



UNITED STATES OF AMERICA
Federal Trade Commission

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

Prepared Remarks of Commissioner Noah Joshua Phillips

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

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

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

Robert Bork published The Antitrust Paradox at a time of economic malaise, widespread concern over faltering U.S. competitiveness and internal doctrinal

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

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

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

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

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

⁴ Noah Joshua Phillips, Commissioner, Federal Trade Commission, Prepared Remarks at the U.S. Chamber of Commerce: Post Hoc, Ergo Propter Hoc (Oct. 17, 2018),

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

This is a real debate, with real consequences. We've gotten it wrong in the

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

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

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

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

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

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

¹¹ *United*

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

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

Second, the consumer welfare standard is not merely the concoction of a few

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

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

Third, trading off consumer welfare against competing interests necessarily

