Response to the
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on The Judiciary
U. S. House of Representatives

by

Timothy J. Muris

GMU Foundation Professor of Law
Antonin Scalia School of Law
George Mason University

Senior Counsel
Sidley Austin LLP

To assist in its investigation of competition in the digital marketplace, the Judiciary Committee has invited me to submit views on topics relevant to that investigation. I am honored to do so. My experience in antitrust spans nearly five decades as a student, professor, scholar, enforcer, expert, consultant, and practitioner. This career began in 1973, as a student at the University of California Los Angeles, School of Law, and I have since served in multiple positions in the government, including at the Federal Trade Commission as Director of both enforcement bureaus—the only person ever to hold both jobs—as well as Chairman from 2001 to 2004.

SUMMARY

This response contains four sections. The first briefly describes my background and explains that, over my long career, I have supported aggressive antitrust enforcement when it would in fact benefit consumers. Besides introducing me to the Committee, this section rebuts recent claims that applying the methodology underlying modern law, known as the consumer welfare standard, prevents an aggressive, pro-consumer Antitrust policy, particularly under Republicans. The two periods when I was most responsible for FTC antitrust enforcement—the mid-1980s and the beginning of this century—were the most active in the last 40 years using the FTC's administrative procedures to attack a wide variety of anticompetitive practices ranging from those in healthcare and in professional associations, to the misuse of the machinery of government to harm competition to preventing anticompetitive increases in energy prices. With respect to a topic of particular interest to the Committee's current work, while I was Chairman the FTC filed four cases alleging single-firm monopolization over three years—an unusually high rate of activity in this very resource-intensive area of the law. For example, in one case, which involved the oil company Unocal, we successfully lowered the gas price at the pump for all California consumers.

We were also aggressive in recognizing that, as my predecessor Bob Pitofsky and I wrote in a joint publication, the FTC involves "more than law enforcement." As an example, after 24 days of hearings culminating in a widely-read 2003 report on competition issues in the patent system, the Commission helped launch bipartisan patent reform. Finally, although outside the Committee's current interest, the Commission's work also includes consumer protection. Here the FTC during my tenure also had many important accomplishments, including creation of the program to attack fraud systematically, extending those efforts internationally and to the Spanish language media within the United States, as well as greatly expanding the FTC's protection of consumer privacy through actions to protect the security of consumers' sensitive data and creation of the National Do Not Call Registry.

The next section addresses the Committee's first two questions concerning the adequacy of existing laws regarding monopolization and anticompetitive transactions. Those questions implicate the heart of the current debate surrounding the recent attacks on how antitrust law has been interpreted and enforced for decades using the consumer welfare standard. That standard, based in sound economic analysis, and its companion holding by American courts that the purpose of antitrust law is to protect consumers, not competitors, has been crucial to avoiding the many mistakes of antitrust's past—especially a "big is bad" animus that too often lead the law and agencies astray. Because today's critics ignore the mistakes of that past, I discuss them here, and especially how the protection of competitors and not competition, as reflected in the

Robinson-Patman Act ("RPA"), not only proved to be one of the worst mistakes in antitrust's history, but also how RPA and the Justice Department's long war against the then largest retailer in America, the Great Atlantic and Pacific Tea Company (A&P), poisoned antitrust for decades to the great detriment of American consumers. Sensible application of the consumer welfare standard would have avoided those catastrophes.

Today's critics base much of their hostility to the consumer welfare standard, and to the long-standing antitrust consensus that they seek to overthrow, on the claim that those associated with the University of Chicago seized control of antitrust law and remade it in the image of their particular economic ideas. The next section shows that such arguments are bogus: many of the scholars who first helped antitrust escape the fallacies of the RPA and the associated crusade against A&P, although dedicated to the same pro-consumer use of economics that the consumer welfare standard demands, were not members of the so-called "Chicago school." On the contrary, numerous scholars associated with Harvard, most notably Professor Phillip Areeda—the original author of the leading Antitrust treatise—and Supreme Court Justice Stephen Breyer have been at least as influential as those affiliated with Chicago in the development of antitrust law under the consumer welfare standard.

Finally, the Committee asks about agency resources and performance. The last section below briefly addresses the continual need for the antitrust agencies to address business practices as they evolve, as well as their own performance record. Such evaluation is necessary: ever a UCLA Bruin, I remain devoted to legendary coach John Wooden's maxim that "when you are through learning, you are through." The section thus offers multiple examples of successful and bipartisan FTC efforts to improve enforcement to the benefit of consumers. In the key healthcare sector, American consumers continue to benefit from the FTC's hard work. After losing seven consecutive hospital merger challenges before I arrived, upon my direction the FTC worked to devise a new enforcement plan by incorporating fresh economic thinking and issuing retrospective case studies showing that several hospital mergers had indeed harmed consumers. This plan resulted in a successful challenge to a consummated hospital merger that served as a template for future enforcement, leading to Obama administration victories in three separate courts of appeal endorsing the FTC's approach. Such success did not require abandonment of the consumer welfare standard, nor a dramatic increase in agency resources. Indeed, as discussed below, my predecessor as FTC chairman, Bob Pitofsky, did much more for American consumers using the consumer welfare standard with just 1,000 staff than did the agency in the 1970s when it had far greater resources (1,800 staff by the turn of the decade), but was motivated by an antitrust policy that was, instead, at war with itself.

MY BACKGROUND

Besides introducing my Antitrust career, this section contradicts the claims that working within the consumer welfare standard prevents aggressive, pro consumer Antitrust policy. Here, and in the last section below, I document many of the pro-consumer, bipartisan accomplishments of modern Antitrust.

My lifelong association with antitrust began in 1973 when I first studied the law and accepted, on Thanksgiving Eve, an offer from my Antitrust professor at UCLA and my first mentor, Jim Liebeler, to assist him in his newly received appointment as Director of the FTC's

Office of Policy Planning and Evaluation.[1] I began an internship at the FTC's Los Angeles Regional Office in January of the next year and, upon graduation and taking the bar examination, moved to its Washington, DC, headquarters in August. Although small, the Office had a role in evaluating all of the agency's Antitrust matters, and also helped launch the FTC's first successful foray into the studying of, and enforcement in, the professions. Two years later, I began my first academic appointment, residing jointly in the Law School and the Law & Economics Center at the University of Miami. Over the next four and a half years I taught classes and worked on considerable scholarship, including a joint book published in 1981 by Cambridge University Press about the wrong turn the FTC's antitrust and consumer protection policies had taken in the 1970s and the requisite need for reform.[2]

After working for President Reagan's transition team, primarily involving FTC issues and staffing, I spent seven years in his Administration across four different positions, two of them at the FTC under Chairman Jim Miller, where I was first Director of the FTC's Bureau of Consumer Protection, then Director of its Bureau of Competition. While I was in the latter role, the FTC pursued an aggressive agenda against anti-consumer conduct, including prosecuting three cases that ultimately required intervention of the Supreme Court to succeed,[3] requiring consent agreements to resolve the then largest oil mergers in history,[4] evaluating the historic General Motors/Toyota joint venture,[5] and expanding the program of studying and criticizing anti-competitive state and federal regulation.[6] We also began the Commission's long-standing effort, discussed in more detail below, to construe appropriately certain judicial doctrines regarding state action when businesses use the government to harm consumers. For example, we successfully sued the title insurance industry in several states for misusing state regulation to harm consumers[7] and U-Haul for misusing the bankruptcy proceeding of its most significant competitor to harm that competitor's ability to compete in the future.[8] We were also aggressive

