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Politics, Markets, and Populism: Antitrust at the Crossroads

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Introduction

Thank you, Professor Nachlis, for the introduction. And thanks to the Rockefeller Center for inviting me. Returning to Dartmouth to lecture is a real honor, and I am humbled by it. I majored in Government, and spent countless hours in and around Rocky, including listening to lectures like this. One in particular seems relevant tonight. In 1998, then-Assistant Attorney General for the Antitrust Division Joel Klein came to Rocky to speak about the Department of Justice's monopolization case against Microsoft. More than twenty years have passed, but that case continues to loom large: the popular attention it received; the decisions rendered by the courts in D.C.; and, of course, that the target was a large technology company. After Klein's speech, my friend Won Joon Choe asked him what the problem was with Microsoft giving away Internet Explorer for free with the operating system, one of key facts in the DOJ's case. Klein responded: "Free is a curious price."

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The Early Years

How did we get antitrust law in America? Following the Civil War, the United States experienced rapid industrialization, economic growth, and technological change. In particular, manufacturing and agriculture production increased, and rail and water transportation became faster and less expensive. The expanding financial sector offered businesses greater access to capital, while accelerated rates of urbanization and immigration supplied a larger labor pool. This economic and societal ferment led U.S. businesses to grow and compete across state lines, while a protectionist trade policy insulated them against competition from abroad.[3] Business owners realized the higher profits to be had if they could acquire or otherwise join forces with their rivals, and the trusts were born: sugar, salt, steel, whiskey—and, of course, the trust established by the grandfather of the namesake of the Rockefeller Center, John Davison Rockefeller's Standard Oil Company. Concerns from other businesses, press coverage, and political attention soon turned into legal challenges, mostly challenges to the form of organization under state corporate law.[4]

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[3] 1 JULIAN O. VON KALINOWSKI ET AL., ANTITRUST LAWS AND TRADE REGULATION § 9.02 (2d ed. 2021); 1 EARL W.

Congress passed the Sherman Act against this backdrop in 1890, barring contracts, combinations, and conspiracies in restraint of trade, and actual and attempted monopolization,[5] albeit not monopoly itself. (Monopoly has never been illegal in America.[6]) The legislative history makes clear that the Sherman Act concerns competition and that its proponents—including Senator John Sherman of Ohio—were concerned about the economic impact that impediments to competition posed, not simply the bigness of companies. They understood the inverse relationship between output and prices; and that trusts and cartels extinguished competition, gaining the ability to limit output and raise prices to American consumers. Senator Pugh of Alabama spoke in support of Sherman's bill, condemning "trusts and combinations to limit the production of articles of consumption entering into interstate and foreign commerce for the purpose of destroying competition in production and thereby increasing prices to consumers".[7]

Court enjoined Standard Oil, then incorporated in Ohio, from continuing to operate after determining "that the making and operation of this trust of 1882 were beyond the corporate powers of the Standard Oil Company of Ohio". United States v. Standard Oil Co. of New Jersey, 173 F. 177, 181 (C.C.E.D. Mo. 1909), aff'd, 221 U.S. 1 (1911). The trustees subsequently reformed the Standard Oil trust in New Jersey, which had more permissive corporate laws. Id. But state law proved to be only a partial solution, effective against stock-transfer trusts yet largely unable to reach asset transfers or holding companies. Hovenkamp, supra, at 80.

[5] Sherman Act, ch. 647, §§ 1-2, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-2).

[6] See, e.g., Verizon Commc'ns Inc. v. L. Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) ("The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system."); United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966) ("The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.").

[7] 21 Cong. Rec. 2558 (1890). Likewise, Representative John Herd of Missouri noted that "the very object of these giant schemes of combined capital is not to increase the volume of supply, and thus

These legislators also understood what today we call “efficiencies”, benefits to businesses and consumers that can come from growth and mergers. Senator Sherman proclaimed that corporations, which he called “the most useful agencies of modern civilization”, “ought to be encouraged and protected as tending to cheapen the cost of production.”[8] He recognized that “[w]hen corporations unite merely to extend their business, . . . they are proper and lawful” and have the potential to “cheapen transportation, lessen the cost of production, and bring within the reach of millions comforts and luxuries formerly enjoyed by thousands.”[9] His bill, he

While the first few years of the Sherman Act disappointed,[11] the government scored a series of victories at the turn of the last century in which the Supreme Court adopted a more aggressive interpretation of the statute.[12] In 1906, the DOJ sued Standard Oil, culminating in the Supreme Court's landmark 1911 decision to affirm lifi 7A/bd the lower court's order con[illegible] and dismantled the trust that, above all others, inspired the law, it also fueled support for additional legislation. The Supreme Court rejected the DOJ's position that the Sherman AndemnA7 (e)1 (d "e)1 (v)3 (e)1 (ry)3 (c)5 (o)1 (n)2 (ce)i.1 (v)3 (7A/b)722l l contract or could be made concenig trade or commece…".

