

REMARKS AS PREPARED FOR DELIVERY

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Competition & Consumer Protection
Regulatory Transparency Project & Capitol Hill Chapter of
The Federalist Society
Washington, D.C.
September 12, 2018

Introductory Remarks

- Thank you, Paul, for that introduction. Thank you to the Regulatory Transparency Project and Capitol Hill Chapter of The Federalist Society for hosting us today, and to everyone here in attendance for joining. I'm excited to speak with the excellent folks on this panel and all of you about the Federal Trade Commission's (FTC or Commission) upcoming *Hearings on Competition and Consumer Protection in the 21st Century* (Hearings).
- Now seems a particularly apropos time for these Hearings. Antitrust law currently holds a prominent place in popular debate. A combination of factors have elevated its profile, and antitrust issues are part of the national debate—indeed, quite literally, front-page news—in a way we have not seen in years (if ever).

Background on the 1995 Hearings

- These Hearings are modeled on the *Global Competition and Innovation Hearings* the FTC held in 1995 under Chairman Robert Pitofsky (1995

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Hearings). The 1995 Hearings brought together consumers, market participants, practitioners, economists, and the Commission for critical discussions and analysis of the trajectory of antitrust enforcement.

- Afterwards, the Commission compiled insights from these hearings into a two-volume report, *Anticipating the 21st Century: Competition Policy in the New High-Tech, Global Marketplace*.¹ And teachings derived from these hearings helped to guide antitrust enforcement over the last two decades.
 - For instance, the Commission and the Department of Justice’s Antitrust Division updated both the Horizontal Merger Guidelines, to expand their discussion of efficiencies, and the Guidelines for Collaboration among Competitors.
 - Additionally, given the key role of intellectual property rights to modern antitrust enforcement—which the 1995 Hearings helped elucidate—the Commission held follow-on hearings over the next several years dedicated to exploring IP questions. The IP reports that resulted helped to shape the Commission’s IP policy and offered meaningful guidance to businesses.

The 2018 Hearings

- Like the 1995 Hearings, we expect these Hearings to help target the Commission’s enforcement and policy efforts for years to come.

¹ U.S. FED. TRADE COMM’N, ANTICIPATING THE 21ST CENTURY: COMPETITION AND CONSUMER PROTECTION POLICY IN THE NEW HIGH-TECH, GLOBAL MARKETPLACE (1996), <https://www.ftc.gov/reports/anticipating-21st-century-competition-consumer-protection-policy-new-high-tech-global>.

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- The Commission has announced six hearing events so far, which will address a swath of issues for antitrust and consumer protection enforcers:
 1. Tomorrow’s hearing will address: Review of Competition and Consumer Protection Landscape; Concentration and Competitiveness in U.S. economy, these two laying some of the foundations for other issues, including the robust critique concerning fundamental tenets of antitrust law; Privacy Regulation. Friday’s now to-be-rescheduled topics were Consumer Welfare Standard in Antitrust and Vertical Mergers;
 2. Later in September, we will address the State of U.S. Antitrust Law; Mergers and Monopsony or Buyer Power;
 3. In mid-October we will explore The Identification and Analysis of Collusive, Exclusionary, and Predatory Conduct by Digital and Technology-Based Platform Businesses; Antitrust Framework for Evaluating Acquisitions of Potential or Nascent Competitors in Digital Marketplaces; Antitrust Evaluation of Labor Markets;
 4. In late October, we will examine Innovation and Intellectual Property;
 5. In early November, we will debate Privacy, Big Data, and Competition; and
 6. In mid-November, we will analyze Algorithms, Artificial Intelligence, and Predictive Analytics.

The Consumer Welfare Standard

- Today, I’d like to draw your attention to one particular topic—namely, the consumer welfare standard. The Commission’s Hearings will explore recent criticisms of the standard, which argue—I’m paraphrasing here—that it facilitates growing corporate concentration and power, blinding enforcers and courts to the threat that growth poses to competitors and democracy.
 - Critics often point to technology platforms, like Google, Amazon, and Facebook—whose size and scope are difficult to overstate—as cases in point for the failure of the legal regime. And they note apparent

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phenomena like industrial concentration and the persistence of markups across the economy.

- But many scholars, economists, and practitioners of antitrust law are skeptical of wholesale change, and it's important to understand why.
- Before the consumer welfare standard was adopted in its current form, those on the left and on the right, from more casual observers to Supreme Court justices, derided antitrust as rudderless, without any clear standard but victory by the government over business.
- Rather than applying a clear rule of decision, courts sought to foster any number of socio-political goals, reaching inconsistent decisions, and often protecting competitors against normal competitive forces. These decisions purported to help the average American (e.g., “small dealers and worthy men”)²—but also acknowledged that the average American consumer would suffer as a result.
 - For instance, in *Brown Shoe Co. v. United States*, the Supreme Court “recognize[d] 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.”³
- This incoherence led to criticisms from the left and the right, including from Supreme Court Justice Stewart, who lamented in *Von’s Grocery* that, “The

² *United States v. Trans-Mo. Freight Ass’n*, 166 U.S. 290, 323 (1897).

³ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

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sole consistency I can find is in litigation under § 7 [of the Clayton Act], the Government always wins.”⁴

- During this time, judges lacked a clear rule of decision and lawyers could not credibly advise clients on M&A decisions. Markets responded (and not well). In part in response to cases like *Utah Pie*, *Brown Shoe*, and *Von’s Grocery*, mergers in the 1960s began to take the shape of conglomerates—a managerial and business disaster reflecting bad M&A strategy and policy.
- Into this breach came concerted efforts from across the political spectrum to define clearly the consumer welfare standard, using economically-coherent criteria.
- Courts and enforcement agencies—along with critical input from scholars, economists, and practitioners—spent the last several decades developing common law to define and hone the consumer welfare standard.
 - A clear rule, oriented to consumers, emerged. It not only considers the prices they pay, but also innovation that benefits them, quality of products and service, and other related factors.
- We need to grapple seriously with this history when we consider the question whether the standard ought to change.
- I want to bracket a related but distinct question: whether current antitrust enforcement is properly calibrated. I expect the Hearings will shed some important insights.

⁴ United States v. Von’s Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

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- But as to the consumer welfare standard itself, from those who seek to change it, there are a number of things I hope to hear:
 1. What are the goals of antitrust, and how are they justified today?
 2. How does today's standard fail these goals?
 3. What is the alternative, and how will it avoid the pitfalls of our earlier regime? Or, if the pitfalls are now worth bearing, why is that so?
 4. How will the alternative apply to conduct we now consider unlawful, either under the rule of reason or the per se rule? For instance, Justice Brandeis was a fan of German cartels and resale price maintenance. What about collusion by small sellers facing a large monopsonist?
 5. Antitrust agencies around the world have embraced the fundamental notion underlying the consumer welfare standard, *i.e.*, that the law is intended to protect competition itself, not competitors. What would be the international implications of changing our standard, and are we comfortable with those?
- I anticipate our Hearings will cover these and other key issues facing antitrust enforcers today.