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# Advantages and Disadvantages of Competition Welfare Standards – Note by the United States

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Antonio CAPOBIANCO
Antonio.Capobianco@oecd.org, +(33-1) 45 24 98 08

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*United States*

# Protecting Competition - Remarks as Prepared for the Handler Lecture to the New York City Bar Association

By JONATHAN KANTER, Assistant Attorney General Antitrust Division, U.S. Department of Justice

## 1. Introduction

1. I want to express my deepest gratitude to the Antitrust and Trade Regulation Committee of the New York City Bar Association for the invitation to speak with you this evening. It is heartwarming to be among so many good friends and colleagues. I am also honored to be giving tonight's address in honor of its namesake, Milton Handler.

2. We meet tonight in a moment of great challenge and great opportunity in antitrust.

3. Corporate power has grown to levels that leave our fellow citizens concerned and confused. On a daily basis, I am asked how the laws meant to protect competition went astray, and what we can do to reinvigorate antitrust enforcement and meet our nation's challenges.

4. I am aware that an academic discussion of antitrust policy may seem esoteric against the backdrop of challenges that are far too real for so many Americans. But the consequences of our enforcement policy are real and significant, especially at a time of crisis and hardship.

5. Our markets are suffering from a lack of resiliency. Among many other things, the consequences of the pandemic have revealed supply chain fragility. And recent geopolitical conflicts have caused prices at the pump to skyrocket. And, of course, there are shocking shortages of infant formula in grocery stores throughout the country.

6. These and other events demonstrate why competition is so important. Competitive markets create resiliency. Competitive markets are less susceptible to central points of failure.[1]

7. But competition is not a switch that we can flip on an off. We cannot just summon competition during a crisis. We must invest in competition for the long term. Indeed, that is why antitrust law exists and competition policy is so important. Decisions that we make

[1] See, e.g., U.S. Dep't of Agric., USDA Agri-Food Supply Chain Assessment: Program and Policy Options for Strengthening Resilience at 12-17 (2022), https://www.ams.usda.gov/sites/default/files/media/USDAAgriFoodSupplyChainReport.pdf (explaining how consolidation creates "[w]eak links" in agricultural supply chains and proposing solutions to reduce concentration and diversify supply chains); White House, Fact Sheet: Biden-Harris Administration Announces Supply Chain Disruption Task Force to Address Short-Term Supply Chain Discontinuities (Jun. 2022) ("Unfair trade practices . . ., just-in-time production, consolidation, and private sector focus on short-term returns over long-term investment have hollowed out the U.S. industrial base, siphoned innovation from the United States, and stifled wage and productivity growth."); see also Fed. Emergency Mgt. Agency, Supply Chain Resilience Guide (Apr. 2019) (noting that "[i]ndustry consolidation into a small set of large suppliers" impacts "supply chain resilience").

in the absence of a crisis will ultimately determine our vulnerability in the presence of a crisis. And, inevitably, an economy built on the fragile foundations of oligopoly and monopoly will leave us more vulnerable.

8. All of this makes our mission at the Antitrust Division even more urgent. While there are few certainties in today's world, we can rely on a prediction that that the unpredictable will occur. So we must learn from the current structural failures to guide our approach going forward and prepare for the uncertainty that lies ahead.

9. In my view, we are living through the error costs of underenforcement, and we owe it to our future to learn from those mistakes and take action to correct our path.

10. Tonight, I would like to expand on an approach to moving civil antitrust enforcement forward that I described in remarks last month at the Stigler Center in Chicago.[2] In my remarks, I briefly outlined five key principles necessary to restore a competitive, resilient, and dynamic American economy. First, recognize that the goal of antitrust is to protect competition. Second, empower people to participate in the development of antitrust policy by changing the language of antitrust so it is accessible and understandable. Third, continually adapt antitrust to address today's market realities. Fourth, revive Section 2 of the Sherman Act. And fifth, bring and litigate cases to develop and strengthen antitrust law.

11. Together, these pillars will strengthen civil antitrust enforcement so it works for the 21st century. We will rebuild our economy, in time, on the solid foundation of competition.

