STATEMENT

OF

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"DOES AMERICA HAVE A MONOPOLY PROBLEM? EXAMINING CONCENTRATION AND COMPETITION IN THE US ECONOMY"

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INTRODUCTION

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. My name is Joshua Wright. I am a former Commissioner for the U.S. Federal Trade Commission ("FTC"), and current University Professor at the Antonin Scalia Law School at George Mason University, Executive Director of the Global Antitrust Institute, and Senior of Counsel at Wilson Sonsini Goodrich & Rosati. Before addressing the subject of today's hearing—concentration and the state of competition in the United States economy—I want to make clear that the views I express here are my own.

Now is an important moment in policy debates about the appropriate relationship between market concentration and United States antitrust law and competition policy. With the growing perception that market concentration in the United States is increasing have come renewed assertions that concentration and economic performance are systematically and inversely related. The resulting axiom is that increasing concentration has caused an increase in market power, which in turn has led to higher corporate profits, reduced output, higher prices, and a reduction in overall consumer welfare. Lax antitrust policy, and lenient merger enforcement in particular, are alleged to be the root cause of these and other problems. The same perceived identity between concentration and competitive intensity has led to a variety of calls to reject the current antitrust framework—a framework based upon the consumer welfare standard and guided by economic analysis and a requirement that plaintiffs prove anticompetitive effects—in favor of alternatives that would presume competitive harm based upon firm size, market share, or the identity of companies involved.

These are important issues and raise fundamental questions about the nature of the antitrust enterprise. In my view, they are also largely empirical questions. Sound empirical evidence should guide not only how we conceive of antitrust issues in specific cases, but it can also shed light on the performance of antitrust institutions as a whole and help calibrate their performance to achieve better outcomes for consumers.

History is another important source of information for addressing these fundamental questions. We have experience in this country with an antitrust regime dictated by firm size alone or a hodgepodge of socio-political goals. For much of its history, there is widespread consensus among antitrust experts that antitrust did more harm than good. Prior to the modern "consumer-welfare" era, antitrust law doctrine was confused and incoherent. That confusion was brought on by the pursuit of populist goals or other socio-political aims, often led to contradictory results, and harmed U.S. consumers. That socio-political antitrust regime was roundly condemned for fostering corporate welfare over consumer welfare and undermining the rule of law. One of the great strengths of our current antitrust framework is the tethering of the consumer welfare standard to economic learning. In analyzing the effectiveness of our current antitrust framework—our laws, the institutions that enforce them, and the consumer welfare standard that guides those institutions—it is imperative to take an objective, evidence-based approach lest we repeat historic mistakes.

One fundamental question presented in the current debate is whether merger policy should be tightened or relaxed from current levels. I do not believe that the current empirical evidence, which consists largely of cross-sectional studies of highly aggregated data, can identify a causal relationship between either market concentration or intensity of antitrust policy on the one hand and economic performance on the other. One of the primary lessons of the structural debates of the 1970s and 1980s in industrial organization economics was that competition and concentration are different things and need to be measured differently. Moreover, as the United States recently observed, reliable data on concentration at the market level is not available for most of the United States economy.[1] An arbitrary focus on market structure and concentration as a basis for changes to policy obscures the more important analysis of actual competitive effects.

[1] Note by the United States, *OECD Hearing on Market Concentration* (June 7, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf.

The lack of evidence of a systematic relationship between market concentration and competitive outcomes by no means implies antitrust institutions, including merger policy, cannot be improved. They can and should be. But one of the most important roles the antitrust agencies can play, given their unique access to data concerning agency analysis of specific mergers, is to help create and evaluate the evidence to identify whether and where there is over- or under-enforcement in modern antitrust policy.

There are three points I'd like to highlight in my testimony today.