[1] My resume follows the response.
[2] The 1981 book was THE FEDERAL TRADE COMMISSION SINCE 1970: ECONOMIC REGULATION & BUREAUCRATIC BEHAVIOR (Kenneth W. Clarkson & Timothy J. Muris eds., 1981). I have continued to write extensively about the consumer welfare standard and the economic analysis underlying it. *See, e.g.*, Timothy J. Muris & Jonathan E. Nuechterlein, *Chicago and Its Discontents*, 87 U. CHI. L. REV. 495 (2020) [hereinafter *Muris & Nuechterlein, Chicago*]; Timothy J. Muris, *Will the FTC's Success Continue*, 26 GEO. MASON L. REV. 1411 (2019); Timothy J. Muris & Jonathan E. Nuechterlein, *Antitrust in the Internet Era: The Legacy of* United States v. A&P, 54 REV. INDUS. ORG. 651 (2019) [hereinafter Muris & Nuechterlein, *A&P*]; Timothy J. Muris, *Improving the Economic Foundations of Competition Policy*, 12 GEO. MASON L. REV. 1 (2003); Timothy J. Muris, *Economics and Antitrust*, 5 GEO. MASON L. REV. 303 (1997).
[3] *See* FTC v. Ind. Fed'n of Dentists, 476 U.S. 447 (1986); FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990); FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) (the state action issues raised in this case are discussed in the last section below).
[4] *See, e.g.*, Chevron Corp., 104 F.T.C. 597 (1984) (consent order).
[5] *See* Gen. Motors Corp., 103 F.T.C. 374 (1984) (consent order). The order was ultimately set aside in Gen. Motors Corp., 116 F.T.C. 1276 (1993).
[6] These restraints included overly restrictive taxicab regulation, *see* City of New Orleans, 105 F.T.C. 1 (1985); City of Minneapolis, 105 F.T.C. 304 (1985), as well as numerous cases against restraints harmful to consumers by professional and other associations.
[7] *Ticor Title Ins. Co.*, 504 U.S. 621.
[8] The FTC's complaint alleged that U-Haul and its parent AMERCO attempted to monopolize the market for rental moving equipment by engaging in sham litigation against a competitor, Jartran, in a Chapter 11 reorganization proceeding. The complaint alleged that U-Haul's conduct in the bankruptcy was a sham because it was "intended primarily to delay or prevent Jartran's reorganization as a competitor." Although U-Haul was a creditor of Jartran, in

in improving legal doctrine, perhaps most notably in moving the law away from the bifurcated per se/rule of reason analytical framework to a more multifaceted and nuanced (and, in some cases, plaintiff friendly) approach.[9]

After leaving the Competition Bureau in 1985, I returned to the Executive Office of the President for the next two and a half years to serve in the Office of Management and Budget, before departing the Administration to the position I retain today, as a chaired professor in the George Mason University School of Law (now named after the late Justice Antonin Scalia, a long-standing friend who did me the honor of swearing me in as FTC Chairman in 2001). While at GMU, I was a member of the American Bar Association's Antitrust Section's second Kirkpatrick Commission to study the Federal Trade Commission led by Jim Rill,[10] later an outstanding Assistant Attorney General for the Antitrust Division. Bob Pitofsky was also on that Commission, and working together we realized how much our views on the proper role of the FTC overlapped, as reflected in the ABA report.[11] I continued to write widely about Antitrust and other topics, in total publishing well over 100 books, monographs, articles, and shorter pieces about antitrust, consumer protection, budgetary issues, regulation, and other topics.

After working as an economic adviser to the Bush-Cheney campaign and then on the budget transition team, I became Chairman of the FTC in June, 2001. Our antitrust enforcement, spearheaded by the excellent work of current FTC Chairman Joe Simons as Director of the Bureau of Competition, was comprehensive, significant, and effective.[12] In particular, building on the excellent record of our predecessors, we expanded their work in the pharmaceutical industry to other areas of healthcare. (Because the merger wave of the 1990s had subsided, we had some opportunities our predecessors lacked.) Furthermore, as in the 1980s, business misuse of government was an area of emphasis, as well as cases involving the professions, unreported consummated mergers, and other basic restraints among competitors that harmed consumers. Perhaps of note to the interests of this Committee, the Commission filed four cases alleging unlawful monopolization while I was Chairman—an unusually high number in this resource-

the Chapter 11 proceeding U-Haul acted as a competitor, not as a creditor. AMERCO, 109 F.T.C. 135, 137 (1987) (Complaint ¶ 19). The Commission settled the case. *Id.*

[9] *See* Brief for the United States as Amicus Curiae in Support of Affirmance, Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla., 468 U.S. 85 (1984) (No. 83-271). Four years after the *NCAA* brief, the Commission provided a basic structure for truncated analysis in Massachusetts Board of Registration in Optometry, 110 F.T.C. 549 (1988), which it later modified in 2003 in Polygram Holding, Inc., 136 F.T.C. 310 (2003), *aff'd sub nom.* Polygram Holding, Inc. v. FTC, 416 F.3d 29 (D.C. Cir. 2005), in an opinion I authored while Chairman.

[10] Timothy J. Muris, *The Kirkpatrick Commission: Antitrust Issues*, 58 ANTITRUST L.J. 25 (1989).

[11] *See* Timothy J. Muris, *More Than Law Enforcement: The FTC's Many Tools – A Conversation with Tim Muris and Bob Pitofsky*, 72 ANTITRUST L.J. 773 (2005). This article is the edited version of the original conversation at the FTC 90th Anniversary Symposium (Sept. 22, 2004), transcript *available at* http://www.ftc.gov/ftc/history/transcripts/040922transcript003.pdf. For a discussion of Pitofsky's outstanding contributions, see *Timothy J. Muris, Robert Pitofsky; Public Servant and Scholar 52* Case W. Res. L. Rev. 25 (2001)

[12] For a discussion of many of these efforts, see Timothy J. Muris, *Looking Forward: The Federal Trade Commission and the Future Development of U.S. Competition Policy*, 2 COLUM. BUS. L. REV. 359 (2003). *See also* Jonathan B. Baker, *Turning on Itself*, NEW REPUBLIC (Sept. 15, 2008), https://newrepublic.com/article/63428/turning-itself; Thomas B. Leary, *The Muris Legacy*, THE ANTITRUST SOURCE 1 (Nov. 2004).

intensive area of the law—with two involving healthcare,[13] one the abuse of intellectual property,[14] and the *Unocal* case discussed above.[15]

Our non-case agenda was of particular importance, with various initiatives laying the foundation for future challenges. The last section below discusses some of these efforts, including in hospital mergers as well as analysis of the so-called state action doctrine, under which states can immunize certain anticompetitive business practices under limited circumstances. The FTC also used all of its many and diverse tools during this time to promote pharmaceutical competition, and produced a lengthy study of patents that, coupled with a similar report a year later from the National Academy of Sciences, helped launch bipartisan patent reform.[16] This work was accomplished with the talented staff of the FTC and with almost always unanimous support of a bipartisan Commission determined to work within, and support, the consumer welfare standard. Since leaving the FTC, I have continued to teach, write, and, as I have since 1989, been affiliated with a law firm advising clients, currently as Senior Counsel at Sidley Austin LLP.