12. I want to use my time this evening to discuss the first pillar in greater depth—recognizing that the goal of antitrust law is to protect competition. That pillar is first in the list because we have to understand our North Star. Antitrust law protects competition and the competitive process in service of *both* prosperity *and* freedom. Competition benefits us not only in moments of stability, but also in times of change or crisis that demand resiliency, innovation, and responsiveness.

13. As the Supreme Court said in *Northern Pacific* and reiterated in *Board of Regents* in 1984, the Sherman Act is a "comprehensive charter of economic liberty."[3] It promotes economic benefits "at the same time" that it preserves market structures that are good for our democracy and our society.[4] These goals are, indeed, self-evident and unequivocally flow from a market economy that thrives on healthy competition.

## 2. The Welfare of Consumers is One of Many Goals

14. A variety of sometimes-conflicting approaches using the label "consumer welfare standard" have become a distraction. To its defenders, the "consumer welfare standard" is a remarkably flexible term. With every criticism, we get a new definition of consumer welfare that carries the term further from the meaning of the actual words "consumer" and "welfare." At the end of the day, if you ask five antitrust experts what the consumer welfare

[2] See Jonathan Kanter, Remarks as Prepared for the Stigler Center at the University of Chicago (Apr. 21, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-university-chicago- stigler.

[3] N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958); NCAA v. Bd. of Regents of Univ. of Oklahoma, 468 U.S. 85, 104 n.27 (1984).

[4] *Id.*

standard means, you will often get six different answers. To me consumer welfare is a catch phrase, not a standard.

15. Three aspects of the consumer welfare standard have been the most problematic. First, there are some versions that assert the antitrust laws were never intended to protect our democracy from corporate power, or to promote choice and opportunity for individuals and small businesses. In this view, the antitrust laws are meant to promote wealth and output, but do nothing for the liberty of our nation.

16. That is not true. The history of the Sherman and Clayton Acts show a profound concern with economic liberty, not merely as an economic concept, but as a concept connected to the freedom of our nation.[5] Competitively healthy markets offer more economic opportunity and less risk of corporate power dominating our democratic and social wellbeing. At the same time, unconcentrated markets with a diversity of firms are more resilient to changes in supply chains and system shocks that can expose the single points of failure in oligopoly markets.

17. Ignoring the many goals and benefits of antitrust law systematically biases antitrust toward underenforcement.

18. The second problem with the consumer welfare standard is the idea that, as a practical matter, antitrust cases should be reduced to econometric quantification of the price or output effects of the specific conduct at issue. I call this the "central planning standard."

19. The idea of the "central planning standard" is that antitrust enforcers or defendants must model and compute the welfare impacts of a specific merger, or of particular conduct under the rule of reason. We have seen this in the shift at the agencies from merger analysis rooted in the legal standards set forth in *Philadelphia National Bank* and other Supreme Court cases, to one that attempts to precisely quantify effects in particular cases.

20. We have to decide cases using flexible tools that are administrable by the agencies and the courts, and that are predictable to businesses making *ex ante* decisions. It cannot be that a business trying to understand the legality of its merger must undertake months of analysis to produce a complex simulation model, or that a court must decide an antitrust case by deciding among dueling consultants' white papers reporting on simulations. Congress and the courts use the term competition so often largely because it is a term we use in everyday life.

21. The third problem is that the consumer welfare standard has a blind spot to workers, farmers, and the many other intended benefits and beneficiaries of a competitive economy. Senator Sherman himself expressed a goal of protecting not only consumers, but also sellers of necessary inputs, such as farmers.[6] We have heard in our recent guidelines listening sessions profound examples of how mergers have harmed individual workers and small business owners by establishing bottlenecks that extract the value of their work. We heard similarly from farmers who can only reach end-consumers through extractive bottlenecks that lower returns to farmers at the same time that they raise prices for consumers.

[5] See, e.g., Lina M. Khan, Note, Amazon's Antitrust Paradox, 126 YALE L.J. 710, 720–21 (2017); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 39–42 (2005).

[6] 21 Cong. Rec. 2461 (1890) (Statement of Sen. John Sherman) ("[Trusts] operate with a double-edged sword. They increase beyond reason the cost of the necessaries of life and business, and they decrease the cost of the raw material, the farm products of the country.").