First, under the consumer welfare standard, the FTC and the Antitrust Division of the U.S. Department of Justice ("DOJ," collectively, "Agencies") have the flexibility to expand and contract enforcement in response to sound empirical evidence. The current framework—to put it plainly—is up to the job. The consumer welfare standard is not merely the estimation and summing up of all the benefits and losses to individual consumers arising from specific business conduct throughout the economy. Nor is it permission for antitrust regulators or courts to micromanage the economy. Rather, the consumer welfare standard is best understood as the concept that antitrust rules and institutions should be designed to maximize the long-run economic productivity of our competitive economy. The consumer welfare standard tethers antitrust analysis and law to economic insights and evidence, thus providing a principled framework for evaluating competitive effects and finding violations. In order to fully appreciate the current debate about concentration and competition, it is useful to briefly revisit antitrust's history. It is important to remember that the consumer welfare standard itself was a response to an incoherent antitrust regime—one that purported to achieve multiple socio-political goals—that propped up inefficient corporations and harmed consumers. In charting the best path forward, policymakers and contributors to the ongoing debate should remain cognizant of the lessons learned from our turbulent antitrust history. While the temptation to rely upon bright line rules based only on market structure and shares is understandable, sacrificing accuracy for administrative simplicity in this case would do more harm than good.

Second, there is no clear evidence that current merger policy is too lax *or* too stringent. That does not mean the Agencies have it "just right." But existing empirical studies purporting to show that increasing market concentration has led to increased market power suffer from a variety of well-known problems relating to measurement and inference. There is simply no evidence that market concentration is systematically on the rise in antitrust relevant markets and aggregate measures of economic performance are ambiguous—there is no empirical basis for the claim that market power is increasing as well. Methodological issues aside, even if one were to accept that aggregate concentration is increasing at a meaningful rate, the questions of competition policy import are whether competitive intensity has change over time and why? Aggregate concentration measures address neither question. It is well-established as a matter of economic theory that increased concentration could equally reflect a decline in competition or the forces of competition at work. Indeed, as more efficient firms grow in size, market concentration increases but average costs decrease or quality increases. Concentration is a consequence, not simply a cause, of competitive activity.

Third, the most worthwhile initiative we can undertake in order to promote more effective competition policy is developing a better body of evidence concerning Agency decision-making. From an empirical perspective this requires a refined approach towards research design. This is especially true concerning merger retrospectives. The question of whether merger policy is too lax or too stringent is different from the question of whether a particular enforcement decision is correct. The former asks whether the Agencies' analysis of mergers is *systematically* biased. By structuring merger retrospectives to square the estimated merger effects of econometric studies with the details of the relevant agency's assessment process, we can begin to identify whether the Agencies' decision-making is consistently biased in a way that harms consumers. More generally, better evidence can be obtained through a simple policy of enhanced transparency. For example, robust closing statements from the Agencies can provide valuable insight into what particular facts motivate their assessments.

I. U.S. ANTITRUST INSTITUTIONS AND CURRENT DOCTRINE ARE EFFECTIVE

Understanding the current debate over the effectiveness and goals of U.S. antitrust laws requires a working understanding of antitrust law's history over its nearly 130-year existence.[2] The overwhelming consensus among those who do antitrust for a living—be they established antitrust scholars, practitioners, or law enforcers serving under both Republican and Democratic administrations—is that the consumer welfare standard has served antitrust well and is the best available legal framework. Still, there are those that advocate for a return to the 'big-is-bad' enforcement style of early antitrust. Proposals include banning all vertical mergers or making *per se* unlawful certain horizontal mergers based solely upon a firm's size. These proposals come despite vast economic evidence that makes clear such moves would make consumers worse off.[3]

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[2] *See, e.g.*, William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000).

[3] *See, e.g.*, Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Buccirossi Paolo ed., 2008); Douglas H. Ginsburg & Joshua D. Wright, Philadelphia National Bank*: Bad Economics, Bad Law, Good Riddance*, 80 Antitrust L.J. 201 (2015); Carl Shapiro, The 2010 Horizontal Merger Guidelines: From Hedgehog to Fox in Forty Years, 77 ANTITRUST L.J. 49, 68 (2010) (referring to the Horizontal Merger Guideline's "express acknowledgment that [the Herfindahl-Hirschman Index] levels are not very helpful diagnostics in these cases"); U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, COMMENTARY ON THE HORIZONTAL MERGER GUIDELINES

A. The 'big-is-bad' approach undermined the rule of law and harmed consumers.

Despite its statutory basis, the development of antitrust jurisprudence is driven primarily through what is often described as a "common law" process. When the Sharman Act was first passed, the Agencies and courts interpreted the law as existing primarily to preserve the small, localized businesses that characterized early America.[4] This interpretation was understandable, given the concern over the "great trusts" that in large part precipitated the Sherman Act's initial passage.

