PREPARED REMARKS

"Post Hoc, Ergo Propter Hoc"

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Thank you, Sean and David, for that introduction. And thanks to the Chamber for hosting us this afternoon. With antitrust now very much a part of the national dialogue, and an entirely new Federal Trade Commission finally in place, engagement with the public and with the business community is critical.

I want to focus today on an essential aspect of the current antitrust debate: the consumer welfare standard. Through it, antitrust law aims to protect the competitive process, not individual competitors. This fundamental principle, which protects consumers' interests in low prices, product quality, service, variety and innovation, anchors not only U.S. law but antitrust regimes around the world—no small feat, given the nearly 130 jurisdictions with active antitrust regimes.[1]

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[1] *See* European Commission, Competition Policy Brief (May 2016) ("In the past 25 years, the number of competition regimes around the world has increased from around 20 at the beginning of the 1990s to around 130 today."), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf; William E. Kovacic, *Extraterritoriality, Institutions, and Convergence in International Competition Policy*, 97 AM. SOC'Y INT'L L. PROC. 309, 309 (2003) ("Competition law is an increasingly common element of public economic policy. A half-century ago, only one country, the United States, had antitrust statutes and active enforcement. Today over ninety jurisdictions have competition laws, and the number will exceed one hundred by the decade's end."), http://ec.europa.eu/competition/publications/cpb/2016/2016_002_en.pdf; OECD, Policy Roundtables, Competition on the Merits, OECD Doc. DAF/COMP(2005)27, at 9 (2005), http://www.oecd.org/daf/competition/abuse/35911017.pdf ("There is substantial agreement among jurisdictions on the broad goals and methods of enforcing competition laws against abuse of dominance, particularly with respect to studying harm to competition, not competitors, through the use of economics.").

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Reading certain editorial pages and listening to the way some American politicians speak, one could be forgiven for forgetting the length and breadth of consensus that has characterized antitrust law and economics for decades. All of a sudden, the consumer welfare standard is to blame for a host of social and political problems we typically think of as far afield from antitrust law: inequality; wage stagnation; and political control of the public sphere by the private sector.

As I've explained elsewhere, I'm skeptical that, in the first place, consumer welfare critics have laid a solid foundation for their claims or, in the second, they offer administrable alternatives that would solve the harms they identify.[2] Today, I want delve further into the former concern.

The case against consumer welfare points to evidence of industry-level concentration across the economy, which purportedly coincides with an increase in, among other things, inequality and low wage growth. Critics see scaled-back antitrust enforcement[3] as the cause of these trends and the consumer welfare standard as the culprit. They point in particular to the period from the 1960s through the 1980s, when the law and economics movement imbued antitrust law with learning focused on theoretical and empirical evaluation of whether business practices actually harmed consumers or the competitive process.

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[2] *See, e.g.*, Commissioner Noah Joshua Phillips, U.S. Fed. Trade Comm'n, Remarks as Prepared for Delivery, Competition & Consumer Protection, Regulatory Transparency Project & Capitol Hill Chapter of The Federalist Society, Washington, D.C. (Sept. 12, 2018), https://www.ftc.gov/public-statements/2018/09/prepared-remarks-ftc-commissioner-phillips

[3] These allegations typically focus on certain kinds of allegedly anticompetitive conduct to the exclusion of areas where agency enforcement has increased in recent decades, such as cartel prosecution.

The operative word here is "when", as this line of argument focuses heavily on trends that followed the shift in antitrust law and, from that, assumes causation. *Post hoc ergo propter hoc*—Latin for "after this, therefore because of this". The logic is often a good starting point for social science research; but, as fans of Aaron Sorkin's *The West Wing* might recall, it is also, famously, a fallacy. Of course, we must study where we have been to understand accurately where we are now—and how to reach our desired destination if we are not already there. But we must also recognize the difference between correlation and causation.

Today, facing rising mergers levels and evidence of industrial consolidation, I want to pause and consider earlier instances of widespread consolidation in the American economy. Ecclesiastes teaches us that "there is nothing new under the sun",[4] and the history of corporate America may tell us a lot more about recent trends than the popular consumer welfare debate might indicate. Antitrust policy is just part of the story, and we should not ignore important inputs into corporate decision-making, like changes in firm management practices and corporate governance and automation and globalization.

