Agencies can order tech companies to do things – but that does not mean those directives will be feasible or even possible to implement.

⁴⁴ Stefanie Olsen, *Ballmer: Would not launch MSNBC again*, CNET NEWS (Jan. 2, 2002) (“‘If we were starting [MSNBC] now, as good an operation as it is, I don't think we would have started it,’ Ballmer told *Reuters* . . . As a result of several lukewarm efforts, Microsoft's Ballmer said the company should stay away from starting a company that provided online content – a vastly different path than that of AOL Time Warner.”).

⁴⁵ HOUSE STAFF REPORT, *supra* note 5, at 385.

⁴⁶ Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, WASH. CTR. FOR EQUITABLE GROWTH 1, 15(2020).

⁴⁷ See, e.g., *Hearing on Online Platforms and Market Power, Part 3: The Role of Data Privacy and Privacy in Competition Before the Subcomm. on Antitrust, Com., and Admin. Law of the H. Comm. on the Judiciary*, 116th Cong. 6–7 (2019) (written testimony of Rohit Chopra, Commissioner, Fed. Trade Comm'n), https://www.ftc.gov/system/files/documents/public_statements/1549812/chopra_-_testimony_at_hearing_on_online_platforms_and_market_power_part_3_10-18-19.pdf (“More recently, the government conditioned the America Online (AOL) and Time Warner merger by requiring that the dominant AOL Instant Messenger chat platform become interoperable, spawning new competition and innovation.”).

⁴⁸ See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL-Time Warner, Inc., Transferee, F.C.C. 01-12 (2001) (memorandum opinion and order).

⁴⁹ See Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. & Am. Online, Inc., Transferors, to AOL Time Warner Inc., Transferee, F.C.C. 03-193 (2003) (“AOL Time

Let us turn to another example. Three of the companies examined by the House Antitrust Subcommittee – Facebook, Google, and Apple – plus Microsoft and Twitter have created the Data Transfer Project. In theory, the project “extends data portability beyond downloading a copy of your data from your service provider, to providing consumers the ability to directly transfer data in and out of any participating provider.”⁵⁰ Since the project began in July 2018, its most notable success has been a tool on Facebook that allows people to transfer photos and videos directly from Facebook to Google Photos. Facebook announced this tool last December.⁵¹ Few announcements have followed. For whatever reason – whether a lack of incentive to ease users’ departure from these services, or the genuine hurdles even for companies collectively worth trillions of dollars to write this computer code – the Data Transfer Project has underwhelmed.

I am by no means denying the potential for interoperability and data portability to improve consumers’ lives and increase competition. I am merely pointing out that they merit close examination before being turned into legal mandates on the private sector. The FTC is pursuing this kind of examination; in September, we held a virtual workshop on data portability.⁵² In addition to lawyers and economists, the speakers included chief technologists from both the public and private sectors. These experts acknowledged the issues that arise from interconnection, including the security of personal data, the problem of identity verification for data transfer requests, and privacy concerns for those whose data may be transferred as part of another person’s request.

For example, if I create an account on a social network, I agree to give that network access to my posts and to my friends’ comments on them. To make interoperability work, my friend using a Rival Social Network would have to be able to see my posts without having an account on the same network that I do, and would need to be able to post comments through the rival network that would appear on my account on my network. I have never given the rival network permission to access my posts. This capability might be solvable by making it easy for users to agree to have their material appear on other networks, but as a matter of privacy this mirroring of content would seem to require affirmative consent, even if through a rapid, unread click-through. In short, a mandate for interoperability is easy for the Subcommittee to suggest, but not so easy to implement, and rife with the potential for unintended consequences.

The House Staff Report also recommends that Congress prohibit the abuse of superior bargaining power, including through potentially targeting contracts deemed to be anticompetitive, and introduce due process protections for individuals and businesses dependent on the dominant platforms.⁵³ “Abuse” is an amorphous term that, if not carefully cabined by

Warner has now requested the elimination of this condition, pursuant to procedures specified in the Order. ... we grant the petition and remove the condition.”)