<u>THOSE WHO IGNORE HISTORY RISK REPEATING ITS MISTAKES</u>

For decades, antitrust enjoyed bipartisan cooperation and wide support in the academy, the courts, and the legal profession. Although disagreements arose in close cases, widespread agreement existed that antitrust should protect consumers, that economic analysis should guide case selection, and that horizontal cases, both mergers and agreements among competitors, were the mainstays of enforcement.[17] Under this view antitrust law is an important pillar of our economy. A freely functioning market, subject to antitrust and other rules of the road, provides maximum consumer benefits. Antitrust law, in effect, competes with other forms of regulation, making most direct regulation unnecessary. Antitrust is not intrusive and prescribes neither command-and-control regulation nor detailed rules of conduct. The methodology underlying

---

[13] *See* Decision and Order, Biovail Corp., No. 0110094 (Oct. 2, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/10/biovaildo.pdf; Agreement Containing Consent Order, Bristol-Myers Squibb Co., No. 0110046 (Mar. 7, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/03/bristolmyersconsent.pdf; Final Judgment, FTC v. Bristol-Myers Squibb Co., No. 1:09-cv-00576-EGS (D.D.C. filed Apr. 1, 2009) (enforcing the 2003 consent order), https://www.ftc.gov/sites/default/files/documents/cases/2009/03/090327bristolmyersjdgmt.pdf.

[14] Complaint, Rambus Inc., No. 0110017 (June 18, 2002), https://www.ftc.gov/sites/default/files/documents/cases/2002/06/020618admincmp.pdf. The Commission ultimately lost this case. *See* Rambus Inc. v. FTC, 522 F.3d 456 (D.C. Cir. 2008).

[15] Complaint, Union Oil Co. of Cal., No. 0110214 (Mar. 4, 2003), https://www.ftc.gov/sites/default/files/documents/cases/2003/03/030304unocaladmincmplt.pdf. *See also* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 478 (2003). A surprising statistic is that in the last twenty years the Antitrust Division has largely abandoned monopolization cases against single firms with only one such action.

[16] *See* FED. TRADE COMM'N, TO PROMOTE INNOVATION: THE PROPER BALANCE OF COMPETITION AND PATENT LAW AND POLICY (2003); NAT'L RESEARCH COUNCIL, NAT'L ACADS. OF SCIS., ENG'G, & MED., A PATENT SYSTEM FOR THE 21ST CENTURY (Stephen A. Merrill, Richard C. Levin & Mark B. Myers eds., 2004). As this complex area evolves, I have continued to highlight the importance of sound antitrust enforcement to protect innovation. *See* Timothy J. Muris, *Bipartisan Patent Reform and Competition Policy*, AM. ENTER. INST. (May 2017).

[17] *See* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. ECON. PERSP. 43 (2000). Cases against individual firms under section 2 of the Sherman Act, although important, resource intensive, and often highly publicized, constitute only a small percentage of total cases filed.

modern antitrust, focusing on the well-being of consumers and applying rigorous economic analysis, has come to be known as the "consumer welfare standard."

Recently, critics from both the right and left claim that, because modern antitrust doctrine, rooted in consumer welfare, cannot meet the challenges of the twenty-first century economy, antitrust must change.[18] While myriad, these proposals to overhaul antitrust doctrine share a few key attributes. *First*, advocates of this radical change express nostalgia for how pre-1980s antitrust appeared to have no clear objectives or rigorous legal guidelines, and cases were often decided on impressionistic notions of "fairness," including protection of competitors. *Second*, the adherents of such proposals typically argue that so-called "tech giants need to be cut down to size, immediately," because they are "killing competitors and other industries" and are poised to "destroy … democracy itself."[19] *Third*, critics identify the modern antitrust consensus with "the Chicago School," which they lampoon and excoriate for its "new goal … to promote the 'welfare' of the 'consumer'" "rather than protect the 'opportunity' of the citizen producer."[20]

Regarding the first two attributes, the emphasis of the current critics on the highly successful tech companies is odd.[21] Any distinction between physical and digital or tech companies is increasingly meaningless. New technologies such as cloud computing, machine learning, and robotics are diffusing throughout the economy in both "new" and "old" industries. Moreover, the highly successful companies we associate with Silicon Valley that have transformed our lives for the better, and are helping us daily through the COVID-19 pandemic, have different positions in the market. Some have large shares, the necessary (but not sufficient) prerequisite for antitrust concern, while others lack such dominance in properly defined antitrust markets of interest.

Crucially, we have travelled the critic's road before, with disastrous consequences for consumers and our economy. To begin understanding why the current critiques fail, Justice Holmes' remark that "a page of history is indeed worth a volume of logic" is especially apt. Important government officials of the 1970s used rhetoric strikingly similar to that of today's critics. In language reminiscent of the modern calls to protect the "opportunity of the citizen producer," quoted above, FTC Chairman Michael Pertschuck in 1977 decried the "failure of competition policy to come to terms with the effects of very large institutions on the quality of life."[22] Pertschuck also specifically called for halting "conglomerate mergers whose effects tend to increase macroconcentration, but which have no identifiable anticompetitive effect in any one

---

[18] *See, e.g.*, Tim Wu, *After Consumer Welfare, Now What? The "Protection of Competition" Standard in Practice*, CPI ANTITRUST CHRON. (Apr. 2018); Lina Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017); Marshall Steinbaum, *The Consumer Welfare Standard Is an Outdated Holdover from a Discredited Economic Theory*, ROOSEVELT INST., Dec. 11, 2017; Daniel Kishi, *Time for a Conservative Anti-Monopoly Movement*, AM. CONSERVATIVE, Sept. 19, 2017.

[19] Heather Timmons, *The Tiny, Passionate Group Battling Google, Facebook, and Amazon's Grip on US Minds and Wallets*, QUARTZ, Nov. 16, 2017.

[20] Barry C. Lynn, *No Free Parking for Monopoly Players: Time to Revive Anti-Trust Law*, NATION, June 8, 2011.

[21] *See* Muris & Nuechterlein, *A&P*, *supra* note 2, at 652-53.

[22] William E. Kovacic, *"Competition Policy in Its Broadest Sense:" Michael Pertschuk's Chairmanship of the Federal Trade Commission 1977-1981*, 60 WM. & MARY L. REV. 1269, 1298 (2019) (quoting Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools 3 (Dec. 27, 1977)).

product and geographic market."[23] Similarly, as Jon Nuechterlein and I have documented, today's heated rhetoric is eerily reminiscent of that of the 1930s and '40s that gave rise to the misguided RPA, spurred by attacks on the then largest retailer in the United States, the Great Atlantic & Pacific Tea Company ("A&P").[24]

The Misguided War on America's Largest Retailer

Before Wal-Mart and Amazon, another company used scale, vertical integration, and innovation to transform retailing, becoming America's largest retailer for forty years by giving consumers a wider range of products than the competition, at lower prices, prompting calls for radical changes to the antitrust laws. That company was the now-defunct Great Atlantic and Pacific Tea Company, or A&P to those who remember it. The A&P grocery chain was a vertically integrated retailer that made use of data, unprecedented scale, and innovation to offer consumers a wider range of products than the competition and at lower prices. Not only did A&P pioneer the large retail chain and later the supermarket, but it also brought enormous benefits to consumers—especially the less affluent—through lower prices, greater variety, and opportunities for improved nutrition. A&P was such a fixture in mid-twentieth-century America that the young John Updike used an A&P store as the setting for his iconic short story of that name.[25]

The first wave of government intervention came via state and federal taxes that were imposed only on chain stores like A&P, a transparent effort to stabilize the profit margins of smaller and less efficient stores. A second and longer-lasting attack on chain stores was the RPA of 1936, originally and more descriptively entitled "the Wholesale Grocer's Protection Act."[26] Reacting to the success of A&P and other chains, the Act imposes a general prohibition on selling "commodities of like grade and quality" at different prices to different buyers, subject to various exceptions. The main effect of the Act on A&P and other chain stores was to limit them from obtaining goods at lower wholesale prices than their smaller competitors and thus from passing the savings along to consumers. Before the mid-1970s, no one could call himself a competent antitrust lawyer unless he could advise clients on the intricacies of RPA doctrine. Indeed, nearly two-thirds of the FTC's non-merger antitrust agenda consisted of RPA cases and investigations—hundreds of them in the 1950s and 1960s.[27] From the start, the RPA was a poorly conceived attempt to discipline A&P in the name of "fairness" that harmed consumers.