These days, dramatic proposals to reshape American capitalism abound, and the targeting of antitrust's consumer welfare standard is but one. But abandoning this standard would be an enormous change in its own right. It would not only imperil not only consumer welfare, but also threaten to dramatically restructure our capital and investment markets, in ways largely unexplored as of yet, and to

[4] HOLY BIBLE, Ecclesiastes 1:9 (New International Version).

undermine the rule of law, here and abroad. Before we go down that road, we owe it to ourselves to consider a little more of our shared history.

For those not tracking the debate, let me start with the claim that increased industry-level concentration is a result of lessened antitrust enforcement; and accept for the sake of argument that industry-level concentration has, in fact, increased. I want briefly to describe the asserted connection to antitrust, and point out some assumptions that underlie it.

Observers of increasing concentration levels often rely upon studies identifying trends at the 2- or 4-digit NAICs code levels, or other Census data, which means they are discussing concentration in industries like "manufacturing", "retail trade", "finance and insurance" or "health care."[5]

Many of the original studies come from experts outside of the antitrust arena, such as labor and other macro-level economists, who acknowledge the limitations of the data and offer insights into previously less-explored areas. This is one of the benefits from collaboration among disciplines: different insights can lead to new questions and, from there, to new learning.

[5] *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; Jan De Loecker & Frederic Warzynski, *Markups and Firm-level Export Status*, 102(6) AM. ECON. REV. 2437, 2437 (2012), https://www.princeton.edu/~jdeloeck/DLW_AER2012.pdf; COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER 4 (Council of Economic Advisors Issue Brief updated May 2016), https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf. *But see* Esteban Rossi-Hansberg, Pierre-Daniel Sarte, & Nicholas Trachter, *Diverging Trends in National and Local Concentration* (NBER Working Paper No. 25066, Sept. 2018), https://www.nber.org/papers/w25066 (examining concentration trends at the local geographic level using higher digit (narrower) Census data, and finding concentration trends identified at the national level with lower digit (broader) Census data were not replicated).

The drawback for people in my line of work is that, in relying on industry-level trends, we do not focus on the much narrower markets that constitute the antitrust-relevant units of analysis. Antitrust looks at markets in which the absence of competition permits firms to raise prices or restrict output for a sustained period, or otherwise to degrade the welfare of consumers. These markets are necessarily narrower than industries, because they are defined in terms of the products or services that consumers perceive to be substitutes. Within "retail trade", for example, a new car dealer would not be a great substitute for a jewelry store.[6] Aggregated, industry-level information is thus not necessarily an accurate indicator of *competition* within a relevant market. As the Department of Justice Antitrust Division and the Federal Trade Commission's (collectively, the Antitrust Agencies) recent submission to the OECD explains: "Concentration never tells the whole story about competition, and the proper delineation of the relevant market is critical if concentration is to tell any part of the story".[7]

The Antitrust Agencies go on to critique the reliance on these industry-level concentration studies for antitrust purposes: "At no level is the Census data capable of demonstrating increasing concentration of '*relevant markets*' in the antitrust sense".[8] They further explain that they "agree with Carl Shapiro, a recent member

[6] *Six Digit NAICS Codes & Titles*, https://www.naics.com/six-digit-naics/?code=4445 (last visited Oct. 17, 2018).

[7] Submission of the United States, Hearing on Market Concentration, OECD Doc. DAF/COMP/WD(2018)59, ¶ 4 (May 27, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)59/en/pdf [hereinafter US OECD Concentration Submission].

[8] *Id.* ¶ 5; *see also* Submission of OECD Secretariat, Market Concentration, OECD Doc. DAF/COMP/WD(2018)46, ¶ 31 (June 6-8, 2018), https://one.oecd.org/document/DAF/COMP/WD(2018)46/en/pdf ¶ 31 ("In trying to interpret this evidence, it must first be noted that a CR50 measure is too broad, since a high value would be entirely consistent with a highly competitive

of the [U.S. Council of Economic Advisors], that the evidence on concentration cited by the CEA is 'not informative regarding the state of competition.'"[9] Similarly, the FTC recently held a panel on industry-level concentration and competition, and all the panelists—leading economists with a range of viewpoints on the proper course antitrust enforcement should take—agreed that macro-level concentration trends do not speak to micro-level competition in antitrust-relevant markets.[10]

Concentration may just as well result from the competitive process itself; for instance, as a result of superior efficiency. Economists have long recognized that economies of scale, on the demand and supply sides, can result in firm growth and concentration.[11] Sorting the cases of efficiency-driven concentration increases from those resulting from behavior harmful to the competitive process requires more than simply identifying the increase in concentration.