⁵⁰ GOOGLE ET AL., DATA TRANSFER PROJECT OVERVIEW AND FUNDAMENTALS 3 (2018), <https://datatransferproject.dev/dtp-overview.pdf>.

⁵¹ Steve Satterfield, *Driving Innovation in Data Portability With a New Photo Transfer Tool*, FACEBOOK: NEWSROOM (Dec. 2, 2019, 1:00 PM), <https://about.fb.com/news/2019/12/data-portability-photo-transfer-tool>.

⁵² *Data To Go: An FTC Workshop on Data Portability*, FED. TRADE COMM’N, (Sept. 22, 2020), <https://www.ftc.gov/news-events/events-calendar/data-go-ftc-workshop-data-portability>.

⁵³ HOUSE STAFF REPORT, *supra* note 5, at 389–390.

guidelines and case law, can give enforcers too much latitude to go after any conduct they disfavor. For example, some observers have suggested that mandatory arbitration of consumer or worker disputes is an abuse that signals the existence of market power⁵⁴ – even though arbitration clauses have become standard in contracts and terms of service from incumbent firms and new entrants alike.⁵⁵

The proposal for the U.S. to prohibit the abuse of superior bargaining position appears to be importing the competition laws of some foreign jurisdictions, including Japan and South Korea. Overseas, this prohibition historically has been used to protect small businesses from the power of large conglomerates with which the small businesses must deal – the Japanese keiretsu or the Korean chaebol – and does not require a showing of anticompetitive effects, including harm to consumer welfare.

But in Japan, the abuse of superior bargaining power has now become part of competition law for consumers. Japan’s draft *Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions Between Digital Platform Operators and Consumers that Provide Personal Information* applies what had been a business-to-business legal framework to situations in which businesses “bargain” with consumers over terms of service.⁵⁶ Under the Platform Guidelines, digital platforms are deemed to have a superior bargaining position relative to consumers when consumers “suffer detrimental treatment” with respect to personal data, but must accept those terms to use the platform’s services.

Germany’s Federal Cartel Office applied a similar analysis in its Facebook case. It found that Facebook is the dominant company in the national market for social networks for private users, and as a dominant company has bargaining power over its users.⁵⁷ Because Facebook’s terms of service violated the EU’s General Data Privacy Regulation, the Federal Cartel Office said, the company had harmed consumers.⁵⁸ It ordered Facebook to allow consumers to continue using the

⁵⁴ See, e.g., Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America’s Top Companies*, 52 U.C. DAVIS L. REV. ONLINE 233, 245 (2019) (“[S]ome companies may abuse their market power to impose arbitration agreements with one-sided terms for the purpose of suppressing consumer claims”).

⁵⁵ For example, three companies called by the majority as witnesses for the Subcommittee’s “Field Hearing: Online Platforms and Market Power, Part 5: Competitors in the Digital Economy,” to testify about their difficulties with the large tech companies, feature arbitration clauses in their consumer terms of service. See Sonos, Inc. Terms of Use, License and Warrant Agreement, Binding Arbitration Agreement (last updated June 2020), <https://www.sonos.com/en-us/legal/terms-of-use#arbitration>; Tile Terms of Service, Section 25, Dispute Resolution by Binding Arbitration (last updated Oct. 16, 2020), [https://www.thetileapp.com/en-us/terms-of-service#Dispute Resolution by Binding Arbitration](https://www.thetileapp.com/en-us/terms-of-service#Dispute%20Resolution%20by%20Binding%20Arbitration); PopSockets LLC Terms of Use, Arbitration Provision, <https://www.popsockets.com/pages/app-termsconditions.html>.

⁵⁶ See Press Release, Japan Fair Trade Comm’n, Request for Public Comments on Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (Aug. 29, 2019), <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.html>.