22. Although proponents of the standard read the words "consumer welfare prescription," used in *Reiter v. Sonotone*,[7] as adopting a consumer welfare *standard*, a straightforward reading of the case undercuts that view. All *Reiter* held was that consumers, as an intended beneficiary of the Sherman Act, should be able to recover treble damages using Section 4 of the Clayton Act. I agree that end consumers are important beneficiaries of antitrust enforcement, but they are not the only beneficiaries. Indeed, *Reiter* quoted *Mandeville Island Farms* in saying "[t]he Act is comprehensive in its terms and coverage, protecting *all* who are made victims of the forbidden practices by whomever they may be perpetrated."[8]

23. It is a mistake to confuse one of the laws' intended goals with the standard courts are to apply. When "consumer" is narrowly defined or read into the statute, antitrust is blind to real problems it was meant to prevent.

24. Those are three specific issues with some definitions of the consumer welfare standard. The overarching problem, however, is that it does not reflect the law as passed by Congress and interpreted by the courts.

25. The legislated goals of the antitrust laws are clear—Congress sought to protect competition and the competitive process.

## 3. The Law Sets Forth a Competition Standard

26. That is really where the question of the goals of antitrust starts and ends for me. As an Executive Branch official, I am obligated to focus on the law as written by the Legislature and interpreted by the Judiciary. Their repeated guidance has been to focus on competition.

27. From at least as early as *Standard Oil* in 1911 to *Alston*, 110 years later, the Supreme Court has consistently measured legality under the Sherman Act based on how conduct impacts *competition*.[9] Higher prices or lower output *can* be evidence that conduct harms competition, but

[7] 442 U.S. 330, 343 (1979).

[8] Reiter, 442 U.S. at 337–38 (emphasis added) (quoting Mandeville Island Farms v. Am. Crystal Sugar Co., 334 U.S. 219, 236 (1948)); see also PLS.Com, LLC v. Nat'l Ass'n of Realtors, 32 F.4th 824 (9th Cir. 2022) ("The district court appears to have understood the term 'consumer' to mean something like one 'who buys goods or services for personal, family, or household use, with no intention of resale.' Consumer, Black's Law Dictionary (11th ed. 2019). But our use of the term in the antitrust context has not been so limited. As our opinion in Glen Holly Entertainment, Inc. v. Tektronix, Inc., 352 F.3d 367 (9th Cir. 2003) demonstrates, a business that uses a product as an input to create another product or service is a consumer of that input for antitrust purposes and can allege antitrust injury.").

[9] Compare Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1911) ("unreasonably restrictive of competitive conditions"), with NCAA v. Alston, 141 S. Ct. 2141, 2147 (2021) ("In the Sherman Act, Congress tasked courts with enforcing a policy of competition "); see also Bd. of Regents, 468 U.S. at 104 & n.27 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 502 (2015) (Sherman Act "serves to promote robust competition" and prohibit "practices that undermine the free market"); Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895 (2007) (antitrust laws "designed primarily to protect interbrand competition"); State Oil Co. v. Khan, 522 U.S. 3, 15 (1997) (primary purpose of antitrust laws "is to protect interbrand competition"); Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (Sherman Act directed "against conduct which unfairly tends to destroy competition itself"); NCAA v. Bd. of Regents of

28. the more important question is how conduct affects the process by which firms compete over price—or anything else.[10]

29. The Clayton Act is even more explicit. In passing Section 7 of the Clayton Act, Congress sought to outlaw mergers based on whether they "may substantially lessen *competition* or tend to create a monopoly." The words are right there on the page.

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the Univ. of Okla., 468 U.S. 85, 104 & n.27 (1984) ("Under the Sherman Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (Sherman Act reflects "legislative judgment" that "competition is the best method of allocating resources"); Gordon v. N.Y. Stock Exch., Inc., 422 U.S. 659, 689 (1975) ("sole aim of antitrust" is "to protect competition"); United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("freedom" guaranteed by antitrust "is the freedom to compete"); FTC v. Proctor & Gamble Co., 386 U.S. 568, 580 (efficiencies are no defense to anticompetitive merger because Congress "struck the balance in favor of protecting competition"), United States v. Von's Grocery Co., 384 U.S. 270, 274–77 (1966) (purpose of antitrust laws is to "prevent economic concentration" and "protect competition"); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 362–63, 371–72 (1963) ("[C]ompetition is our fundamental national economic policy "); *Brown Shoe v. United States*, 370 U.S. 294, 315–23 (1962) (Celler-Kefauver Act's "dominant theme" to combat "rising tide of economic concentration" through competition); *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) ("[T]he policy unequivocally laid down by the [Sherman] Act is competition."); *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 385–86 (1956) (Sherman Act achieves "freedom of enterprise from monopoly or restraint"); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economy policy long has been faith in the value of competition."); *Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers*, 325 U.S. 797, 809 (1945) ("The primary objective of all the Anti- trust legislation has been to preserve business competition and to proscribe business monopoly."); *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) ("In order to establish violation of the Sherman Anti-Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."); *Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918) (restraints legal if they "regulat[e]" or "promote[] competition" but illegal if they "suppress" or "destroy" it).