This was not the conclusion of "conservative economics." As Chief Judge Diane Wood (appointed by President Clinton) explained for the Seventh Circuit Court of Appeals in 2016, the RPA's "fit with … antitrust policy is awkward, as it was principally designed to protect small businesses" at the expense of consumers.[28] Indeed, a future FTC Chairman in the Clinton administration, Robert Pitofsky, as an NYU professor and staff author of the widely praised 1969 ABA Report, condemned the FTC's RPA enforcement policies for protecting small companies

[23] *Id.* at 1302 (quoting Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the Annual Meeting of the Section on Antitrust and Economic Regulation of the Association of American Law Schools 14 (Dec. 27, 1977)).
[24] Muris & Nuechterlein, *A&P*, *supra* note 2.
[25] John Updike, *A & P*, NEW YORKER, July 22, 1961, at 22.
[26] *See* Hugh Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1123 (1983).
[27] *See* D. Daniel Sokol, *Analyzing Robsinon-Patman*, 83 Geo. Wash. L. Rev. 2064, 2071-73 (2015).
[28] Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 746 (7th Cir. 2016).

against larger, lower cost firms and for "equat[ing] injury to a particular competitor with injury to the competitive process."[29] Although decades of such withering criticism ultimately led the government to suspend RPA enforcement[30] and led courts to use the Act's ambiguity to limit its harm,[31] the Act had a highly pernicious effect on antitrust law—not only because it was aggressively enforced in its own right for decades, but also because its big-is-bad rationale infected how enforcers and courts conceptualized antitrust law in general.

If "[t]hose who cannot remember the past are condemned to repeat it,"[32] these results of heeding antitrust populism should be remembered—today more than ever—as a cautionary tale of what can happen when antitrust is untethered from the economically rigorous focus on consumer welfare. Already burdened by the RPA and anti-chain taxation laws,[33] in 1944 the A&P and its key executives were indicted for criminal violations of the Sherman Act. After a lengthy bench trial, a federal district court convicted all defendants, and the court of appeals affirmed. The convictions rested on vague assertions that A&P had priced below obscure accounting measures of cost in various product lines and geographic areas and thereby committed a form of predatory pricing, a tactic to drive competitors from the geographic market and then raise retail prices to monopoly levels. The government further argued that, because A&P forced suppliers to give it deep discounts, those suppliers compensated through price increases to other grocers, so that, as the government claimed, "[t]he consumers who buy food in stores competing with A&P pay part of the low cost of A&P's operations."[34] The prosecution and the district court also attacked A&P for vertically integrating into food production and distribution, with the district court being particularly offended that one A&P affiliate—the Atlantic Commission Company ("Acco")—operated as A&P's purchasing agent for fresh produce and sold to third-party grocery stores whatever A&P's retail stores did not need—typically at higher (*i.e.* market) prices than Acco paid.

The clear anti-consumer nature of the DOJ's crusade against the A&P produced important, contemporaneous criticism. MIT professor Morris Adelman concluded that the DOJ's prosecution of A&P was an "attempt … to infuse the Robinson-Patman Act into the Sherman Act," along with all of its "hostility to price competition, the yearning for secure entrepreneurial status, [and] the envy of and hate of the small businessman for big business."[35] Regarding the predatory pricing claim, Adelman explained that "[n]o reasonable and prudent A&P management would have incurred losses to drive out competition because it would have been impossible to claim the pay-off," as "[e]ntry into the food trade was so cheap and easy that any attempt to raise prices would immediately have resurrected competition."[36] The buyer power claim was similarly spurious, because its theory of consumer harm nonsensically "implies

---

[29] *See* REPORT OF THE AMERICAN BAR ASSOCIATION COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 67 (1969) (Robert Pitofsky, ABA Commission Counsel).
[30] *See* Sokol, *supra* note 27, at 2074-76. *See also* Kovacic, *supra* note 15, at 478.
[31] *See, e.g.*, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 180-81 (2006).
[32] 1 GEORGE SANTAYANA, THE LIFE OF REASON 284 (1905).
[33] These were a transparent effort to prop up the profit margins of smaller and less efficient stores. Marc Levinson, *Monopoly in Chains: Antitrust and the Great A&P*, 12 CPI ANTITRUST CHRON. 2, 4 (2011).
[34] MARC LEVINSON, THE GREAT A&P AND THE STRUGGLE FOR SMALL BUSINESS IN AMERICA 231 (2011).
[35] M.A ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY 17 (Harvard 1959) [hereinafter ADELMAN, A&P STUDY]. Adelman's book level treatment of *A&P* developed from his initial analysis of the case in Morris A. Adelman, *The A&P Case*, 63 Q.J. ECON. 283 (1949).
[36] ADELMAN, A&P STUDY, *supra* note 35, at 14.

that manufacturers met their profit targets by raising prices to other stores to compensate for their price breaks to A&P. But why would manufacturers have charged other retailers less if only A&P had paid more?"[37] Finally, at no point did the critics explain why Acco's "multiple roles" posed an actual competitive problem, as third-party grocery stores presumably bought from Acco only when its prices were competitive with those of the many other suppliers in the market.[38]

To add insult to injury, having secured the convictions, DOJ filed yet *another* case against the A&P, this time to dismantle the largest and most innovative retailer in American history.[39] That case was settled,[40] but only after the long war of attrition against A&P had led the company to concentrate on fending off the government, while new retailers—not so burdened—ultimately eclipsed it.[41]

The upshot of the A&P saga should be simple. We prefer competitive markets. But that is the easy part. The crucial question is how to determine when business conduct deviates from that ideal and should be prohibited. The critics, new or old, provides no answer. The contribution of economics is essential—that is, using economics as a key part of what has come to be known as the modern consumer welfare standard. Under that standard, the catastrophe of RPA and the misguided attacks on A&P would never have occurred. Yet the new critics propose to repeat these mistakes. Because many of today's critics mistakenly conflate this economic analysis with the claim that a narrow, conservative view they associate with the University of Chicago, I turn next to this allegation.