⁵⁷ See Press Release, Bundeskartellamt, *Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources* (July 2, 2019), https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

⁵⁸ See Bundeskartellamt, *Facebook, Exploitative Business Terms Pursuant to Section 19(1) GWB for Inadequate Data Processing* (Feb. 15, 2019), <https://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Missbrauchsaufsicht/2019/B6-22-16.pdf>.

social network even if the users refused to give Facebook access to their data on other apps and websites.

Regulations like Japan’s Platform Guidelines and enforcement matters like Germany’s Facebook case seek to protect consumers from companies’ superior bargaining power. But they may have the effect of reducing consumers’ choices. Many consumers may rationally conclude that the ability to upload and share an unlimited number of high-definition digital photos or videos online, without paying a penny for server space and webhosting, is a good trade for their data. I fear these emerging competition principles would preclude consumers from rationally choosing to make this trade. I do want consumers to have the information necessary to evaluate the pros and cons of this trade, which will require federal privacy legislation that gives consumers greater transparency regarding which data are collected, and how that data is processed, shared, and monetized.⁵⁹ I do not want governments to take decision-making authority away from empowered consumers.

Devolving from an effects-based to a form- or rules-based competition regime is no less harmful in the area of mergers than it is for conduct. The House Staff Report calls for Congress to reduce market power through merger presumptions. Any acquisition by a dominant platform – even one in an unrelated market – would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion.⁶⁰

This proposal is problematic for several reasons. First, it requires defining a market up front to know whether the company is “dominant.” This approach harkens back to the outdated structuralist focus on market share, instead of looking at the actual or likely effects of the acquisition.⁶¹ The vague “public interest” standard similarly takes enforcers backwards from the consumer welfare standard. Instead of using a metric underpinned by economic tools of analysis to determine whether consumers are harmed or benefited by a merger, this proposal would have enforcers engage in an almost unavoidably political calculus of whose interests to serve.

Second, the merger presumption flips burden of proof from the enforcer to the private sector and interferes with the free market pursuit of ways to respond to demand. Why would we not want business people to try a thousand different ways to get resources to create new products, break into new markets, and achieve minimum viable scale? Companies routinely decide whether to “build or buy” new products and capabilities. In acquiring another company to achieve a goal rather than doing so through internal growth and expansion, a company calculates that it is more efficient not to reinvent the wheel using finite resources.

⁵⁹ See Christine S. Wilson, Comm’r, Fed. Trade Comm’n, Free Markets, Regulation, and Legislation: A Place for Everything, and Everything in Its Place, Remarks at the Free State Foundation Twelfth Annual Telecom Policy Conference, Washington, D.C. 13 (Mar. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1568831/wilson_-_free_state_foundation_keynote_3-10-20.pdf.

⁶⁰ HOUSE STAFF REPORT, *supra* note 5, at 387–88.

⁶¹ See U.S. DEP’T OF JUST. & FED. TRADE COMM’N, HORIZONTAL MERGER GUIDELINES § 4.0 (2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.html>.

Along the same lines, the report recommends that Congress codify bright-line rules and structural presumptions in concentrated markets. Specifically, any transaction that would give a single firm 30% or more of a market – with a lower standard for monopsony or buyer power claims – would be presumptively prohibited.⁶² The would-be merging companies would carry the burden of proof to show that the merger would not reduce competition, and they could not point to efficiencies to overcome the presumption.

A codified presumption completely ignores the differences among markets, especially regarding barriers to entry and the potential for technological change to enable leaps over those barriers. A 30% share in the market for cement in 2005 was not like a 30% share in the market for movie rentals. Though there was no technology on the horizon to revolutionize how we could adhere bricks to one another, there *was* technology that would change how we obtained video content – no longer having to go down to the store or even wait for a DVD to arrive by mail.⁶³