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[11] 2 EARL W. KINTNER, LEGISL42

This outcome stoked concern that federal judges would have too much discretion to decided what conduct was illegal, and that they would move too slowly.[16] In 1914, President Woodrow Wilson called for legislation to bring greater clarity and certainty to antitrust.[17] He also endorsed the creation of a trade commission empowered to review business practices and advise companies on thei5 (w)f

Since the passage of the Sherman, FTC, and Clayton Acts, the substance of antitrust law has adapted to changes in our economy and improvements in our understanding of the competitive process gained from the study of economics and business. [22] Insights from the "Chicago" and "Harvard School[s]" in the 1960s and -70s, for example, brought greater sophistication and rigor to the antitrust enterprise.[23] They moved beyond crude inferences based on market structure and concentration to a more detailed examination of how particular conduct could harm competition and consumers in specific markets. Judges could now better identify and condemn anticompetitive behavior without also punishing business practices that fostered competition and benefited consumers. They realized that antitrust law had gone too far in condemning certain conduct that could be procompetitive and therefore deserved a more searching review of its harms and benefits.[24] As a result, the law changed for the better, becoming more coherent and less likely to undermine that which it was always meant to protect: competition.

The Present Populist Movement

Today Americans enjoy the fruits of half a century of exceptionally strong economic growth and innovation. Many factors, most of which lie outside the topic of

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[22] See, e.g., HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 1-39 (2008).

[23] See, e.g., William E. Kovacic, The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix , 2007 COLUM. BUS. L. REV. 1 (2007).

[24] See, e.g., Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (overruling per se treatment of non-price vertical restraints and holding that they should be evaluated under the rule-of-reason standard); (overruling per se treatment of resale price maintenance agreements and holding that they should be evaluated under the rule-of-

the lecture and above my paygrade, fueled this.[25] But also deserving of credit: sensible, competition-oriented antitrust enforcement. In the main, the American capitalist economic model has been a success. The United States, with less than five percent of the world's population, prides itself on having the world's largest economy.[26] That is good for American consumers, workers, businesses, and investors. That makes protecting the competitive processes that have fostered the American economy, industries, (v)3 (e)1 (-1 (ies1 (ec)-1 (on)1 (om)-)5 (t)-(u)1 (-(u)1 (-(u 0 Tdt)-1 (rt

requirements".[27] That is an area on which the Commission has done a lot of good in the past, and I hope we continue that tradition. But too much of the EO is inconsistent with competition. It seeks to i1 (it)-1 (io(s)-)Tj..: 12Tw 0.28 0 [(B7o)1.1 (pe1 (t)-17.6,p B7ope1 (t)15 (c)-2 8 01 (t)1e[(in)1 (c)-1u (o)r (c)-2 8 02T2 0e 1 (c)-15 (m)-1 (p)-1 (et)-1 (it)-1e1 (t),ha

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will lead to greater privacy for consumers. But the profit motive here—that is, most digital platforms generate revenue by monetizing user data to sell ads—hardly dictates that outcome. And in more cases, increased privacy could limit the ability of firms to compete and leave consumers with a worse product or service.[31]

Or take content moderation. Republicans often argue that, if there were better competition, conservatives would be subject to less censorship online.[32] How to moderate content at scale is a terrifically difficult problem, with most regulatory responses fraught with First Amendment peril. But is it a competition problem? People have a lot of issues with Twitter's moderation calls, but how exactly do they stem from monopoly power? And why does anyone think that, were Facebook to sell Instagram and WhatsApp, conservatives would get more favorable treatment? The fact is that we have little social consensus around what level of moderation is optimal. So why anyone assumes that a market functioning without whatever impediment they perceive would yield their desired moderation outcome is not clear to me.

Third, the sheer reach of the claims of antitrust reformers of what the law could or would solve suggests that their concerns are not about competition. Would-

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[31] Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Should We Block This Merger? Some Thoughts on Converging Antitrust and Privacy 11-16 (Jan. 30, 2020), https://www.ftc.gov/system/files/documents/public_statements/1565039/phillips_-_stanford_speech_10-30-20.pdf; Noah Joshua Phillips, Commissioner, Fed. Trade Comm'n, Remarks at the Mentor Group Paris Forum 11-17 (Sept. 13, 2019), https://www.ftc.gov/system/files/documents/public_statements/1546405/phillips_-_paris_forum_9-13-2019.pdf.

