

UNITED STATES OF AMERICA  
**Federal Trade Commission**  
WASHINGTON, D.C. 20580

Office of Commissioner  
Rebecca Kelly Slaughter

**STORMING THE CONCENTRATION CASTLE:  
ANTITRUST LESSONS FROM THE PRINCESS BRIDE**  
*Remarks of Commissioner Rebecca Kelly Slaughter  
As Prepared for Delivery*

Greg Lastowka Memorial Lecture  
Rutgers Law School  
March 31, 2022

**Introduction**

Thank you to Professor Carrier and Rutgers Law School for hosting us and inviting me to deliver the Greg Lastowka Memorial Lecture. Professor Lastowka was a beloved member of the Rutgers faculty and all-around wonderful human being who was taken from our world far too soon in 2015. I did not have the privilege of knowing him personally, but I do know him as an accomplished scholar in cutting edge areas of the law. The names of two of his best-known articles, *The Laws of the Virtual Worlds*, written in 2004, and *Virtual Justice: The New Laws of Online Worlds*, written in 2010, say it all. He researched and explored novel issues surrounding virtual property and avatar rights and the potential legal challenges that could arise in online spaces; al

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to go deep into it. And for both of you in the audience who don't (yet) know the story, it is the

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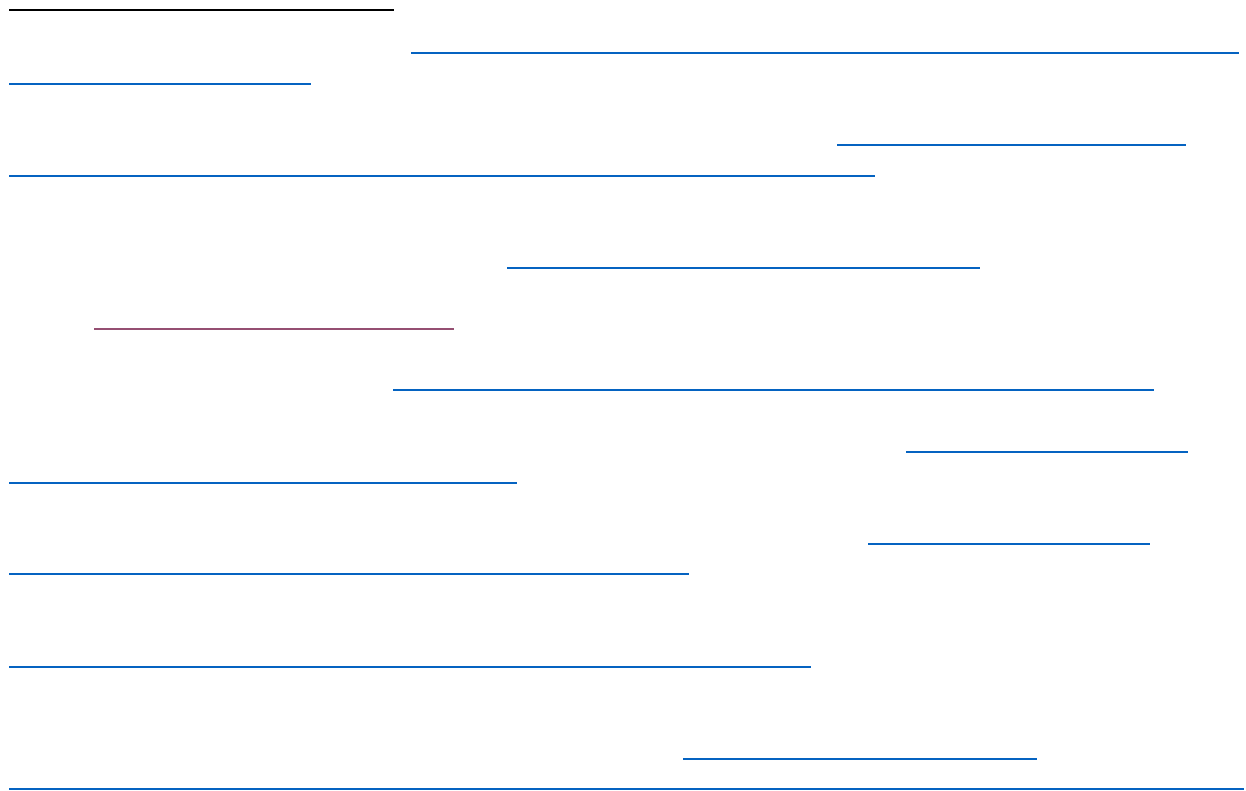
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A large body of evidence shows that concentration levels within industry sectors is high and has continued to rise over time. We can fairly debate individual studies and how they inform antitrust policy, but the weight of this empirical evidence cannot be ignored. One study of approximately 900 industry sectors concluded that market concentration increased by 75% between 1997 and 2012.<sup>7</sup> And within those sectors, the market share of the top four firms increased by over 25%.<sup>8</sup>