The doctrine quickly became incoherent as antitrust courts attempted to maximize an array of social and political goals in the name of protecting "small dealers and worthy men."[5] The various goals were often at odds with one another.[6] As a result, none of these

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16 (2006), https://www.justice.gov/atr/file/801216/download ("[M]arket concentration may be unimportant under a unilateral effects theory of competitive harm."); DENNIS W. CARTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th ed. 2005) ("[T]he criticisms of [the structure, conduct, performance] approach are many, but perhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct. . . . The barrage of criticism has cause most research in this area to cease."); 4 Timothy J. Muris, Improving the Economic Foundations of Competition Policy, 12 GEO. MASON L. REV. 1, 10 (2003) ("The [structure, conduct, performance] paradigm was overturned because its empirical support evaporated."); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978).

[4] Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 ST. JOHN'S L. REV. 101, 102-03 (2015); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 217-18 (2010); See Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9. J.L. & ECON. 7, 10-11 (1966); Douglas H. Ginsburg, *An Introduction to Bork (1966)*, 2 COMPETITION POL'Y INT'L 225 (2006).

[5] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men"); United States. v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945)

goals was particularly well-served, outcomes were unpredictable, and antitrust precedent was internally inconsistent.[7] This lack of consistency, however, was not antitrust law's only problem.

Antitrust enforcement harmed competition and consumers during its early years because it prohibited broad swaths of procompetitive behavior. For instance, courts once found vertically integrated firms violated the Sherman Act because less efficient rivals were "harmed" by the integrated firm's ability to offer lower prices to consumers.[8] Similarly, mergers involving firms with relatively low market shares were regularly condemned even

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(antitrust law exists to "put an end to great aggregations of capital because of the helplessness of the individual before them").

[6] *See, e.g.*, United States. v. Aluminum Co. of America, 148 F.2d 416, 428-29 (2d Cir. 1945) (Hand, J.) ("We have been speaking only of the economic reasons which forbid monopoly; but, as we have already implied, there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic results. . . . [A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the *helplessness of the individual* before them." (emphasis added)); Brown Shoe Co. v. United States, 370 U.S. 294, 333, 344 (1962) ("[W]e cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization."); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 699 (1967) (A "competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.").

[7] *See* Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013); Ginsburg, *supra* note 2, at 217-18.

[8] *See* United States v. New York Great Atl. & Pac. Tea Co., 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949); *see also* Marc Levinson, *Monopoly in Chains: Antitrust and the Great A&P*, 12 CPI ANTITRUST CHRON. 1 (2011).

if—and sometimes because—they would result in lower consumer prices.[9] When the courts and Agencies did focus on price effects, their analysis simplistically used market structure and concentration as a proxy for predicting anticompetitive harm. In 1968, the DOJ issued its first Horizontal Merger Guidelines, placing "primary significance on the size of the market share held by both the acquiring and acquired firm."[10] For instance, in concentrated industries the DOJ would challenge an acquisition of a firm with 4% market share by a firm with 4% market share.

The predictable result of focusing on size rather than actual competitive effects was that antitrust enforcement targeted and condemned procompetitive practices at least as often as it did anticompetitive ones. As Frank Easterbrook would later explain, erroneously condemning procompetitive conduct is likely to be much more costly to society than wrongly permitting anticompetitive conduct, because the former would indefinitely chill the condemned firms (and others) from engaging in similarly beneficial conduct, while the latter would likely experience some amount of natural market correction, as monopoly rents attract competition.[11] Ultimately a widespread consensus

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[9] United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 323 (1897) (antitrust law exists to protect "small dealers and worthy men").

[10] Department of Justice 1968 Horizontal Merger Guidelines, https://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11247.pdf.

[11] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 15–16 (1984).

emerged—the multi-dimensional, socio-political approach to antitrust built largely upon the idea that 'big-is-bad' was a failure.[12]

With the introduction of the consumer welfare standard as the lodestar of antitrust analysis, antitrust institutions were formed around several unifying notions: that consumer welfare is the appropriate goal and that antitrust decisions should be guided by economic theory, empirical evidence, and the error-cost framework.[13]

B. The Consumer Welfare Standard allows antitrust institutions and laws to evolve with economic developments.

The Supreme Court's adoption of the consumer welfare standard institutionalized the economic approach to antitrust law and transformed antitrust from a lost and rambling area of law to a coherent, principled tool for advancing consumer outcomes.[14] Specifically,