U.S. 270, 274–77 (1966) (purpose of antitrust laws is to "prevent economic concentration" and "protect competition"); United States v. Phila. Nat'l Bank, 374 U.S. 321, 362–63, 371–72 (1963) ("[C]ompetition is our fundamental national economic policy "); Brown Shoe v. United States, 370 U.S. 294, 315–23 (1962) (Celler-Kefauver Act's "dominant theme" to combat "rising tide of economic concentration" through competition); N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958) ("[T]he policy unequivocally laid down by the [Sherman] Act is competition."); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 385–86 (1956) (Sherman Act achieves "freedom of enterprise from monopoly or restraint"); Standard Oil Co. v. FTC, 340 U.S. 231, 248 (1951) ("The heart of our national economy policy long has been faith in the value of competition."); Allen Bradley Co. v. Local Union No. 3, Int'l Bhd. of Elec. Workers, 325 U.S. 797, 809 (1945) ("The primary objective of all the Anti- trust legislation has been to preserve business competition and to proscribe business monopoly."); Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 44 (1930) ("In order to establish violation of the Sherman Anti- Trust Act, it is not necessary to show that the challenged arrangement suppresses all competition between the parties or that the parties themselves are discontented with the arrangement. The interest of the public in the preservation of competition is the primary consideration."); Bd. of Trade v. United States, 246 U.S. 231, 238 (1918) (restraints legal if they "regulat[e]" or "promote[] competition" but illegal if they "suppress" or "destroy" it).

[10] See, e.g., Sullivan v. NFL, 34 F.3d 1091, 1101, 1096 (1st Cir. 1994) ("The Supreme Court has emphasized, however, that overall consumer preferences in setting output and prices is more important than higher prices and lower output, per se, in determining whether there has been an injury to competition.").

Congress wanted to halt "a rising tide of economic concentration in the American economy" so that competition, not consolidation, reigned supreme.[11] Rather than require "elaborate proof of market structure,

30. market behavior, or probable anticompetitive effects," Congress told courts to evaluate whether a merger risks substantially lessening competition.[12] If it does, then the merger is illegal.[13]

31. There is perhaps no better source on this history than Professor Milton Handler himself. Professor Handler contributed to and chronicled the development of antitrust law from the 1920s through the New Deal and the 20th century.[14] He helped presidents and law students understand the importance of antitrust to our national economy and democracy. He also received the Antitrust Division's highest honor—the John Sherman Award—in 1998.[15]

32. Professor Handler wrote at the centennial of the Sherman Act in 1990 that "the combination of a policy of minimal antitrust enforcement and the glorification of efficiency have reduced antitrust to [a] parlous condition."[16] He wrote that the Sherman Act had been previously understood as "a charter of freedom and the economic equivalent of the Bill of Rights," and urged the restoration of vigorous enforcement "vital for the preservation of the free enterprise system."[17] Professor Handler reflected an academic perspective that was once well understood but somehow has been forgotten.

## 4. The Benefits of the Competition Standard

33. Congress was right to set competition and the competitive process as our North Star. It is a good standard that leads us to ask the right questions in particular cases.

34. First, what do I mean by *competition*? Competition starts with rivalry. As the Supreme Court said in *Philadelphia National Bank*, competition exists "at every level."[18] That includes competition over price, or over whatever consumers provide in exchange for accessing a product or service—whether that's personal information or data. Competition can exist over anything that causes somebody to choose one firm over another.