Prohibiting mergers that would create a 30% market share also prevents smaller competitors from combining to challenge a market leader. The classic example of this prohibition in U.S. antitrust was the FTC’s successful lawsuit to block the merger of two baby food companies.⁶⁴ Heinz and Beech-Nut argued that Beech-Nut’s superior recipes and Heinz’s underutilized manufacturing facilities, when combined, would create a stronger rival to the dominant company, Gerber.⁶⁵ After an appellate court ruled against the merger, Heinz sold its baby food business, which eventually exited the U.S. market entirely.⁶⁶ A 2009 retrospective by an FTC economist found that Beech-Nut lost some market share, while Gerber’s share increased and no substantial entry occurred.⁶⁷

These consequences suggest that blocking the *Heinz/Beech-Nut* merger may have been an example of erroneous enforcement. Yet, in an assumption that appears to drive the report as a whole, the Subcommittee simply asserts as fact that “false positives” (or erroneous enforcement) are no more costly than “false negatives” (erroneous non-enforcement), and that, when relating to conduct or mergers involving dominant firms, “false negatives” are costlier.⁶⁸ But false positives cannot be corrected by the market, whereas false negatives can. Heinz and Beech-Nut were legally barred from combining; had they been permitted to merge and prices increased as

⁶² HOUSE STAFF REPORT, *supra* note 5, at 393.

⁶³ See Paul Bond, *Blockbuster ready to get hostile*, THE HOLLYWOOD REP. (Mar. 17, 2005) (“Blockbuster Inc. might begin purchasing shares of Hollywood Entertainment as early as next week and is prepared for a legal battle with antitrust regulators if they try to stop the hostile takeover, Blockbuster general counsel Edward Stead said Wednesday. . . . Blockbuster also has maintained that worries it might increase prices in areas where it owns all of the movie rental stores are unfounded because stores like Wal-Mart have been selling DVDs and videos so cheap that they have become competition to rentals. Also, subscription DVD-by-mail services like Netflix and video-on-demand and digital video recorder technologies also ought to be considered competition, the company believes, though Stead said the FTC doesn’t see it that way. ‘They seem to be invested in an analysis they did of video rental stores in 1999,’ Stead said. ‘But in our pricing decisions, video rental stores are irrelevant.’”).

⁶⁴ See *F.T.C. v. H.J. Heinz Co.*, 246 F.3d 708, 727 (D.C. Cir. 2001).

⁶⁵ See *id.* at 722.

⁶⁶ See Viola Chen, *The Evolution of the Baby Food Industry 2000-2008*, 6 J. COMPETITION L. & ECON., 423, 428 (2010).

⁶⁷ See *id.* at 441.

⁶⁸ HOUSE STAFF REPORT, *supra* note 5, at 399.

the FTC's lawsuit predicted, a new entrant still could capture market share by offering a lower-priced option.

IV. The Next Steps.

I have shared with you my disagreements on certain recommendations advanced by the Subcommittee staff. I would like to close, though, on a positive note. To that end, please allow me to highlight some of the themes in the report with which I agree.

One proposal entails “enhanc[ing] the public transparency and accountability of the antitrust agencies, by requiring [them] to solicit and respond to public comments for merger reviews, and by requiring [them] to publish written explanations for all enforcement decisions.”⁶⁹ I support transparency, so I support having the FTC publish more written explanations for its enforcement decisions, including those that did not result in the agency's taking action. Particularly with respect to mergers, several of our fellow competition authorities disclose their thinking when they decline to take enforcement action. Along with the UK, the EU and Singapore also publish notably thorough explanations.

The Subcommittee also recommends that Congress consider “requiring the agencies to conduct and make publicly available merger retrospectives on significant transactions consummated over the last three decades.”⁷⁰ As I explained during my Senate confirmation hearing (and in other fora, including the OECD, over the years),⁷¹ I am an ardent advocate of conducting more merger retrospectives and making public the results of those analyses. As the *Heinz/Beech-Nut* example illustrates, retrospectives enable us to check our homework and refine our enforcement approach.

And citing the submissions of FTC alumni, the Subcommittee suggests increasing the budgets of the Federal Trade Commission and the Antitrust Division.⁷² I fully support increasing the antitrust agencies' budgets. Although our funding has nominally increased, it has not kept pace with the cost of living or even the mandatory salary increases for our staff, which means the number of enforcers has declined. At the same time, the size of the economy we are policing has increased.⁷³ We face off in court against companies with much greater resources for hiring lawyers and economic experts.

