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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,

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[4] THOMAS K. MCCRAW, PROPHETS OF REGULATION

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]

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[6] For this section, see RICHARD D. STONE, THE INTERSTATE C

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

supposedly leveled the playing field.[13] This step, too, was insufficient, so in 1906 Congress

criminal offense for a railroad to carry any product – other than timber, whose lobbyists got a

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

Times: “The heavy hand of regulation, wkn

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.

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

[50] *See, e.g.*, D. Daniel Sokol, *Explaining the* [illegible]

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

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

[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

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