To be clear: industry-level concentration data could be consistent with a lessening of competition; but it does not, on its own, tell that story.

History—including the long history of antitrust enforcement in the United States, only a little of which I can cover here—provides some important lessons for

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market. Moreover, the different market categorisations that are used are insufficiently precise, since even at the 4-digit level these group products into markets despite it being unlikely that those products compete with one another (e.g., luggage vs purses).").

[9] US OECD Concentration Submission, *supra* note 7 (quoting Carl Shapiro, *Antitrust in a Time of Populism*, INT'L J. INDUS. ORG. (forthcoming 2018)).

[10] U.S. Fed. Trade Comm'n, Competition and Consumer Protection in the 21st Century, Panel on *Has the US Economy Become More Concentrated and Less Competitive: A Review of the Data* (Sept. 13, 2018), https://www.ftc.gov/news-events/events-calendar/2018/09/ftc-hearing-1-competition-consumer-protection-21st-century.

[11] *See, e.g.*, Harold Demsetz, *Two Systems of Belief about Monopoly, in* INDUS. CONCENTRATION, THE NEW LEARNING 167 (Harvey J. Goldschmid et al. eds., 1974).

understanding the antitrust implications of concentration trends. And that is what I want to focus on today.

Between 1890, when Congress passed the Sherman Antitrust Act, and the end of the 20th Century, scholars recognize five "merger waves", periods of dramatic corporate consolidation.[12] While each had its own unique characteristics, they all exhibit certain important commonalities.[13] These merger waves typically occur during periods of economic recovery, and they tend to be precipitated by industrial and technological shocks, supply shocks, regulatory change, financial innovation, and increased foreign competition. Those have been and can be important drivers of consolidation. These merger waves also provoked concern about their legitimacy and economic efficiency, very much like the national debate we are having today.[14]

The first merger wave, from 1887 to 1904, followed an economic depression and coincided with the Sherman Act's passage; it ended with the financial panics of 1904 and 1907, and the Supreme Court's decision in *Northern Securities*.[15] The second lasted from the end of World War I until the Crash of 1929. These were dramatic years for the growth of American industry, including innovations like electricity, telecommunications and the automobile. Scholars believe that antitrust

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[12] Greg N. Gregoriou & Luc Renneboog, *Understanding Merger and Acquisitions: Activity Since 1990*, *in* INTERNATIONAL M&A ACTIVITY SINCE 1990: RECENT RESEARCH AND QUANTITATIVE ANALYSIS (2007); Marina Martynova & Luc Renneboog, *A Century of Corporate Takeovers: What Have We Learned and Where Do We Stand?*, 32 J. BANKING & FIN. 2148 (2008).
[13] Martynova & Renneboog *supra* note 12; Gregoriou & Renneboog, *supra* note 12.
[14] *See* Martynova & Renneboog *supra* note 12; Gregoriou & Renneboog, *supra* note 12; Laurence Capron, *Historical Analysis of Three Waves of Mergers and Acquisitions in the United States (1887-1904, 1916-1929, 1950-1970): Triggering Factors, Motivations, and Performance* (1996), https://faculty.insead.edu/laurence-capron/documents/historical-analysis-of-three-waves-of-mergers.pdf.
[15] Northern Securities Co. v. United States, 193 U.S. 197 (1904).

regulation—in particular raising the cost of cartel behavior—may have helped to push firms to choose combination.[16]

Because so much of the antitrust debate today focuses on the legal changes around the 1980s, we should look carefully at the merger waves occurring just before, during, and just after that decade. Doing so underscores that multiple factors in addition to antitrust policy helped to drive corporate changes and structure during this time.