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[12] *See, e.g.*, U.S. v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (White, J., concurring) (noting that the "sole consistency" he could find was "that in litigation under § 7, the Government always wins"); GEORGE J. STIGLER, THE ECONOMIST AS PREACHER AND OTHER ESSAYS 41 (1982); Neil W. Averitt & Robert H. Lande, *Using the "Consumer Choice" Approach to Antitrust Law*, 74 ANTITRUST L.J. 175, 178 (2007) (describing the antitrust paradigm of the 1960s and 1970s as "standardless and unduly hostile to business" and the consumer welfare standard as "an immense improvement" over the big is bad era); Douglas H. Ginsburg, *Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217 (2010) ("Forty years ago, the U.S. Supreme Court simply did not know what it was doing in antitrust cases."); William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43, 44 (2000).

[13] *See* Joshua D. Wright, *Abandoning Antitrust's Chicago Obsession: The Case for Evidence-Based Antitrust*, 78 ANTITRUST L.J. 241, 245-49 (2012).

[14] *See* Deborah Garza, Deputy Ass't Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks on Modernization of Antitrust Law – Private and Public Enforcement and Abuses – Europe and the U.S. (May 29, 2008), https://www.justice.gov/atr/speech/remarks-modernization-antitrust-law-private-and-public-enforcement-and-abuses-europe-and ("Even the most passionate critics of current enforcement policy

this standard provides a clear, economically-based rule that when anticompetitive effects outweigh procompetitive benefits, the conduct is unlawful. It also provides concrete guidance for identifying likely or actual competitive effects. As a result, antitrust jurisprudence is able to evolve alongside our economic understandings and the introduction of new business models and high-tech industries.

As a natural extension, antitrust enforcement embraces challenges within the consumer welfare framework. The framework enables antitrust enforcement institutions to take seriously critiques and empirical evidence that contradict our current understanding of the relevant issues and modify doctrine and policy as needed, while rejecting critiques that are not substantiated by evidence. Through rigorous scholarship and debate, economic theories and empirics have been honed to more accurately identify the necessary

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recognize the constraining influence of existing case law and, importantly, the substantial degree of consensus that exists today around most aspects of antitrust policy—a consensus forged on a solid foundation of economic learning . . . . We won't return to what antitrust enforcement looked like 40 years ago.").

and sufficient conditions for anticompetitive behavior to arise.[15] Antitrust jurisprudence has likewise developed to reflect these economic advances.[16]

II. CONCENTRATION AND COMPETITION POLICY: TOWARDS A BETTER UNDERSTANDING

One notable result of the tethering of antitrust to sound economics was the widespread rejection of the structure-conduct-performance ("SCP") paradigm. Based largely upon Joe Bain's famous 1951 study and similar work by Bain and others,[17] the SCP paradigm posited that higher market concentration was correlated to several competitive metrics, namely prices and margins. Beginning in the late 1950s and through the 1980s, the fundamental theoretical and empirical weaknesses in the SCP paradigm were gradually exposed. The fatal flaw is best understood by Harold Demsetz's recognition that a firm can expand both its market share and market power simply by outcompeting its rivals—that is, a correlation between firm size and firm profits can be identified through more

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[15] *See*, *e.g.*, David S. Evans, *The Antitrust Economics of Multi-Sided Platform Markets*, 20 YALE J. ON REGULATION 325 (2003); Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* HANDBOOK OF ANTITRUST ECONOMICS 391 (Buccirossi Paolo ed., 2008); Steven C. Salop & David T. Scheffman, *Raising Rivals' Costs*, 73 AM. ECON. REV. 267 (1983); Joshua D. Wright, *Moving Beyond Naïve Foreclosure Analysis*, 19 GEO. MASON L. REV. 1163 (2012).

[16] *See, e.g.,* State Oil Co. v. Khan, 522 U.S. 3 (1997); Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007); Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438 (2009).