35. You cannot have choice without choices. And as Judge Diane Wood put it, "without competitors, there will be no competition."[19] Sometimes competition can come

[11] Brown Shoe, 370 U.S. at 315.

[12] Phila. Nat'l Bank, 374 U.S. at 362-63.

[13] See, e.g., Von's Grocery Co., 384 U.S. at 274–77.

[14] See generally Spencer Waller, The Language of Law and the Language of Business, 52 Case W. Res. L. Rev. 283, 287-290 (2001).

[15] See U.S. Dep't of Justice, Milton Handler Receives the Antitrust Division's John Sherman Award, (May 21, 1998), https://www.justice.gov/archive/atr/public/press_releases/1998/212837 htm

[16] Milton Handler, ANTITRUST IN TRANSITION xviii (1991).

[17] Id. at xvii.

[18] See Phila. Nat'l Bank, 374 U.S. at 368.

[19] Hearing on Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power, Before the H. Subcomm. on Antitrust, Commercial, and Administrative Law, 117th Cong. (2021) (statement of Hon. Diane P. Wood),

from *potential* rivals rather than actual ones, but the point remains the same—you cannot have competition without rivals and rivalry.

36. What do I mean by the competitive process? The competitive process is how rivalry plays out in the market among multiple competitors. It is charging lower prices so customers buy your goods instead of a rival's or paying higher salaries so you attract talent away from a competitor. It is treating employees with respect because you know they can and will leave if you do not. The heart of the competitive process is the guarantee that everyone participating in the open market—consumers, farmers, workers, or anyone else—has the "the free opportunity to select among alternative offers."[20] That freedom to choose drives competition between firms trying to ensure their offer is the one that's chosen.[21]

37. Without choices, farmers get less competitive buyers for their livestock. Workers get lower wages. Consumers have no choice in who exploits their personal data. Protecting competition and the competitive process is about ensuring people have the power to choose between alternatives.

38. Focusing on competition and the competitive process protects *all* the benefits of competition, not just the ones we think we can measure or calculate. Because competition is dynamic. Antitrust enforcers should not decide what values should be promoted at the expense of others or attempt to weigh impacts, our job is simply to promote competition and then let the benefits — whether they are measurable or not — flow from the competitive process.

39. Even if we could measure and balance these different values, dynamic competition will still surprise us. There is an old saying about innovation, often attributed to Henry Ford, that if Ford had asked customers what they wanted, they would have said a faster horse. I think that carries an important lesson for antitrust enforcers. Even if we can confidently measure something, it may not ultimately matter. We'll get faster horses, not automobiles.

40. We cannot predict specific outcomes in the future and we should not try, nor is that what the law requires. Rather, we preserve competitive markets, which drive innovation.

41. Competition and uncertainty go hand in hand, as firms uncertain of where or how rivalry will emerge will continuously improve their own products and services to stay ahead of the next evolution. To that end, antitrust is more about protecting what we cannot predict or measure rather than what we can.

42. Focusing on competition also prevents enforcers from being forced to undertake value judgments that exceed their mandate. The Supreme Court explained in *Philadelphia National Bank* that an anticompetitive merger cannot be saved based on "some ultimate reckoning of social or economic debits and credits." It wrote that:

> *A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it*

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https://www.congress.gov/117/meeting/house/111350/witnesses/HHRG-117-JU05-Wstate-WoodD- 20210318.pdf.

[20] *Nat'l Soc'y of Pro. Eng'rs*, 435 U.S. at 695.

[21] F.T.C. v. Indiana Fed'n of Dentists, 476 U.S. 447, 459 (1986) ("limiting consumer choice by impeding the "ordinary give and take of the market place" cannot be sustained under the Rule of Reason" (internal citation omitted)); Bd. of Regents, 468 U.S. at 107 ("A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law.").

> *enacted the amended Section 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid."*[22]

43. Focusing on whether conduct harms competition or the competitive process is also a clear, administrable way of applying the antitrust laws. It is a question courts and the Agencies have developed the tools and experience to analyze over decades.