Far from leading to increased efficiency, as some commenters claim, these high rates of market concentration have led to increased market power among fewer firms in myriad industries. Indeed, this enhanced market power has been characterized by significant rises in markups and profit margins but notable decreases in output and productivity growth.<sup>9</sup>

Digital markets are a key concern—and I'll address them further in my remarks this afternoon—but the scourge of market power reaches far beyond Big Tech. We have all felt the impact of market power in our daily lives, from cellphones and broadband to healthcare and pharmaceuticals to the food in our refrigerators, and beyond.<sup>10</sup>

There is no doubt that high market concentration and the unchallenged market power of dominant companies in our economy inflict serious harms on competition, consumer choice, product quality, innovation, and workers. These distortions heighten exclusionary barriers that small and nascent businesses face, as dominant firms have constructed moats around the suppliers and customers these rivals need to grow.<sup>11</sup> Because they are insulated from the threat of



Within supply chains, incumbents exploit their positions as gatekeepers to dictate commercial terms and to extract concessions to which their business partners would not otherwise agree under competitive market conditions.<sup>13</sup> And, in labor markets, these forces deprive workers of the competitive process for their employment, stagnate wages, and inhibit their mobility, for example, through the proliferation of non-compete clauses in employment contracts, and anti-poaching provisions in franchise agreements.<sup>14</sup>

So, bringing us back to the Princess Bride, we need to storm the castle. And we don't have a lot of time for dilly-dallying.

### **The Liabilities:**

In hatching the plan to rescue Princess Buttercup, the first thing the Man in Black does is ask for an accounting of liabilities. Inigo reports that they face a castle that has but one gate, guarded by 60 men, while they are a team of only three (one of whom is just recently mostly dead, though a quick healer).

That analogy resonates. Competition authorities—including the FTC, the DOJ, and our state counterparts—are vastly outmatched by the parties we investigate and against whom we litigate. As I mentioned, our staffing and funding levels have remained relatively flat while our workload (as measured by the number of merger filings and levels of concentration in the economy) has grown dramatically.

And on top of that, we are grossly outnumbered on each specific case we bring. It is not uncommon for there to be a dozen or more attorneys representing the parties we investigate for every one FTC-er. Our entire annual budget in 2021, for all of our operations—including all of our consumer protection work, as well as competition—was \$351M. That is an unfathomable amount of money to me. But I did the math, and that is approximately how much profit Facebook, a company we are currently suing for antitrust violations, makes every single day and a half.

But the David-versus-Goliath feel of our work is not our only liability. The courts have substantially tied our hands as well. Right now, there is a challenge before the Supreme Court to our authority to litigate cases using the administrative process Congress designed for the agency. And over the last several decades, antitrust enforcers have been hamstrung by court decision

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Germán Gutiérrez & Thomas Philippon, *Investment-Less Growth: An Empirical Investigation*, Brookings Papers on Economic Activity (2017), <https://www.brookings.edu/wp-content/uploads/2018/02/gutierreztextfal7bpea.pdf>.

<sup>13</sup> Staff of Subcomm. on Antitrust, Com. and Admin. L. of the H. Comm. on the Judiciary, *Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations* 39–40 (2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf).