THE MISUNDERSTOOD ROLE OF THE CHICAGO SCHOOL

As discussed above, for decades, a wide, bipartisan consensus held that antitrust law should focus on the welfare of consumers, guided by economic analysis. For example, Carl Shapiro—the top antitrust economist in the Obama and Clinton Justice Departments—warns: "[L]et us avoid a 'big is bad' mentality and let us truly have the interests of consumers in mind. We learned long ago that proper antitrust enforcement is about protecting consumers, and protecting the competitive process, not about protecting competitors. We must not forget that guiding principle."[42]

The Critics Ignore the Role of Harvard and Other non-Chicago Scholars

Today, critics of this consensus not only ignore history's lessons in wanting to overturn them, but they also err when they claim the modern approach to antitrust enforcement is the result of "a small crew within the Reagan administration" who "set out to clear the way for a radical reconcentration of power"[43] that represented a unique "Chicago School" of antitrust analysis. Yet, consistent with the widespread support it has enjoyed, the commitment to

---

[37] LEVINSON, *supra* note 34, at 231.
[38] *Id.* at 230-31 (2011) (noting that Acco "sales to buyers other than A&P came to a mere 3 percent of U.S. grower's total produce sales").
[39] *See* Muris & Nuechterlein, *A&P*, *supra* note 2, at 663.
[40] In exchange for the government's agreement to drop the suit, A&P agreed to close Acco. *See* LEVINSON, *supra* note 34, at 249.
[41] *See* Muris & Nuechterlein, *A&P*, *supra* note 2, at 663-64.
[42] Carl Shapiro, *Antitrust in a Time of Populism*, 61 INT'L J. INDUS. ORG. 714, 742 (2017).
[43] Lynn, *supra* note 20. For a fuller discussion of those issues, see Muris & Nuechterlein, Chicago, supra note 2.

economic rigor and consumer welfare has always transcended any particular "school" of antitrust analysis. The hallmarks of the consumer welfare standard—that antitrust should address only harm to competition rather than mere harm to competitors; that harm to competition *means* harm to consumer interests—did not even originate at Chicago. These concerpts appeared prominently in critiques of the RPA and of the misguided attacks on A&P as early as the 1940s and through the next two decades by non-Chicago Scholars including Donald Turner,[44] Frederick Rowe,[45] Morris Adelman,[46] and Robert Pitofsky.[47] Indeed, these scholars often criticized members of the Chicago School on individual issues of doctrine.

Today's attacks on the Chicago School almost invariably ignore the equal if not greater influence of scholars from Harvard—Areeda, Turner, Breyer, and others—on the development of modern antitrust law. For example, Areeda and Turner's landmark 1975 article on predatory pricing helped delimit for generations of antitrust courts and practitioners the narrow economic circumstances in which price cuts could harm consumers and thus should be prohibited.[48] Few law review articles have been as influential on antitrust doctrine. The article was essential to protect consumers from the attacks on low prices exemplified by the RPA and the attacks on A&P that the 1967 Supreme Court's *Utah Pie*[49] decision had reinvigorated.[50]

In that case, multiple national frozen pie companies had selectively lowered prices in Salt Lake City to compete more effectively against Utah Pie, a local company that controlled nearly two-thirds of the local market.[51] None of these competitors plausibly hoped to gain more than a minority share of this market; still less could any of them expect to drive the other competitors from that market and then raise prices to monopoly levels. The Supreme Court nonetheless upheld jury verdicts against the national pie companies because they had selectively lowered prices in Utah, but not elsewhere.[52] That tactic, the Court believed, was unduly hard on the local family-operated incumbent, with "only 18 employees."[53] The Court concluded that antitrust should protect such small companies, even those with high market shares, from the "financial

[44] Note, *Trouble Begins in the "New" Sherman Act: The Perplexing Story of the A&P Case*¸ 58 YALE L.J. 969 (1949).
[45] *See* Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1060 (1957).
[46] *See* ADELMAN, A&P STUDY, *supra* note 35, at 160-79.
[47] *See* ABA COMMISSION REPORT, *supra* note 29, at 67-68.
[48] Phillip E. Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). Most antitrust scholars agree that harmful predatory pricing, though rare, is possible. Current antitrust doctrine already captures the circumstances in which liability for predatory pricing makes sense. Antitrust cannot be revised to prohibit low prices that current legal doctrine does not already capture without consumer harm in both the short term (discounts are eliminated) and long term (large firms are necessarily reluctant to reduce prices). As explained by now Justice Stephen Breyer, "a price cut that ends up with a price exceeding total cost … is almost certainly moving price in the 'right' direction (towards the level that would be set in a competitive marketplace). The antitrust laws very rarely reject such beneficial 'birds in hand' for the sake of more speculative (future low-price) 'birds in the bush.'" Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (Breyer, J.).
[49] Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685 (1967).
[50] Modern populists appear to want a return to such doctrine. *See generally* Khan, *supra* note 18.
[51] 386 U.S. at 689-91.
[52] *Id.* at 694-701.
[53] *Id.* at 689.

pinch" they feel when selective price-cutting by larger competitors forces them to "reduce [their] price[s] to a new all-time low in a market of declining prices."[54]

Although largely abandoning the RPA in the 1970s, the FTC nevertheless sought to apply *Utah Pie*, with alleged predatory pricing by General Foods ("GF") against Proctor & Gamble ("P&G") one of the most prominent cases. P&G, then the most feared marketer of consumer goods in the world, had purchased the strongest western coffee brand, Folgers, which it sought to expand nationwide. When it entered the heartland of the strongest eastern firm, GF's Maxwell House, an all-out price war erupted, to the enormous benefit of consumers. The FTC sued GF for *responding competitively* to P&G's entry,[55] and the staff originally proposed the truly extraordinary remedy of mandatory trademark licensing, ignoring the adverse effects on consumers of diluting GF's property rights. The Commission rejected that remedy, but sued GF in 1976 after an internal staff struggle requiring four formal Commission meetings. Only after an eight-year battle did the Reagan era Commission reject the complaint in 1984.[56]

In the 1980s, the federal courts also protected consumers from the agressive approach to predatory pricing and embraced Areeda and Turner's economic analysis. The First Circuit's *Barry Wright Corp. v. ITT Grinnell Corp.*[57] decision in 1983—authored by then-Judge Stephen Breyer—noted the "general agreement that a profit-maximizing firm might . . . engage in predatory pricing . . . if it knows (1) that it can cut prices deeply enough to outlast and to drive away all competitors, and (2) that it can then raise prices high enough to recoup lost profits."[58] And it was Breyer's approach that the Supreme Court would later affirm in *Brooke Group*, widely condemned by critics today, which essentially enshrines the 1975 article of Areeda and Turner—who had served as DOJ antitrust chief in the economically liberal Johnson administration.

Breyer himself was an antitrust professor at Harvard when he was appointed to the First Circuit in 1980, and antitrust's current critics ignore his subsequent judicial role. Under their narrative, "a small crew within the Reagan administration" reshaped antitrust by installing Bork and other Chicago School conservatives in the federal judiciary.[59] But judicial decisions tell a different story. As Professor Kovacic notes, "no judge voted more consistently for defendants or authored opinions with greater impact in narrowing the zone of antitrust liability than Stephen Breyer, a Carter appointee and former colleague of Areeda and Turner at Harvard. As a court of appeals judge, Justice Breyer was instrumental in setting doctrinal trends often ascribed to the influence of the Chicago School."[60]

Breyer's crucial role is instructive for multiple reasons. First, he is yet another major figure whom no one would associate with the Chicago School yet is just as committed as

[54] *Id.* at 699-700.
[55] *See* Gen. Foods Corp., 103 F.T.C. 204, 207-08 (1984). As an Assistant to the Director of the FTC's Office of Policy Planning and Evaluation from 1974 to 1976, I worked in opposition to the case.
[56] *Id.* at 373.
[57] 724 F.2d 227 (1st Cir. 1983).
[58] *Id.* at 231-32 (citing Areeda & Turner, *supra* note 48, at 698-99).
[59] Lynn, *supra* note 20.
[60] William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 COLUM. BUS. L. REV. 1, 8.