[17] Joe S. Bain, *Relation of Profit Rate to Industry Concentration: American Manufacturing, 1936-1940*, 65 THE Q.J. ECON. 293-324 (1951).

competition, not less.[18] Indeed, the SCP paradigm has no intellectual influence on modern economics, is no longer taught in graduate level economics courses, and has little influence to no influence on how Agency economists evaluate transactions."[19]

In 2015 a White House Council of Economic Advisors ("CEA") paper by Jason Furman & Peter Orszag reignited the concentration debate.[20] It is important, as a logical matter, to identify separately the empirical claims that have since been made. The first is the empirical observation that increases in aggregate concentration measures imply a meaningful reduction in competition in actual antitrust markets. The second is the claim that increases in aggregate concentration levels is sufficient to infer a causal relationship with poor economic performance. The third is a policy claim that lax antitrust enforcement has caused both the increase in aggregate market concentration, if it exists, and the reduction in economic performance. In the less than four years since the Furman & Orszag

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[18] HAROLD DEMSETZ, TWO SYSTEMS OF BELIEF ABOUT MONOPOLY 167 (Harvey J. Goldschmid et al. eds., 1974).

[19] Ginsburg & Wright, *supra* note 2, at 207; DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 268 (4th Ed. 2005) (noting "the criticisms of [the SCP] approach are many, but perhaps the most significant criticism is that concentration itself is determined by the economic conditions of the industry and hence is not an industry characteristic that can be used to explain pricing or other conduct . . . [t]he barrage of criticism has caused most research in this area to cease.").

[20] Jason Furman & Peter Orszag, *A Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, Presentation at "A Just Society" Centennial Event in the Honor of Joseph Stiglitz, Columbia University (Oct. 16, 2015).

paper, each of the three claims seems to have become stylized fact in competition policy circles. Upon further review, it is not clear that these propositions withstand scrutiny.

A. Is market concentration actually increasing?

The problem with measures of industry concentration is that aggregation obscures information at the antitrust relevant market-level. An antitrust relevant "market" is composed of firms that impose significant competitive pressure upon one another.[21]

Furman & Orszag demonstrate increased dispersion of returns to capital across firms in the United States over time, with an increasingly large proportion of firms obtaining supra-normal returns. Using the CR50 (the combined market share of the 50 largest firms) calculated at the two-digit industry level[22] to measure concentration,[23] the authors go on to *tentatively* hypothesize that corporate consolidation, among other

[21] Under the Agencies' Horizontal Merger Guidelines, "market definition focuses solely on demand substitution factors, i.e., on customers' ability and willingness to substitute away from one product to another in response to a price increase or corresponding non-price change such as a reduction in product quality or service." U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 4 (2010).

[22] The United States economy uses the North American Industry Classification System (NAICS) for categorizing industries, and those categorizations are increasingly narrower at higher levels of specificity. The NAICS divides the economy into 24 2-digit sectors (e.g., broad sectors like "retail trade") which are divided into 99 3-digit subsectors, 311 4-digit industry groups, 709 5-digit industries, and 1057 6-digit industries.

[23] Concentration ratios (CR) express the market share of the Nth largest firms in a market, industry, or economy. For instance, the CR4 denotes the combined market shares of the four largest firms.

explanations, could be a contributing factor.[24] The authors correctly call for deeper evaluation concluding that "a more complete exploration of these explanations can help guide us towards the right policy solutions for addressing rising inequality."[25] Many similar studies followed.[26]

The gap between aggregate industry concentration measures and actual antitrust markets is not just a theoretical issue. Absent a well-defined antitrust market, market share statistics are largely meaningless for the purpose of measuring competitive intensity and are certainly not appropriate for inferences about the intensity of competition *across* industries. Gregory Werden and Luke Froeb document the excessive aggregation in United States Census data and show how such aggregation masks changes in market concentration.[27] First, the authors demonstrate how "even the least aggregated Census data can be over a hundred times too aggregated."[28] They go on to conduct a thought

[24] "Our only real conclusion is thus that more attention needs to be paid to what is driving firm-level trends in the United States, and in particular whether they reflect economic rents at the firm level." Furman & Orszag, *supra* note 16, at 2.

[25] *Id.*

[26] See, e.g., *Business in America: Too Much of a Good Thing*, THE ECONOMIST (May 26, 2016), https://www.economist.com/briefing/2016/03/26/too-much-of-a-good-thing (finding that across the 893 sectors measured, the weighted average CR4 increased from 26 percent in 1997 to 32 percent in 2012).

[27] Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST MAGAZINE (Fall 2018).

[28] *Id.*

experiment that shows how such excessive aggregation can render observed concentration trends meaningless[29] and can lead to fallacies associated with averaging.[30]

Existing evidence does tend to show a modest increase in aggregate concentration in a handful of sectors, but it is far from obvious that this should be a cause for concern from an antitrust perspective. Even if concentration is increasing, the real questions of competition policy import are whether competitive intensity has changed over time and why?