<sup>14</sup> Remarks of Commissioner Rebecca Kelly Slaughter, New Decade, New Resolve to Protect and Promote Competitive Markets for Workers, Fed. Trade Comm'n (Jan. 9, 2020), [https://www.ftc.gov/system/files/documents/public\\_statements/1561475/slaughter\\_-\\_noncompete\\_clauses\\_workshop\\_remarks\\_1-9-20.pdf](https://www.ftc.gov/system/files/documents/public_statements/1561475/slaughter_-_noncompete_clauses_workshop_remarks_1-9-20.pdf); José Azar, Ioana Marinescu & Marshall I. Steinbaum, *Labor Market Concentration* (2019), [https://www.nber.org/system/files/working\\_papers/w24147/w24147.pdf](https://www.nber.org/system/files/working_papers/w24147/w24147.pdf); Arindrajit Dube & Ethan Kaplan, *Does Outsourcing Reduce Wages in the Low-Wage Service Occupations? Evidence from Janitors and Guards*, 63 *Indus. & Lab. Rels. Rev.* 287 (2010).





So back to the Princess Bride: Daunted by the limitations of their personal skills, however impressive, the Man in Black wishes for a wheelbarrow and a cloak of flames to help plan their castle assault. And, lo-and-behold, they have access to both; they just hadn't been thinking of them as assets.

Similarly, I think we can scrutinize our own toolbox and identify assets available to us that have gone overlooked. This has very much been the approach of the Biden Administration. Last year, President Biden called on all Federal agencies to take a whole of government approach to addressing the current lack of competition and the harms that Americans face as a result.<sup>24</sup> It is important to marshal all facets of government in tackling these problems because competition is implicated by policies across the government, not just in the competition agencies. For example, the FCC recently initiated a rulemaking that would affirmatively open up competition for broadband in apartment buildings.<sup>25</sup>

The FTC, given its explicit remit to address unfair methods of competition, has a particular role to play in the assault on monopoly, and we have some specific tools in our own toolbox that we can dust off. Some of these include (1) our authority under Section 5 of the FTC Act to block unfair methods of competition that may not fall squarely within other antitrust statutes; (2) our authority to pass rules under Section 5 to prohibit unfair methods of competition; (3) a cross-agency approach to competition and consumer protection questions; (4) underutilized language in Section 7 of the Clayton Act to block proposed acquisitions that would tend to create a monopoly; and (5) merger guidelines that can be revised to better reflect market realities and improve agency approach. I will touch on each of the first three briefly, but I think they have been well covered in other fora, so I will really spend the meat of my time on Section 7 before turning briefly to the merger guidelines to conclude.

Section 5 of the FTC Act prohibits unfair methods of competition; this has long been understood to encompass all mergers and conduct that would independently violate the Clayton and Sherman Acts, but it also goes beyond those statutes. Last summer, the FTC voted to rescind its prior Section 5 statement that, in the opinion of the majority of the Commission (including

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language may proscribe different mergers than those prohibited by “substantially lessen competition,” and then talk about what sort of cases I believe that text covers.

While there is little recent caselaw on whether a merger violates the “tend to create monopoly”

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inefficiency and before consummation.”<sup>38</sup>

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their incipency mergers that threatened to enhance the market power of a few firms. For example, eight yerf.g89.4004T9-20ight8-6 (erf.r ( t f)5 (xa)4 endm (e)4 t, ght)-3h (e)4 dist( )-f.ric fr

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This kind of strategy *tends to create monopolies* in the remaining market, and we should be able to prevent them.

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I'll conclude this lengthy tale by coming back to the Princess Bride. Though the escapade is not without (substantial) setbacks and surprises, the Man in Black, Inigo, Fezzik, and Princess Buttercup do manage against all odds to best Prince Humperdink, kill Count Rugen, and escape. To get to that happy ending, they need to stay persistent, think creatively, and work with relentless determination.

Over the nearly four years I have been a commissioner at the Federal Trade Commission, I have been working to do just that—and I think it's a perfect place for such an endeavor. I have enormous gratitude for the hard work that our dedicated and talented staff have done and all that they have accomplished. And I also appreciate what I have heard over and over from them and from my predecessors: the FTC is special because it is an institution that is committed to self-reflection and that has a strong willingness to adapt to changing market realities in order to tackle tough problems. In fact, these concepts were at the very heart of the creation of the FTC. Congress was unhappy with the status quo in 1914. Antitrust law and the Department of Justice were not sufficiently tackling the market power problems of the day. And as a result, Congress established the FTC to further protect consumers and promote competition in the face of anticompetitive, deceptive and unfair businesses practices.

We have a mighty task ahead. And we may be outmatched. But notwithstanding the challenge, the battle is worth fighting, with every asset at our disposal.

Thank you for your time today. And have a wonderful rest of your afternoon.