I appreciate Congress's concern for competition and applaud its efforts to target specific harms felt by constituents, including the high price of prescription drugs. For example, Congress recently passed a law to prevent branded drug manufacturers from abusing safety regulations to

⁶⁹ *Id.* at 403.

⁷⁰ *Id.*

⁷¹ See Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson, Concerning the Proposed Acquisition of Essendant, Inc. by Staples, Inc., FTC File No. 181-0180 (Jan. 28, 2019),

https://www.ftc.gov/system/files/documents/public_statements/1448328/181_0180_staples_essendant_majority_statement_1-28-19.pdf.

⁷² HOUSE STAFF REPORT, *supra* note 5, at 403.

⁷³ See Dissenting Statement of Commissioner Rebecca Kelly Slaughter on the Federal Trade Commission Fiscal Year 2021 Budget Request (Feb. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1566145/p859900budgetslaughterstatement_0.pdf (“more funding is necessary to meet the increasing demands on the FTC to protect American consumers”).

prevent generic competitors from obtaining needed samples of patented drugs to create lower-priced versions. But this is an example of a competition issue that was caused by government interventions: the grant of a limited-time monopoly through the patent, and the statutorily mandated regulatory regime that limits access to the drug.

To be clear, I am not taking issue with our patent regime; I believe that patent rights stimulate innovation, and that progress through innovation creates greater incremental benefits for consumers than do lowering the cost and improving the quality of existing products.⁷⁴ Instead, I use this example to highlight a key issue – interventions by legislators tilt the playing field and disrupt the competitive dynamics in a market. Railroads acceded to the regulations praised in the House Staff Report so they could avoid “ruinous competition.” In 1887 Congress passed the Interstate Commerce Act, which required “reasonable and just” rates without “unjust discrimination,” and created the Interstate Commerce Commission to enforce the Act. But some customers and competitors still complained, so Congress spent the next several decades layering on more and more laws and regulations.

In 1903 Congress passed the Elkins Act, to ban railroad rebates to large industrial customers; in 1906 the Hepburn Act, to strengthen the ICC’s rate-setting and ban vertical integration; in 1910 the Mann-Elkins Act, to empower the ICC to suspend rates during an investigation; in 1920 the Transportation Act, to empower the ICC to set minimum rates to protect financially weaker railroads and to allow railroads to pool traffic if the ICC approved. Some historians trace the decline of railroads in the US to the extensive regulation they faced, which limited their ability to meet the challenge of competition from new forms of transportation. Railroads complained about this imbalance. Congress solved it by regulating more.

The 1935 Motor Carrier Act granted the ICC the authority to regulate the trucking and airline industries. The ICC eventually gained power to regulate everything from barge traffic to natural gas pipelines, which made it a referee on competition among means of transport. When the Southern Railroad developed a new kind of grain car, more than twice as efficient as earlier methods, the ICC would not let it cut rates by 60%, because lower rail rates would hurt the competing barge shippers. Similarly, in 1965, two railroads wanted to lower their rates for shipping steel from Pittsburgh to a Kentucky factory, to match what barges and trucks charged. But the ICC forbade the lower railroad rate as too low.

This is the history that made deregulation a bipartisan cause in the 1970s. Freed from restrictive price and service rules, railroads optimized their networks, pared unproductive routes, and

⁷⁴ See Joseph F. Brodley, *The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress*, 62 N.Y.U. L. REV. 1020, 1026 (1987) (citing Zvi Griliches, *R&D and Productivity: Measurement Issues and Econometric Results*, 237 SCI. 31, 34–35 (1987)); Lester C. Thurow, *A Weakness in Process Technology*, 238 SCI. 1659, 1660–62 (1987); Robert Solow, *Technical Change and the Aggregate Production Function*, 39 REV. ECON. & STAT. 312 (1957); F.M. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 407 (2d ed. 1980); see also, e.g., Edwin Mansfield, *Entry, Gibrat’s Law, Innovation, and the Growth of Firms*, 52 AM. ECON. REV. 1023, 1044 (1962) (in an empirical study, finding “that on the average the successful innovators in these industries grew about twice as rapidly as other comparable firms during the relevant period”).

reduced labor costs. The increasing efficiency led to lower railroad rates nationally. Truckers lowered their rates in states that did not maintain rate regulation.