B. There is no empirical basis to support the inference that there has been a systematic increase in market power.

The second empirical premise underlying stricter merger policy proposals is that increasing concentration has caused an increase in durable market power that has resulted in harm to consumers. To test this claim it is necessary to have information about the movements of indicators of competitive intensity. For example, the exercise of monopoly power, by definition, requires a reduction of output and an increase in market prices.

Jan De Loecker & Jan Eeckhout purport to show that markups (an increase in prices relative to marginal costs) have risen since 1980, and interpret this to suggest that there has

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[29] The authors show that even though horizontal and vertical mergers have completely *different* effects on market concentration, they might have exactly the same effect on NAICS subsectors and industries. *Id.*

[30] Subsector concentration can increase even if the concentration of every market in a subsector decreases. *Id.*

been a rise in market power.[31] De Loecker & Eeckhout are commonly cited for the proposition that the measured increase in markups gives reason to believe that antitrust enforcement has failed to protect consumers from monopoly power. One fundamental concern with the study is that it is well established that profit margins alone are not reliable evidence of market power.[32] Another is that the authors do not tie the increase in markups to an increase in prices. For example, one plausible (and competitively benign) explanation for an increase in markups over time is a shift in the economy towards more innovation oriented firms, services, and intellectual property-intensive activities with greater margins.

Moreover, if the increase in markups over time identified by De Loecker & Eeckhout is associated with an increase in market power, one would expect to see a corresponding decrease in output. Using a similar methodology, Sharat Ganapati instead demonstrates that industry concentration is positively correlated with firm productivity and real output, but is uncorrelated with price changes.[33] Of course, caution is appropriate in relying upon *any* aggregate measures of concentration and performance to generate inferences about competitive intensity. At the same time, the fact that the signature outcome from a rise in

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[31] Jan De Loecker & Jan Eeckhout, *The Rise of Market Power and the Macroeconomic Implications* (2017), http://www.janeeckhout.com/wp-content/uploads/RMP.pdf.

[32] See, e.g., Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. COMPETITION L. & ECON. 511 (2013).

[33] Sharat Ganapati, *Oligopolies, Prices, Output, and Productivity* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3030966&download=yes.

market power—the simultaneous increase in prices and decrease in output—is missing, gives one serious pause in interpreting the evidence in favor of the view that economic performance in the United States has declined as a result of a rise in market power.

Sam Peltzman focuses on the interplay between concentration, prices, and productivity across hundreds of manufacturing industries from 1982-2011.[34] He finds that there is not much change in prices in concentrated sectors relative to other sectors, but that there is evidence that productivity and concentration are positively correlated.

Finally, much of the perception of an increase in concentration in the U.S. is focused on a handful of large firms. Robert Hall tests this view and finds no evidence that mega-firm-intensive sectors have higher markups.[35] In fact, Hall presents evidence that while there is no real trend in markups for manufacturing, there is a strong trend of growing markups in the Finance & Insurance and Health Care & Social Assistance industries—both of which are heavily regulated.

As it stands, there is no empirical foundation from which to conclude that market power is rising. To the extent some studies show that markups are increasing, other

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[34] Sam Peltzman, *Productivity and Prices in Manufacturing During an Era of Rising Concentration* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3168877.47.

[35] Though he does find some evidence that markups grew in sectors with rising mega-firm intensity. Robert E. Hall, *New Evidence on the Markup of Prices Over Marginal Costs and the Role of Mega-Firms in the US Economy* 20 (2018), https://www.nber.org/papers/w24574.

studies show that output has increased and that quality-adjusted prices have remained stable. While claims that aggregate concentration has at least modestly increased find somewhat consistent empirical support, there is no support for the notion that the U.S. economy has experienced a systematic increase in durable market power.

C. The relationship between concentration and competition is ambiguous.

The fundamental problem with regard to cross-sectional price- or profit-concentration studies is that such measurements are plagued with endogeneity and lack of identification. Industrial organization economists have long been skeptical of claims of causal inference arising from cross-sectional studies.[36] Market structure is determined by market-specific characteristics, and entry and exit feeds back from performance to market structure. Many of the existing price-concentration studies are not designed to effectively account for such endogeneity.