[32] Steve Kovach, Democrats and Republicans disagree on how to curb Big Tech's power — here's where they differ, CNBC (Oct. 7, 2020), https://www.cnbc.com/2020/10/07/democrats-and-republicans-disagree-on-how-to-regulate-big-tech.html.

be reformers have been quick to blame antitrust enforcement (or lack thereof) for everything from supply chain issues for medical devices during the height of the COVID-19 crisis[33] to labor gaining too little from economic growth[34] to systemic racism[35] and even the decline of American democracy.[36] The point is not that privacy, content moderation, and all these issues do not warrant conversation. They surely do. But it is not at all clear to me that they are issues that stem from competition problems; and so, among other things, it seems counter-intuitive that competition solution1 (t)4nter citio a

Fourth, some pending legislative proposals bar competition. That is their purpose and effect. They would prevent certain companies from expanding into new businesses, that is from introducing new competition.[38]

Finally, a particular cohort of antitrust reformers seek to defend cartels, "the supreme evil of antitrust".[39] Preoccupied with supposed power of big companies, they bemoan government enforcement against cartels of small producers[40] and endorse enthusiastically attempts to enable cartel behavior by what they view as more sympathetic companies.[41]

Whatever these proposals are about, it is not competition.

So why is so much debate focused upon antitrust? One reason, I submit, is

Another reason, I think, is that the vernacular of antitrust resonates with the public as a means of addressing problems associated with corporations, and does so in a way much more comfortable to American ears than, say, "industrial planning"—or even "regulation".

It seems like once a week when some politician, expressing displeasure about one tech giant or the other doing one thing or another, professes exasperation and says "break them up!" What, precisely, is that supposed to solve, and how? Breaking up companies is part of antitrust enforcement, in particular with respect to mergers. But break ups are billed popularly as a type of ultimate punishment for companies that have done wrong; a corporate death penalty of sorts. But antitrust is a not a morality play, and divestitures are not about punishing the wicked or bringing low the mighty. They are, rather, an intervention to remedy specific competition harms and leave consumers better off.

There are risks to using antitrust as a cudgel, and pouring too much into the vessel of antitrust. Forcing antitrust enforcers to pick and choose between non-competition goals will politicize antitrust enforcement, render it vulnerable to political influence. This has happened before. The Watergate tapes famously exposed President Nixon's interference on behalf of a Republican National Committee donor in a Department of Justice antitrust case.[42] That scandal led Congress to require that a federal judge approve antitrust settlements by the

[42] E.W. Kenworthy, The Extraordinary I.T.T. Affair , N.Y. TIMES (Dec. 16, 1973), https://www.nytimes.com/1973/12/16/archives/whats-good-for-a-corporate-giant-w--good

Department. The Nixon administration also reportedly threatened television networks with antitrust suits, to extract positive press coverage.[43]

Populist antitrust is also likely to be less effective, which ultimately will hurt consumers. Without a focus on competition, we will ignore harms to them. At the FTC, I have considered cases where lessening competition might protect the environment, or keep kids from vaping.[44] Those are worthy goals, but they are not what antitrust law protects. And looking past competition into other matters would harm consumers.

The reflexive resort to competition themes will lead us, and other policy-makers, to get basic facts wrong—leading to formulating bad policy. Recently the Chair of my agency responded to a White House concern about rising gas prices with a claim that gas station mergers were the cause because some involved purchases of family-run businesses or "power imbalances" between large chains and little guys.[45] There are a number of drivers for rising prices at the pump, but nothing I am aware of suggests that mergers are the culprit. At a time when gas

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[43] Walter Pincus & Geroge Lardner Jr., Nixon Hoped Antitrust Threat Would Sway Network Coverage, WASH. POST (Dec. 1, 1997), https://www.washingtonpost.com/wp-srv/politics/special/nixon/stories/nixon120197.htm.

[44] FTC Press Release, FTC Files Suit to Block Joint Venture between Coal Mining Compa nies Peabody Energy Corporation and Arch Coal (Feb. 26, 2020), https://www.ftc.gov/news-events/press-releases/2020/02/ftc-files-suit-block-joint-venture-between-coal-mining-companies; FTC Press Release, FTC Sues to Unwind Altria's $12.8 Billion Investment in Competitor JUUL (Apr. 1, 2020), https://www.ftc.gov/news-events/press-releases/2020/04/ftc-sues-unwind-altrias-128-billion-investment-competitor-juul.

[45] Letter from Lina Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, Nat'l Econ. Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf.

prices are at a seven year high,[46] Americans cannot afford for policy to be fashioned on such thin gruel.

A few months ago, a friend of mine—a pretty conservative guy—asked me a question over drinks: why shouldn't we break up the big tech companies? Being Jewish, I answered the question with a question: what would that solve? He replied: "Oh, nothing. I just want to stick it to 'em." There are important competition questions worth asking, including about the digital economy. But too much of the discussion boils down to that point. We don't like them, or something they are doing (or merely exemplify). And antitrust is the tool to use to punish them. But antitrust is not, and has never been a general warrant to punish companies that some—or even many—don't like. No more so than the myriad other legal regimes we have. Antitrust is about competition, and it should stay that way.

[46] Sarah O'Brien, Gas prices are at a seven-year high and expected to keep rising. How to save at the pump, CNBC (Oct. 19, 2021), https://www.cnbc.com/2021/10/19/gas-prices-are-at-seven-year-high-how-to-save-at-the-pump.html.