Chicagoans to the centrality of consumer welfare and rigorous economics in antitrust analysis. Second, current condemnation of antitrust doctrine ignores him, presumably because it is easier to demonize a conservative like Bork than a liberal like Breyer. Third, Breyer's jurisprudence reminds us that antitrust defies easy partisan labels. Rigorous analysis can lead the liberal Breyer to oppose antitrust intervention in close cases. So too it can lead conservatives to support antitrust intervention in ways that can surprise nonlawyers, as when DOJ antitrust chief and leading Chicago scholar Bill Baxter successfully dismantled AT&T in the Reagan administration[61] and law-and-economics professors and Reagan appointees Judges Douglas Ginsburg and Stephen Williams found Microsoft liable for monopolization in 2001.[62]

Breyer himself was heavily influenced by Professor Areeda, whose influence stretched well beyond his 1975 article. Indeed, no serious account of U.S. antitrust law can ignore the enormous influence of the definitive antitrust treatise that Areeda and Turner first issued in 1978, now, in its fourth edition, authored by Professor Hovenkamp.[63] Of particular note is the Supreme Court's decision in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*[64]—another target of the new critics—when that Court cited the treatise for its central holding that "essential facility claims should … be denied where a state or federal agency has effective power to compel sharing and to regulate its scope and terms."[65] In fact, in reiterating that the Court has never recognized an essential facilities doctrine, the Court cited Justice Breyer's opinion in *AT & T Corp. v. Iowa Utilities Board*,[66] with the same conclusion.[67] The rationale, then, for what many attack as conservative economics, comes from academics with no roots in the Chicago School.

Chicago and Deconcentration

Of course, scholars associated with Chicago have had crucial roles in the development of antitrust law and policy. No more significant example exists than the debate over concentration. Through the mid-1970s, most antitrust lawyers and industrial organization economists believed that even modest concentration was harmful. Major support for the deconcentration approach advocated by today's antitrust critics once came from statistical analyses of the relationship between market structure and measures of "performance" (the so called "structure-conduct-performance" or "SCP" paradigm), as numerous studies had shown that firms in concentrated industries earned higher (accounting) profits, and many critics used these studies to condemn even modest concentration.[68] This hostility towards concentration had a profound impact on antitrust. Merger policy, ranging from the relatively sophisticated view of *Philadelphia National*

---

[61] *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131, 170 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).
[62] *See* United States v. Microsoft Corp., 253 F.3d 34, 44, 51 (D.C. Cir. 2001) (en banc) (per curiam).
[63] *See generally* 1-3 PHILLIP E. AREEDA & DONALD F. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (Little, Brown & Co. 1978).
[64] 540 U.S. 398 (2003).
[65] *Id.* at 411 (citing P. Areeda & H. Hovenkamp, Antitrust Law, p. 150, 773e (2003 Supp.)).
[66] 525 U.S. 366 (1999).
[67] *Id.* at 428.
[68] These studies and the concentration debate are summarized in INDUSTRIAL CONCENTRATION: THE NEW LEARNING (Harvey J. Goldschmid et al. eds., 1974).

Bank[69] to the simplistic anti-concentration conclusion of *Von's Grocery*,[70] was biased toward preventing even slight increases in concentration in even modestly concentrated industries. Moreover, the government launched a determined, mostly misguided, effort to deconcentrate large sectors of the American economy. And many economists, public officials, and legislators supported new laws and doctrines to dismantle many corporations into smaller units.[71]

Perhaps the most important scholarship refuting this paradigm was that of Harold Demsetz. For the sake of argument, he accepted as true the widely held belief that large firms in concentrated industries earned higher rates of return. If the reason was market power exercised through higher prices as the deconcentration proponents argued, he hypothesized, then smaller firms in concentrated industries should earn higher returns than smaller firms in unconcentrated industries, because the smaller firms in concentrated industries would benefit from the lack of competition. If the larger firms in concentrated industries were more profitable because they were more efficient, however, than smaller firms in concentrated industries, who lack the efficiency of their larger brethren, would not have higher profits than smaller firms in unconcentrated industries. In fact, the evidence supported the efficiency hypothesis, and the concentration emperor was found to be without clothes.[72]

Unfortunately, the government had to be forced to apply Demsetz's insights. From 1970 to 1976, the FTC won 21 of 23 antitrust cases heard in federal court; but from 1977 to 1983, it won only 13 of 35, including eight out of 22 in merger cases.[73] Those are shocking statistics. The academy changed, the courts followed, and finally the government caught up after its defeats in court and the change in Presidential administrations.

History, it seems, is raising similar issues, as the very debate decided decades ago has re-emerged, as reflected in Thomas Philippon's 2019 book *The Great Reversal: How America Gave Up on Free Markets*. Philippon argues that American markets have become less competitive relative to those in Europe, with reduced antitrust enforcement a potential reason. But, as it did decades ago, the emerging empirical literature suggests that the answer remains the same.[74]

---

[69] United States v. Phila. Nat'l Bank, 374 U.S. 321 (1963) (finding a bank merger *presumptively* unlawful for resulting in a combined share of approximately 35% in a market where the four largest firms had an approximately 70% share).

[70] United States v. Von's Grocery Co., 384 U.S. 270 (1966) (finding a merger between two retail groceries unlawful for having a combined share of less than 8% in a market where the four largest firms had an approximately 25% share).

[71] 1 REPORT TO THE PRESIDENT AND THE ATTORNEY GENERAL OF THE NATIONAL COMMISSION FOR THE REVIEW OF ANTITRUST LAWS AND PROCEDURES viii-ix (1979). For a discussion of various historical uses of monopolization, and more recent disagreement about the application of the consumer welfare standard to single firm conduct cases, see Timothy J. Muris, *The FTC and the Law of Monopolization*, 67 ANTITRUST L.J. 693 (2000).

[72] *See* Harold Demsetz, *Two Systems of Belief About Monopoly*, *in* INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164 (Harvey J. Goldschmid et al. eds., 1974). This book is one of the most influential books published in the history of the economics of antitrust. *See* Timothy J. Muris, *Is Heightened Antitrust Scrutiny Appropriate for Software Markets?*, *in* COMPETITION, INNOVATION AND THE MICROSOFT MONOPOLY 83, 84 (Jeffrey A. Eisenach & Thomas M. Lenard eds., 1999).

[73] John H. Carley et al., *Politics and Policy in 1981*, *in* THE REGULATORY REVOLUTION AT THE FTC: A THIRTY-YEAR PERSPECTIVE ON COMPETITION AND CONSUMER PROTECTION 8, 15 (James Campbell Cooper ed., 2013).

[74] *See, e.g.*, D. Autor et al., *The Fall of the Labor Share and the Rise of Superstar Firms*, Q.J. Econ. (forthcoming 2020). For a concise summary of the debate, which continues, see Peter R. Orszag, Opinion, *What If Companies*

Rather than the result of inadequate antitrust enforcement, this research indicates that the industries concentrating the fastest are also the most productive. Today, much of this productivity appears to be explainable from "the emergence of superstar firms that were earning high returns, enjoyed high productivity and paid high wages."[75]

Rather than condemn productivity and innovation, whether in the 1930s, 1970s, or today, we should applaud it. Companies like these superstar firms, many of whom are so-called "tech giants," have been built from the ground up in the United States rather than in Europe or China largely because the U.S. legal environment is stable, predictable, and uniquely hospitable to vigorous, paradigm-shattering competition by all businesses, large and small. That legal environment is a hallmark of American exceptionalism.