Critically, that is not to say that these studies have not picked up on potential areas of concern. But concentration tells us nothing in and of itself. Aggregate price-concentration studies are not adequate to make reliable inferences about the intensity of

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[36] *E.g.*, Harold Demsetz, *Industry Structure, Market Rivalry, and Public Policy*, 16 J.L. & ECON. 1 (1973); William N. Evans, Luke M. Froeb & Gregory J. Werden, *Endogeneity in the Concentration-Price Relationship: Causes, Consequences, and Cures*, 41 J. INDUS. ECON. 431 (1993); T.F. Bresnahan, *Empirical Studies of Industries with Market Power, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 1011 (Richard Schmalansee & Robert Willig eds., 1989); Richard Schmalansee, *Inter-Industry Studies of Structure and Performance, in* 2 HANDBOOK OF INDUSTRIAL ORGANIZATION 951 (Richard Schmalansee & Robert Willig eds., 1989).

competition or the desirability of changes in merger policy because they ignore dynamic, market-specific realities. To the extent that studies of actual antitrust markets suggest that, on average, market power is increasing, it remains unclear what is driving that increase. "It is perfectly possible that in many markets this is the outcome of healthy competitive forces that allow [more efficient firms] to thrive and to build market power on the back of their recurring success."[37]

D. Existing merger retrospectives are generally not designed to inform merger policy.

There is significant support for using merger retrospectives as a way to inform merger policy. For example, Carl Shapiro states that "merger retrospectives are especially valuable [] since they directly address the question: which mergers harm customers by lessening competition?"[38] I agree that merger retrospectives should be encouraged because they help to improve our understanding of individual agency decisions. However, because merger retrospectives focus on a single transaction their usefulness for the purposes of informing merger policy as a whole is extremely limited.

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[37] Chris Pike, OECD Competition Division, *Market Concentration Issues Paper* (April 20, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf.

[38] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714 (2018).

Professor Kwoka's meta-analysis of existing merger retrospectives[39] has been cited by many in support of the notion that modern antitrust enforcement has failed to proscribe harmful mergers.[40] Kwoka identifies 49 transactions for which retrospective studies exist, of which 42 are mergers. He finds that for all mergers studied in his sample, the average price effect is a 7.22 percent increase. Professor Kwoka concludes that "recent merger control has not been sufficiently aggressive in challenging mergers." Michael Vita & David Osinski, both experienced antitrust economists of the Bureau of Economics at the FTC, offer a critical review.[41] The authors raise several objections to Kwoka's methodology.[42]

More fundamentally, Vita & Osinski point out that the analysis cannot be used to support Kwoka's claim that *recent* Agency policy has been too lax. Most of the mergers in the sample are dated—only 7 of the 42 mergers evaluated occurred since 2000. Of the 7

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[39] JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES (2015).

[40] *See* Markus Dertwinkel-Kalt & Christian Wey, *Evidence Production in Merger Control: The Role of Remedies* 5 (Düsseldorf Inst. Competition Econ., Discussion Paper No. 217, 2016), http://hdl.handle.net/10419/130192 ("Kwoka present[s] empirical evidence for the EU and the US which questions whether remedies effectively counter anti-competitive merger effects."); F. David Osinski & Jeremy A. Sandford, *Merger Remedies: A Retrospective Analysis of Pinnacle/Ameristar* (2017), https://ssrn.com/abstract=3008770 ("Kwoka provides an extensive summary of agency enforcement actions, finding that remedies imposed are generally inadequate in preserving competition."); Shapiro, *supra* note 34, at 22 ("[E]vidence from U.S. merger retrospectives supports a shift to a moderately stricter merger enforcement policy." (citing KWOKA, *supra* note 35)).

[41] Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018).

[42] For example, that Kwoka's analysis does not use standard meta-analytic techniques for computing average price effects and standard errors of the studies in his sample; that the observations are not weighted by their estimated variances, which leads to all price effect estimates being treated equally regardless of precision of the estimates; and that the estimated average price effects also appear to lack standard errors, which makes it impossible to evaluate whether those effects are statistically different from zero. *Id.*

mergers that occurred in the 2000s: four exhibited no increase in post-merger (or post-remedy) prices; one had disputed results; one represented a successful challenge to an already consummated merger; and only one (Whirlpool/Maytag) is indicative of potentially lax merger enforcement. Moreover, many mergers in the sample were not adjudicated by the Agencies—e.g., airline mergers were investigated by the Department of Transportation, not the DOJ. Like all of the studies discussed here—and many that were not—Professor Kwoka's analysis raises important issues and contributes to our overall economic knowledge. But I do not think it provides a basis to substantiate the claim that lax merger policy has resulted in an increase in market concentration and market power across the economy.