The merger wave that took place from the 1950s to the 1970s followed the worldwide economic depression of the 1930s and World War II, and—it must be noted for present purposes—coincided with robust middle class economic growth. This consolidation, the largest merger wave to date, followed the adoption of a *stricter* antitrust regime. Scholars agree the passage of the Celler-Kefauver Amendments to the Clayton Act in 1950 contributed meaningfully to the shape of mergers and acquisitions during this time: enforcers and courts disfavored both horizontal and vertical mergers, so firms turned to other avenues for growth.[17]

[16] *See, e.g.*, George Bittlingmayer, *Did Antitrust Cause the Great Merger Wave?*, 28 J.L. & ECON. 77 (1985); Gregoriou & Renneboog, *supra* note 12, at 1 ("The earlier waves of the 1890s and 1920s are believed to have been driven by antitrust legislation[.]"); Capron, *supra* note 14.

[17] Gerald F. Davis, Kristina A. Diekmann & Catherine H. Tinsley, *The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of the Organizational Form*, 59 AM. SOC. REV. 547, 547 (1994) ("Following the enactment of the Celler-Kefauver Act in 1950, horizontal and vertical acquisitions (buying competitors, buyers, or suppliers) fell out of regulatory favor, and firms seeking to grow through acquisition were forced to diversify into other industries."); Capron, *supra* note 14, at 3 ("Anti-trust legislation strongly influenced the nature of mergers to the extent that the Celler-Kaufer [*sic*] amendment systematically condemned all horizontal mergers independently of its effects upon the competitive intensity (the Anti-Monopoly Act went so far as to condemn certain related diversification mergers)."); Martynova & Renneboog, *supra* note 12, at 6 ("The beginning of this wave in the US coincided with a tightening of the antitrust regime in 1950."); Gregoriou & Renneboog, *supra* note 12, at 2 ("Diversifications during the 1960s can be attributed to such assorted causes as stricter antitrust regulations, less well developed external capital markets, and labor inefficiencies, as well as a host of economic, social, and technological changes[.]").

America got corporate conglomerates. But the economic premise for unifying seemingly disparate business operations was weak, and proved unsuccessful in practice.

Developments in corporate law and strategy followed, and contributed to changing competitive landscapes, including de-consolidation. The costs to shareholders, companies and workers from bad M&A strategy got America thinking about corporate governance, led in part in the mid-1970s by the Securities and Exchange Commission (SEC).[18] In 1974, for instance, the SEC filed suit for fraud and misleading statements against the chairman, CFO, and three outside directors of Penn Central, a railway company that embraced the conglomerate trend and expanded into pipelines, hotels, industrial parks, and commercial real estate—and then collapsed into the nation's largest bankruptcy in 1970.[19] A robust debate regarding corporate governance, including what values to maximize and how structurally to incentivise that maximization, followed. In 1976, for example, Michael Jensen and William Meckling described how firms could and should be structured to reduce agency costs, the problem of aligning the incentives of the

[18] Brian R. Cheffins, *The History of Corporate Governance*, *in* OXFORD HANDBOOK OF CORPORATE GOVERNANCE 46, 47 (Mike Wright et al. eds., 2013) ("The federal Securities and Exchange Commission (SEC) brought corporate governance on to the official reform agenda in the mid-1970s.").

[19] *See* Complaint, SEC v. Penn Central Co., 1974 WL 391 (E.D. Pa., May 2, 1974); Cheffins, *supra* note 18; SEC. & EXCHANGE COMM'N, THE FINANCIAL COLLAPSE OF THE PENN CENTRAL COMPANY (1972), https://fraser.stlouisfed.org/files/docs/historical/house/1972house_fincolpenncentral.pdf; Felix Belair Jr., *Charges of Fraud at Penn Central are filed by S.E.C.*, NY TIMES (May 3, 1974), https://www.nytimes.com/1974/05/03/archives/charges-of-fraud-at-penn-central-are-filed-by-sec-goldman-sachs-in.html.

principal—the shareholders of a corporation—with their agents—management.[20] By the time regulators and academics truly stepped in, the 1973 oil crisis ended the two decade-long merger wave, driving the world into economic recession and malaise.