Yes, I am happy to cite chapter and verse on the failures of regulatory regimes.⁷⁵ That said, though, I do not oppose all regulation. Markets function inefficiently when consumers face significant information asymmetries, including incomplete information about product features and quality. In the face of documented market failures, government intervention may help protect consumers. For example, I have repeatedly advocated for a comprehensive federal privacy law, as consumers' data is collected, maintained, shared, and monetized in ways that they cannot see and cannot avoid.⁷⁶ Some of these practices cause harm, and as I noted above, a privacy law can provide needed transparency so that consumers can begin to make informed choices. Legislation that limits the types of data that can be collected, shared, and monetized also may provide breathing room for new companies to innovate and enter. Thus, privacy legislation could have the benefit of injecting competition into the tech space.

The U.S. is not alone in questioning whether competition laws need to be overhauled. Some of my counterparts at other competition authorities, including Lord Andrew Tyrie when he was with the CMA, have expressed concern that voters and consumers are unhappy with the status quo.⁷⁷ They speak of a feeling, perhaps especially among young people, that capitalism is failing them.

It is important to contrast capitalism with crony capitalism. Capitalism is a system in which the production of goods and services is based on supply and demand in the market rather than central planning, and government intervenes only where necessary to address market failures. In contrast, crony capitalism is a system in which lobbyists engage in rent-seeking and legislatures create laws and regulators create rules that pick winners and losers. I submit to you that it is *that* type of system that engenders of feeling of hopelessness among citizens, who see no way to better their lives if they are not favored by the rule-makers. And it is that type of system we need to reject, to restore the faith of the citizenry in our antitrust regime.

In the end, I come back to Chesterton's Fence. Those who wish to tear down what we have now need to demonstrate that they understand why we have it. The U.S. – and many other jurisdictions – already have tried competition law that attempts to serve multiple constituencies through enforcement based on the form of a conduct or merger. We built a consensus for enforcement driven by effects-based economic analysis under the consumer welfare standard after seeing the failures of many alternatives. An antitrust regime premised on objective economic analysis designed to maximize consumer welfare *is* the best way to benefit consumers and earn their trust. The right approach is not to overhaul antitrust, but to clear away the obstacles to free market competition that government has created. These obstacles include

⁷⁵ See *supra* note 36 and accompanying text.

⁷⁶ See *supra* note 57 and accompanying text.

⁷⁷ See, e.g., Letter from Andrew Tyrie, Chairman, Competition & Mkts. Auth., to Greg Clark, Sec'y of State for Bus., Energy & Indus. Strategy, Dep't. for Bus., Energy & Indus. Strategy 4 (Feb. 25, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/781151/Letter_from_Andrew_Tyrie_to_the_Secretary_of_State_BEIS.pdf (“there are increasing signs that the public doubt whether markets work for their benefit.”).

protections for incumbents, restrictions on market entry, and exemptions from liability.⁷⁸ Once government is no longer putting its thumb on the scales, citizens will enjoy the freedom to compete on the merits as businesses, and to enjoy the fruits of free market competition as consumers.

⁷⁸ For example, these obstacles manifest in the health care provider sector as restrictions on the scope of practice, interstate practice, and telemedicine; certificate of need laws; and certificates of public advantage that immunize against federal antitrust law. *See generally* Christine S. Wilson & Pallavi Guniganti, *Deregulating Health Care in a Pandemic – and Beyond*, 34 ANTITRUST 14 (2020).