III. COMPETITION POLICY EFFECTIVENESS, AGENCY DECISION-MAKING, AND DEVELOPING BETTER EVIDENCE

The most worthwhile initiative we can undertake in order to promote more effective competition policy is developing a better body of evidence concerning Agency decision-making. From an empirical perspective this requires a refined approach towards research design. This is especially true concerning merger retrospectives. While merger analysis in individual cases has grown increasingly sophisticated, we still know very little about the effectiveness of merger *policy*. The question of whether merger policy is too lax or too stringent is different from the question of whether a particular enforcement decision is correct. The former asks whether the Agencies' analysis of mergers is *systematically* biased; the latter is of limited use for application across markets with unique competitive dynamics.

There are two types of data that must be collected in order to evaluate the effectiveness of merger policy. The first is data on the relevant market pre- and post-merger. This has been the primary focus of the antitrust community. Dennis Carlton demonstrates that merger retrospectives focused only on ex-post outcomes are surprisingly poor guides for analyzing merger policy.[43] Thus, the second type of data that must be collected is ex-ante information concerning the Agency's predictions of the merger. "Only . . . by combining a record of what tools were used and what conclusions were drawn from each tool with a study of observed outcomes from mergers . . . can systematic evidence be collected on the efficacy of various methods used in merger review."[44] By structuring merger retrospectives to square the estimated merger effects of econometric studies with the details of the relevant agency's assessment process, we can begin to identify whether the Agencies' decision-making is consistently biased in a way that harms consumers.

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[43] Whether the government made a random error in an individual case is not indicative of a policy bias. Dennis Carlton, *Why We Need to Measure the Effect of Merger Policy and How to Do It*, 5 COMPETITION POLICY INT'L J. 77 (2009).

[44] Dennis Carlton, *Revising the Horizontal Merger Guidelines*, 6 J. COMPETITION L. & ECON. 619, 651 (2010).

The DOJ and FTC should play a critical role and must consistently record their assessment techniques and predictions. Importantly, the Agencies need to share this information. While the Agencies might be understandably reluctant to share their predictions for the purpose of research, they have a long history of contributing to competition policy research and development. The DOJ and FTC are uniquely situated to conduct the appropriate retrospective studies, either on their own or in collaboration with academic industrial organization economists.

More generally, insight about Agency decision-making can be obtained through a simple policy of enhanced transparency. The FTC should be commended for its Hearings on Competition and Consumer Protection in the 21st Century. The Hearings present an open forum in which enforcers and constituents can together grapple with the new issues presented by evolving business models and technology. Challenges to the status quo should be taken seriously by antitrust academics as well as the Agencies. Public comments and reports indicating Agency analysis on these new issues will be invaluable. Similarly, robust closing statements from the Agencies would increase public understanding as to what particular facts motivate their assessments.[45]

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[45] "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient police man." Louis Brandeis, *What Publicity Can Do, in* OTHER PEOPLE'S MONEY—AND HOW BANKERS USE IT (1914) (speaking to the benefits of financial disclosure).

CONCLUSION

The danger of premising changes to competition policy on inconsistent (or worse, unsupportable) economic evidence is that we risk making consumers worse off. We have considerable experience in this country with an antitrust regime that—in the guise of advancing populist notion or a mix of socio-political aims—incoherently protects inefficient competitors and punishes pro-consumer behavior. Much of the rest of the world watches these debates in the U.S. with interest, in part to evaluate the strength of our commitment to the consumer welfare standard. Firm or share-based presumptions of illegality in particular raise concerns where the empirical evidence does not substantiate their use. The SCP paradigm was abandoned for good reason. There are no doubt imperfections in current antitrust institutions, including merger enforcement policy. I am grateful to have the opportunity to discuss those institutions with you today and opportunities to calibrate them to better achieve their goals. In my view, meaningful assessment of competition policy effectiveness requires a particular type of merger retrospective involving a different kind of evidence. I would urge the Agencies to embark on such studies immediately to broaden our base of knowledge. I would also encourage the Agencies to strengthen their commitment to transparency by issuing more closing statements and other guidance that clearly and accurately describe their analytical framework and decision-making processes to the public.