The Modern Place of Chicago

As it began in the 1950s, and through the evolution of the major Chicago texts in the 1960s and 1970s, Chicago had a clear, shared normative agenda—namely rejection of the prevailing orthodoxy. The initial Chicago results, produced primarily through case-by-case analysis, as well as broad empirical studies on issues such as the wisdom of deconcentration, uniformly challenged the then existing and overwhelmingly pro-plaintiff orthodoxy of antitrust policy. The Revolution succeeded; one only has to read the numerous Supreme Court decisions since 1997's *Continental T.V., Inc. v. GTE Sylvania Inc.*[76] in rejecting the pre-1980 doctrine to understand the triumph of Chicago.

Yet the Chicago School did not focus, let alone agree, on the many details for antitrust policy that would be necessary once the old order was overthrown. There was simply no shared view of the numerous details of appropriate doctrine. Moreover, as the continued application of the Chicago methodology moved beyond the initial results, it produced more diverse analyses not easily described or categorized. Like 1776, Chicago had its revolutionary band of brothers, but just as the American revolutionaries diverged politically when actually running a government, the Chicago scholars hardly agreed regarding the details of operational antitrust policy.

This is perhaps most obvious in merger policy, with Chicago scholars widely diverging. Professor Bork's then permissive views came close to those of the Obama Justice Department decades later, whose 2010 guidelines effectively made four-to-three mergers the marginal case.[77] Professor Richard Posner advocated a policy far more restrictive than the Obama DOJ's; his approach would presumptively bar any merger with a four-firm concentration level above 60 percent.[78] The Chicago scholar with the most influence on actual merger policy—Reagan DOJ

Get Big Because They're Better?, BLOOMBERG, Dec. 2, 2019 (Orszag was the Director of the Office of Management and Budget during the Obama Administration).

[75] *See* Orszag, *supra* note 73.

[76] 433 U.S. 36 (1977).

[77] *See* ROBERT H. BORK, THE ANTITRUST PARADOX 221-22 (1st ed. 1978) (advocating for an interpretation that would make four-to-three mergers presumptively lawful but not three-to-two mergers). The 2020 Guidelines codified the practices of the agencies at least since the mid 1990s, For the FTC, see https://www.ftc.gov/sites/default/files/documents/reports/horizontal-merger-investigation-data-fiscal-years-1996-2011/130104horizontalmergerreport.pdf

[78] *See* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 112 (Chicago 1976).

antitrust chief William Baxter—endorsed an approach in the 1982 merger guidelines highly restrictive by today's standards, with six-to-five mergers the marginal case.[79]

None of this is to say that big is always good, nor that the antitrust agencies are wrong to investigate particular practices in appropriately designated antitrust markets. Such investigations will necessarily be intensive, fact bound, and precise in their focus, under the consumer welfare standard, which applies modern economic analysis.[80] Moreover, application of the consumer welfare standard is not static; the economy changes, as does economic learning. There is a continual need for evaluation of particular practices and our approach to them, as discussed next.

THE CONSTANT NEED FOR EVALUATION

I attended law school at UCLA, near the end of John Wooden's remarkable tenure as basketball coach, with 10 national championships in his last 12 years. I frequently watched the team practice, and have read his many books and as much about him as I could. One of my favorite Wooden maxims, which certainly applies to antitrust as well as to life in general, is "when you are through learning, you are through." The insights of the consumer welfare standard—as discussed above, shared by many who were neither "conservative" nor affiliated with the University of Chicago—are not a license for stagnation at the expense of continued empirical study of the changing business and legal environment. Let me offer a few examples from my career.

In the 1990s, the antitrust agencies struggled to challenge potentially anticompetitive hospital mergers, losing their last seven challenges. Upon arriving in 2001, I found the agencies prepared to abandon the field. I could certainly believe that that government should not win them all, but it seemed highly unlikely that each challenge was inappropriate. During my Chairmanship, the FTC investigated the effects on consumer welfare of several consummated hospital mergers. The Bureau of Economics released four case studies that demonstrated collectively the mergers analyzed had in fact harmed consumer welfare and that the underlying economic assumptions used to support the mergers were defective. With this empirical

---

[79] *See* United States Department of Justice, Antitrust Division, Merger Guidelines, 47 Fed. Reg. 28,493, 28,497 (June 30, 1982) ("Markets … having the equivalent of no more than approximately six equally sized firms [are considered to be highly concentrated]. Additional concentration resulting from mergers is a matter of significant competitive concern ….”). Bruce Kobayashi and I argue that the use of "Chicago" has no utility in most 21st century debates about antitrust policy. *See* Bruce H. Kobayashi & Timothy J. Muris, *Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century*, 78 ANTITRUST L.J. 147 (2012).

[80] I have supported publicly the FTC's monopolization case against Qualcomm, *see* Brief of *Amicus Curiae* Timothy J. Muris in Support of Appellee, FTC v. Qualcomm Inc., No. 19-16122 (9th Cir. Nov. 29, 2019), while expressing concern over theories the FTC recently floated to make it easier to challenge long-consummated mergers, *see* Timothy J. Muris & Jonathan E. Nuechterlein, *First Principles for Review of Long-Consummated Mergers*, 5 CRITERION J. ON INNOVATION 29 (2020). I am also concerned over what appears to be overly restrictive regulation by non-American jurisdictions. *See, e.g.,* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Global Innovation, Local Regulation: Navigating Competition Rules in the Digital Economy, Remarks at UIC John Marshall Law School Center for Intellectual Property, Information and Privacy Law (Mar. 13, 2020). Another recent criticism of government enforcement is that the agencies too often fail to obtain monetary relief. To the contrary, the government can and does obtain such relief in appropriate circumstances, leaving to the private bar the specialized task of obtaining and providing such relief in cases that follow government actions. There is no reason for the government to compete unnecessarily with the plaintiff's bar in this area of the law.

evidence, the Commission used a more sophisticated economic methodology in the crucial *Evanston* hospital-merger case in 2007,[81] filed administratively, as well as in subsequent federal court cases. The Commission has since enjoyed several successful merger challenges, including the Sixth Circuit's *ProMedica* decision in 2014,[82] the Ninth Circuit's *St. Luke's* decision in 2015,[83] and the Third Circuit's 2016 decision in *Penn State Hershey*.[84] Although it is unfortunate that it took so long to correct judicial mistakes, those mistakes appeared to arise more from a desire to protect local hospitals than from so-called "conservative" economics. [85]To the contrary, these bipartisan efforts, across several Chairs and Presidents of both political parties, are an excellent application of the consumer welfare standard in action.

Another area of bipartisan success involves efforts to use the government to limit, or even eliminate, competition. Such efforts can severely harm consumers, and violate the antitrust laws unless protected under doctrines the Supreme Court has developed. For over 35 years, through leadership of both parties, the FTC has led in interpreting one such doctrine, that requiring state action, to protect both its underlying policies and consumers. These efforts have resulted in numerous cases to protect consumers, important advocacy documents, and three victories in the Supreme Court.