44. We can also use real-world evidence, economics, expertise, and common sense to determine whether conduct harms competition. After all, words like "competition" and "competitive" are part of our everyday vocabulary. If somebody tells you that the NL East looks competitive this year, you understand what they mean. There are many strong teams duking it out to win.[23]

45. I do not presume that focusing on competition will lead to easy answers in every case. At a certain point—in antitrust, and in every area of law—we must exercise judgment. People disagree over what a reasonable person would do in a certain situation. People disagree about how to weigh whether one interest is substantial enough to outweigh another. Exercising judgment in hard cases is an unavoidable part of law.[24] The key is making sure we exercise that judgment in a way that is reliable, administrable, and consistent with the statutes we enforce.

46. Moreover, when we wrestle with hard questions, they should be the right questions. Focusing us on competition sets us up for the right debate.

47. It should also be clear at this point in our history that focusing on competition is a much more administrable standard than one that attempts to quantify consumer welfare effects. The consumer welfare standard was originally promised as a solution to the hard cases, but experience has demonstrated just the contrary. Too often, it leads us to focus on estimating data to the third decimal point for statistical models detached from the competitive realities actually playing out in the markets. Instead of making judgments easier in hard cases, the consumer welfare standard has often made even the easy cases hard to judge.

48. Ironically, this sharply contradicts the intent of Judge Bork, when he argued that even if some members of Congress intended to promote a broad range of values through the antitrust laws, we should focus on price and output effects because it makes antitrust easier to administer.[25] We have seen first-hand, however, how unwieldy and difficult to administer attempting to calculate those effects can be. Cases have become sprawling exercises where companies promise billions in efficiencies and armies of consultants argue

[22] 374 U.S. at 371.

[23] Let's go Mets!

[24] *See United States v. Trenton Potteries Co.*, 273 U.S. 392, 397 (1927) ("Reasonableness is not a concept of definite and unchanging content. Its meaning necessarily varies in the different fields of the law, because it is used as a convenient summary of the dominant considerations which control in the application of legal doctrines. Our view of what is a reasonable restraint of commerce is controlled by the recognized purpose of the Sherman Law itself.").

[25] *See* Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, J. Law & Econ. 7, 10 (1966); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 Yale L.J. 775, 833–34 (1965).

over newly-invented and often-untested models that they claim show a transparently problematic merger will benefit consumers.

49. The irony of the consumer welfare standard is that consumers have been harmed in its name by underenforcement of the antitrust laws. In practice, self-imposed requirements that the agencies demonstrate precise price effects before taking action have systematically biased us toward underenforcement. This results in less competitive markets with less freedom *and* less efficiency. It means hollowed-out markets susceptible to failure when supply shocks upset delicate systems. The competition crisis we find ourselves in threatens our democracy and our economic liberty at the same time that it has profoundly negative effects on individual consumers.

50. Today, too many consumers pay supracompetitive markups, find their data extracted and their privacy trampled, and have no alternatives in critical markets for food, healthcare, and other every-day staples. For them, the consumer welfare standard has been a wolf in sheep's clothing. We owe them better.

51. So, as enforcers, we will remain vigilant and undeterred in our mission to protect competition. This cuts across the entire spectrum of our civil antitrust enforcement program, including the Sherman Act and Clayton Act. This applies to anticompetitive conduct, including monopolization.

52. Also — lest there be no ambiguity — we will continue to challenge deals that present unacceptable risk to the American public. Indeed, we are already demonstrating our willingness to block anticompetitive transactions in a broad range of critical industries like airlines and healthcare. Companies that test our resolve in these and other areas do so at their own risk and will continue to confront aggressive antitrust enforcement. As one of my predecessors explained, some deals should never leave the boardroom.

## 5. Closing

53. It is time we get back to first principles and focus on the policies that Congress was trying to advance in passing the antitrust laws. It is time we make the antitrust laws work for our modern economy, our society, and our fellow citizens.

54. The first step is recognizing that the antitrust laws are not narrowly focused. They are focused on competition and the competitive process with a range of benefits to consumers, workers, resiliency, and our democracy. Focusing on competition and the competitive process and its myriad attendant benefits makes it easier to empower Americans to understand antitrust policy and participate in its development. It makes it easier to address market realities.

55. For more than a century, Congress has recognized this. The courts have recognized this. Professor Handler recognized it. So, it is fitting for me to close by saying—it is time we rejoin them and recognize that the goal of antitrust law is to protect competition and the competitive process. In doing so, we protect the underlying values that make our country and democracy a model for the world. Thank you.