PREPARED REMARKS

Reading certain editorial pages and listening to the way some American politicians speak, one could be forgiven for forgetting the length and breadth of

The operative word here is "when", as this line of argument focuses heavily on trends that followed the shift in antitrust law and, from that, assumes causation. *Post hoc ergo propter hoc*—Latin for "after this, therefore because of this". The logic is often a good starting point for social science research; but, as fans of Aaron Sorkin's *The West Wing* might recall, it is also, famously, a fallacy. Of course, we must study where we have been to understand accurately where we are now—and how to reach our desired destination if we are not already there. But we must also recognize the difference between correlation and causation.

Today, facing rising mergers levels and evidence of industrial consolidation, I want to pause and consider earlier instances of widespread consolidation in the American economy. Ecclesiastes teaches us that "there is nothing new under the sun",[4] and the history of corporate America may tell us a lot more about recent trends than the popular consumer welfare debate might indicate. Antitrust policy is just part of the story, and we should not ignore important inputs into corporate decision-making, like changes in firm management practices and corporate governance and automation and globalization.

These days, dramatic proposals to reshape American capitalism abound, and the targeting of antitrust's consumer welfare standard is but one. But abandoning this standard would be an enormous change in its own right. It would not only imperil consumer welfare, but also threaten to dramatically restructure our capital and investment markets, in ways largely unexplored as of yet, and to undermine

[4] HOLY BIBLE, Ecclesiastes 1:9 (New International Version).

the rule of law, here and abroad. Before we go down that road, we owe it to ourselves to consider a little more of our shared history.

For those not tracking the debate, let me start with the claim that increased industry-level concentration is a result of lessened antitrust enforcement; and accept for the sake of argument that industry-level concentration has, in fact, increased. I want to briefly describe the asserted connection to antitrust, and to point out some assumptions that underlie it.

Observers of increasing concentration levels often rely upon studies identifying trends at the 2- or 4-digit NAICs code levels, or other Census data, which means they are discussing concentration in industries like “manufacturing”, “retail trade”, “finance and insurance” or “health care.”[5]

Many of the original studies come from experts outside of the antitrust arena, such as labor and other macro-level economists, who acknowledge the limitations of

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The drawback for people in my line of work is that, in relying on industry-level trends, we do not focus on the much narrower markets that constitute the antitrust-relevant units of analysis. Antitrust looks at markets in which the absence of competition permits firms to raise prices or restrict output for a sustained period, or otherwise to degrade the welfare of consumers. These markets are necessarily narrower than industries, because they are defined in terms of the products or services that consumers perceive to be substitutes. Within “retail trade”,

of the [U.S. Council of Economic Advisors], that the evidence on concentration cited by the CEA is 'not informative regarding the state of competition.'"[9] Similarly, the FTC recently held a panel on industry-level concentration and competition, and all the panelists—leading economists with a range of viewpoints on the proper course antitrust enforcement should take—agreed that macro-level concentration trends do not speak to micro-level competition in antitrust-relevant markets.[10]

Concentration may just as well re7C [(the panelists—l7(7096 e ƀBDC (mar3 Tc e)5.3 (vavc

regulation—in particular raising the cost of cartel behavior—may have helped to push firms to choose combination.[16]

Because so much of the antitrust debate today focuses on the legal changes around the 1980s, we should look carefully at the merger waves occurring just before, during, and just after that decade. Doing so underscores that multiple factors in addition to antitrust policy helped to drive corporate changes and structure during this time.

The merger wave that took place from the 1950s to the 1970s followed the worldwide economic depression of the 1930s and World War II, and—it must be noted for present purposes—coincided with robust middle class economic growth. This consolidation, the largest merger wave to date, followed the adoption of a *stricter* antitrust regime. Scholars agree the passage of the Celler-Kefauver Amendments to the Clayton Act in 1950 contributed meaningfully to the shape of mergers and acquisitions during this time: enforcers and courts disfavored both horizontal and vertical mergers, so firms turned to other avenues for growth.[17]

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[16] *See, e.g.*, George Bittlingmayer, *Did Antitrust Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985); Gregoriou & Renneboog, *supra* note 12, at 1 ("The earlier waves of the 1890s and 1920s are believed to have been driven by antitrust legislation[.]"); Capron, *supra* note 14.

[17] Gerald F. Davis, Kristina A. Diekmann & Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of the Organizational Form*, 59 AM. SOC. REV. 547, 547 (1994) ("Following the enactment of the Celler-Kefauver Act in 1950, horizontal and vertical acquisitions (buying competitors, buyers, or suppliers) fell out of regulatory favor, and firms seeking to grow through acquisition were forced to diversify into other industries."); Capron, *supra* note 14, at 3 ("Anti-trust legislation strongly influenced the nature of mergers to the extent that the Celler-Kaufer [*sic*] amendment systematically condemned all horizontal mergers independently of its effects upon the competitive intensity (the Anti-Monopoly Act went so far as to condemn certain related diversification mergers)."); Martynova & Renneboog, *supra* note 12, at 6 ("The beginning of this wave in the US coincided with a tightening of the antitrust regime in 1950."); Gregoriou & Renneboog, *supra* note 12, at 2 ("Diversifications during the 1960s can be attributed to such assorted causes as stricter antitrust regulations, less well developed external capital markets, and labor inefficiencies, as well as a host of economic, social, and technological changes[.]").

America got corporate conglomerates. But the economic premise for unifying seemingly disparate business operations was weak, and proved unsuccessful in practice.

Developments in corporate law and strategy followed, and contributed to changing competitive landscapes, including de-consolidation. The costs to

Globalization also increases the stakes for the conversation we are now having about the consumer welfare standard. The international antitrust community has reached a consensus today that the goal of the antitrust laws is to protect the competitive process, not individual competitors. This fundamental premise is the cornerstone of the consumer welfare standard. Abandoning it cannot, therefore, be accomplished without international repercussions.

Are we again experiencing a real uptick in mergers? After the Internet bubble burst in 2000 and 9/11, merger activity picked up, only to be ended by the Great Recession. And that was ten years ago. Hart-Scott-Rodino filings have since rebounded, and the Wall Street Journal reported this summer that the M&A market is heading for a record.[25] Antitrust law in the early 21st Century hasn't shift dramatically, but M&A has.

The history of mergers and acquisitions in America tells us that a merger wave is not likely caused by a change in antitrust law alone. It also tells us that the public often views change with suspicion, and that changes in antitrust policy often bear results not anticipated (or even desired) by antitrust legislation or enforcers.

In the debate regarding antitrust law's consumer welfare standard, we should be mindful of avoiding the *post hoc ergo propter hoc* fallacy. We have tremendous data and scholarship to help illuminate our path forward, and we should continue to bring that learning to bear and to make only those policy changes that rigorous analysis warrants.

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[25] *M&A Market Headed for a Record, Powered by Tech Disruption, AT&T Ruling*, T