First, in 1992, the Supreme Court upheld the Agency's 1984 complaints to prevent the title insurance industry from fixing prices without states clearly authorizing and appropriately supervising the price-fixing.[86] While I was Chairman, the FTC in 2003 issued an extensive, 73-page staff report evaluating the doctrine, explaining that some courts unnecessarily applied it to protect anti-consumer restraints and urging the FTC to protect consumers against anticompetitive practices by non-sovereign state entities.[87] The effort drew wide bipartisan support. In the Obama administration, the FTC won two more important Supreme Court victories, one under each prong of the state action doctrine. In 2013, the Court rejected the overly broad

---

[81] Op. of the Comm'n, Evanston Nw. Healthcare Corp., Docket No. 9315 (Aug. 6, 2007).

[82] ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014).

[83] Saint Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015).

[84] FTC v. Penn State Hershey Med. Ctr., 838 F.3d 327 (3d Cir. 2016).

[85] A recent opinion piece blames lax antitrust enforcement for a shortage of hospital beds, allegedly contributing to current problems in fighting COVID-19, especially in rural areas. https://www.washingtonpost.com/outlook/2020/04/08/were-short-hospital-beds-because-washington-let-too-many-hospitals-merge/.Although true that the number of beds declined and that the unfortunate judicial opinions described in the text, and ignored by the authors, allowed too many anticompetitive mergers to proceed, the argument suffers from numerous flaws. For one, a principal reason for the decline in beds was reduction in hospital stays, including a shift to outpatient procedures. There are in fact serious problems in the provision of services in rural areas, as rural population continues to decline, but mergers have actually strengthened some small independent hospitals that might not have survived otherwise. Moreover, the authors nowhere explain the strange logic of buying a rural hospital, likely isolated from other competitive hospitals, and then closing it. Finally, regarding limitations on the FTC's ability to prevent anticompetitive hospital mergers, state laws can act as such a barrier. The next two paragraphs in the text discuss the FTC's bipartisan efforts to limit such state laws, Including a victory in the Supreme Court involving a hospital merger. While suggesting that the government could be more aggressive in hospital mergers and elsewhere in healthcare, Commissioner Rebecca Slaughter presents a much balanced picture of the Commission's history and current hospital merger program. https://www.ftc.gov/public-statements/2019/05/remarks-commissioner-rebecca-kelly-slaughter-antitrust-health-care

[86] *Ticor Title Ins. Co.*, 504 U.S. 621.

[87] OFFICE OF POLICY PLANNING, FED. TRADE COMM'N, REPORT OF THE STATE ACTION TASK FORCE (Sept. 2003). The Task Force was headed by now Senator Ted Cruz.

interpretation that some courts had applied in finding state authorization in vague statutory mandates for the elimination of competition.[88] Two years later, after the FTC found that the North Carolina Board of Dentistry violated the antitrust laws by excluding non-dentists from providing teeth whitening services, the Supreme Court rejected the board's state action defense because of inadequate state supervision of the practices.[89] Commission scrutiny should increase as licensure requirements expand into new lines of business where they have been absent historically, and the Commission must continue to challenge these types of anticompetitive restrictions on consumer welfare.

Within the consumer welfare framework, the FTC has a variety of litigation and non-litigation tools to implement its mission to the benefit of consumers. Consider the area of pharmaceuticals. Building on the leadership of Chairman Pitofsky, the FTC brought and evaluated innovative cases,[90] produced an industry report[91] whose recommendations received a highly public endorsement from the President, induced regulatory reforms at the Food and Drug Administration, and inspired legislative amendments to the crucially important Hatch-Waxman Act, which helps govern generic competition.[92] We also filed an amicus brief in an important case raising issues about generic drug entry,[93] as well as commented to a state legislature on the economic impact of any willing provider legislation, which risked reducing the incentives of pharmacies to develop attractive or innovative proposals.[94] Finally, we testified in Congress on the effects of drug regulation on drug prices, and our joint FTC/DOJ health care hearings reviewed the state of competition in the pharmaceutical industry, resulting in a call for more competition in healthcare.[95] Subsequent administrations have continued these efforts. These initiatives in one of the most crucial sectors of our economy illustrate, in the words of a joint article with Bob Pitofsky, published in the Antitrust Law Journal, that the FTC involves "more than law enforcement."[96]

The highly successful chairmanship of Bob Pitofsky leads me to close with a few comments on the Judiciary Committee's third and last question regarding the adequacy of the

---

[88] FTC v. Phoebe Putney Health Sys., Inc., 568 U.S. 216 (2013) (hospital merger).

[89] N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015). The North Carolina case itself followed a similar case against the South Carolina Dental Board filed while I was last at the agency. *See* S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006).

[90] *See, e.g.*, Final Orders and Stipulated Permanent Injunctions, FTC v. Perrigo Co., No. 1:04-cv-01397-RMC (D.D.C. Aug. 25, 2004), ECF Nos. 9 & 10; Statement of Chairman Timothy J. Muris in the Matter of Genzyme Corporation / Novazyme Pharmaceuticals, Inc. (Jan. 13, 2004).

[91] FED. TRADE COMM'N, GENERIC DRUG ENTRY PRIOR TO PATENT EXPIRATION: AN FTC STUDY (2002).

[92] *See* Drug Price Competition and Patent Term Restoration Act of 1984, Pub. L. No. 98-417, 98 Stat. 1585 (codified as amended in scattered sections of 15, 21, 28, & 35 U.S.C.).

[93] In re Buspirone Patent Litig., 185 F. Supp. 2d 363 (S.D.N.Y. 2002) (order adopting much of the FTC's reasoning).

[94] Letter from Todd J. Zywicki, Dir., Office of Policy Planning, et al., to Patrick C. Lynch, Attorney Gen., State of R.I. & Providence Plantations and Juan M. Pichardo, Deputy Majority Leader, Senate, State of R.I. & Providence Plantations (Apr. 8, 2004), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.patrick-c.lynch-and-hon.juan-m.pichardo-concerning-competitive-effects-ri-general-assembly-bills-containing-pharmaceutical-freedom/ribills.pdf.

[95] *See* DEP'T OF JUSTICE & FED. TRADE COMM'N, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004).

[96] Muris & Pitofsky, *More Than Law Enforcement*, *supra* note 11. The current FTC is using these tools with multiple initiatives, including its Hearings on Competition and Consumer Protection in the 21st Century and so-called 6(b) studies of a variety of industry practices.

agency's resources. Bob worked with only 1,000 people, measured by so-called full-time equivalents (FTEs), yet was widely, and deservedly, praised for his many accomplishments. The FTC in the 1970s had as many as 1,800 but, untethered from the consumer welfare standard, launched numerous harmful initiatives and cases under both of its missions.[97] Leadership matters, and Bob was a great leader with great Bureau directors, but so do the rules and constraints under which leaders operate. The new critics, ignoring the history of the RPA, the mistaken crusade against the A&P, the predatory pricing revival, and other "big is bad" attributes rightly relegated to the dustbin of antitrust history, threaten to launch a new era of anti-consumer law and policy. For the sake of hard-working Americans, we should ignore the temptation.

* * *

Again, I thank you for asking me to discuss these issue

[97] Upon arriving in 2001, I discovered that the number of professionals in a 1000 FTE agency was very close to the professional level in the 1200 FTE FTC that I had left in 1985. The difference was in part that some FTC support functions had been "privatized," that is performed by contractors not counted within the FTE level. Moreover, the technology dramatically had changed, the full arrival of the computer age increasing productivity.