The 1980s merger wave began during the recovery from that, and likewise arose during a time of regulatory, policy, and technological development. Scholars primarily attribute this wave to "the inefficiencies created by the previous wave's diversifications"—in other words, it appeared to involve a fair bit of course correction.[21] Corporate managers were learning from the mistakes of the past and taking into consideration the needs of shareholders. The improvements in efficiency that flowed are part of what we continue to witness today.

These corporate managers were also putting organizational and technological innovation into practice. With increasing computing power came opportunities to analyze and react to more data. Automated spreadsheets proliferated , as did management consultancy as a specialized field to help guide corporate decisions. Corporate managers were also scared stiff by innovations in M&A. The 1980s merger wave entailed record numbers of "divestitures, hostile takeovers, and transactions such as leveraged buyouts (LBOs), suggesting increased investor focus on corporate control."[22] These innovations forced change and efficiency on a

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[20] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

[21] Gregoriou & Renneboog, *supra* note 12, at 3 & internal citations; Martynova & Renneboog, *supra* note 12, at 6 ("As the main motive for this wave, the academic literature suggests that the conglomerate structures created during the 1960s had become inefficient by the 1980s such that companies were forced to reorganize their businesses.").

[22] Gregoriou & Renneboog, *supra* note 12, at 3.

sometime unwelcoming corporate world. Antitrust law was changing, too; but it was but a small part of big changes in the economy bearing on how mergers and acquisitions—an important mechanism by which consolidation (and, sometimes, de-consolidation)—happens.

The final merger wave of the 20th Century, from 1993 to 2000, followed trends that have continued to define M&A, the worldwide economy, and geopolitics to this day. The fall of Communism, globalization and the rapid development and proliferation of high-speed computing and telecommunications changed the what, where, why and how of American corporate strategy. Today, global competition is the reality American businesses face.

The increasingly international nature of merger activity bears out this reality. While the earlier waves were predominantly (though not exclusively) U.S. phenomena, recent activity is increasingly global, with the final 20th Century wave recognized as "a truly international phenomenon."[23] During this seven-year wave, there were 119,000 M&A deals in the U.S. and 117,000 in Europe.[24] That is consistent with the broader trend toward globalization in the economy and the adoption of antitrust regimes around the world. As we become more interconnected, we would expect to observe some amount of convergence in firm activity.

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[23] Martynova & Renneboog, *supra* note 12, at 5.

[24] Gregoriou & Renneboog, *supra* note 12, at 4. The composition of M&A deals again appears to have reacted to a changing regulatory environment. Scholars note, for instance, a decrease in hostile takeovers from the 1980s merger wave, which some attribute to the risk of alternative governance tools like stock options and shareholder activism. Gregoriou & Renneboog, *supra* note 12, at 4 & internal citations.

Globalization also increases the stakes for the conversation we are now having about the consumer welfare standard. The international antitrust community has reached a consensus today that the goal of the antitrust laws is to protect the competitive process, not individual competitors. This fundamental premise is the cornerstone of the consumer welfare standard. Abandoning it cannot, therefore, be accomplished without international repercussions.

Are we again experiencing a real uptick in mergers? After the Internet bubble burst in 2000 and 9/11, merger activity picked up, only to be ended by the Great Recession. And that was ten years ago. Hart-Scott-Rodino filings have since rebounded, andthe Wall Street Journal reported this summer on the M&A market heading for a record.[25] Antitrust law in the early 21st Century hasn't shift dramatically, but M&A has.

The history of mergers and acquisitions in America tells us that a merger wave is not likely caused by a change in antitrust law alone. It also tells us that the public often views change with suspicion, and that changes in antitrust policy often bear results not anticipated (or even desired) by antitrust legislation or enforcers.

In the debate regarding antitrust law's consumer welfare standard, we should be mindful of avoiding the *post hoc ergo propter hoc* fallacy. We have tremendous data and scholarship to help illuminate our path forward, and we should continue to bring that learning to bear and to make only those policy changes that rigorous analysis warrants.

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[25] *M&A Market Headed for a Record, Powered by Tech Disruption, AT&T Ruling*, THE WALL STREET JOURNAL (July 1, 2018), https://www.wsj.com/articles/m-a-market-headed-for-a-record-powered-by-tech-disruption-at-t-ruling-1530462295