The Clayton and FTC Acts: 100 Years of Looking Ahead
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address to Congress to urge legislation "to prevent private monopoly more effectually than it has yet been prevented."[5] The following month, Wilson delivered a special address on trusts and monopolies to a joint session of Congress, in which he called for two things: (1) a "more explicit legislative definition of the policy and meaning of the existing antitrust law," and (2) an "interstate trade commission."[6] Congress answered the President's first call by passing the Clayton Act and his second by passing the Federal Trade Commission Act – significantly restructuring the American approach to antitrust and leading the world in adopting a more modern approach to it.

Forward-looking Antitrust Enforcement: Incipiency as a Motivating Principle

One of the chief shortcomings of the Sherman Act was that it was effectively only backward-looking, particularly in the merger context. As Senator Henry Hollis of New Hampshire noted in 1914, the Sherman Act "does not become effective until a monopoly is full

Congress's choice of the word "may" signified a recognition of the imprecision of the task at hand. As the Supreme Court held in *Brown Shoe*, "Congress used the words '*may be*' … to indicate that its concern was with probabilities, not certainties."[10] Congress could have simply prohibited price discrimination, exclusive dealing, and mergers altogether and in all circumstances. But, as Senator Thompson explained at the time of its passage, the Clayton Act's purpose was to protect the public "from extortion practiced by the trust, but at the same time not to take away from it any advantages of cheapness or better service which honest, intelligent cooperation may bring."[11]

At the opposite extreme, Congress could have required proof that a particular restraint would harm competition before it could be declared unlawful – or, at the very least, established a more stringent standard than "may." But Congress recognized 100 years ago what is still true today – namely that determining the effect of an agreement or business practice is an inherently predictive exercise. In order for enforcement to be both forward-looking and meaningful, we must be willing to accept the possibility of the occasional false positive.

The Supreme Court has time and again recognized the centrality of incipiency to the Clayton Act.[12] In *United States v. Philadelphia National Bank*, Justice Brennan wrote, "the amended section 7 was intended to arrest anticompetitive tendencies in their 'incipiency.'"[13] And in *United States v. E. I. du Pont de Nemours & Co.*, the Supreme Court wrote that Section 7 of the Clayton Act was "designed to arrest in its incipiency not only the substantial lessening of

Insisting to the contrary that econometric modeling must

hospital space over the last seven years – and is a case study in the value of having the Commission study and then bring to bear its expertise on thorny competition issues.

Forward-looking antitrust enforcement is as important and necessary today as it was in 1914. Over the last century, enforcement under the Clayton Act has shifted away from structural