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Does the U.S. Economy Lack Competition?

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Does the United States have a monopoly problem? Several prominent voices have raised this concern. In two thought-provoking articles in March 2016, *The Economist* wrote that American firms' profits are too high.[1] It questioned why "steep earnings are not luring in new entrants" and worried that companies may be "abusing monopoly positions[] or using lobbying to stifle competition."[2] Among other steps, it called on the U.S. government to modernize its antitrust apparatus, loosen copyright and patent laws, and scrutinize technology platforms like Google and Facebook.[3] In short, its prescription was that "America needs a giant dose of competition."[4]

The Economist's call for greater competition is not the only one.[5] In April 2016, the Council of Economic Advisers (CEA) wrote that "competition appears to be declining in at least part of the economy."[6] It found evidence that industry concentration is rising, firms are enjoying higher rents, and dynamism is declining.[7] In stronger terms, Nobel laureate Paul Krugman asserted in April 2016 that "growing monopoly power is a big problem for the U.S. economy," observed that "profits are at near-record highs," and blamed a drop in competition.[8] Writing a column in the *New York Times' DealBook* the same month, Professor Chris Sagers lamented "the administration's failure

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1 *Too Much of a Good Thing*, ECONOMIST, Mar. 26, 2016; *The Problem With Profits*, ECONOMIST, Mar. 26, 2016.

2 *The Problem With Profits*, *supra* note 1.

3 *Id.*

4 *Too Much of a Good Thing*, *supra* note 1.

5 *See also* Greg Ip, *Why Corporate America Could Use More Competition: Signs of Rising Market Concentration Could Be Troublesome for Investment, Consumers*, WALL ST. J., July 8, 2015.

6 Council of Economic Advisers Issue Brief, *Benefits of Competition and Indicators of Market Power*, Apr. 2016, at 4, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

7 *Id.* at 6.

8 Paul Krugman, *Robber Baron Recessions*, N.Y. TIMES, Apr. 18, 2016, at A21.

to enforce the antitrust laws," spoke of "toiling in the regrettably dusty precincts of antitrust policy," and concluded that "[t]he one thing most of us really don't want to do is actually use" competition law.[9] Even more notably, President Obama issued an executive order on April 15, 2016, requiring agencies to take steps to "encourage competition in the U.S. economy[.]"[10]

To address this perceived problem, some critics have argued for a more interventionist approach to antitrust enforcement.[11] In their view, the government should not merely prohibit anticompetitive behavior, but try to create more competition. They propose steps like weakening patent rights, opposing merger-driven consolidation even if anticompetitive effects are unclear, and potentially imposing mandatory-sharing duties on technology firms that have amassed more data than their rivals.[12]

The recurring theme of these critiques and proposals is that America must do more to promote competition. Collectively, these developments raise serious questions. That is especially true for those, like me, who enforce U.S. competition policy. Before coming to any sound conclusions, however, one must consider whether those claims of pervasive monopoly reflect accurate analysis of probative data. Next, even if the diagnosis of a monopoly problem is correct, do these commentators accurately identify the cause and, even more important, how would one cure it?

I will evaluate the factual and theoretical foundations of this commentary. I will also examine whether antitrust officials should be doing more, as some have argued. Finally, I will consider what is the best way to promote competition.

I. Does America Have a Monopoly Problem?

The question whether America has a monopoly problem is critical, but its resolution turns on a nuanced point. Specifically, by which benchmark should we gauge competitiveness?

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[9] Chris Sagers, *Everyone Wants to Get Tough on Antitrust Policy, But Not Really*, DealBook (Apr. 29, 2016), http://www.nytimes.com/2016/04/30/business/dealbook/everyone-wants-to-get-tough-on-antitrust-policy-but-not-really.html.

[10] The White House, *Executive Order--Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy* (Apr. 15, 2016), https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers.

[11] *See supra* notes 1, 6, 8–9; *see also* Lina Khan, *How to Reboot the FTC: The Agency's Antitrust Policy Isn't Up to the Challenges of the 21st Century. Here's How to Fix It.*, Politico (Apr. 13, 2016), http://www.politico.com/agenda/story/2016/04/ftc-antitrust-economy-monopolies-000090 (criticizing the FTC's recent antitrust-enforcement efforts, advocating an approach based on a hostility to concentration, and calling on the FTC to block mergers with partial horizontal overlaps "outright" in lieu of divestitures and other remedies).

[12] *Too Much of a Good Thing*, *supra* note 1 (calling for "a loosening of the rules that give too much protection to some intellectual-property rights" and "more active, albeit cruder, antitrust actions[,]" and asking "whether it makes sense to have most of the country's data in the hands of a few very large firms"); Sagers, *supra* note 9.

A. By What Metric Can We Judge Competition, and Does the Answer Matter?

Market forces are powerful. They are usually the most effective engine for economic growth and consumer welfare and are generally superior to state control. But markets are fallible. Product heterogeneity, information asymmetries, entry barriers, capital-markets imperfections, and other realities conspire against the textbook model of "perfect competition," rendering it an inappropriate benchmark.[13]

A more workable approach may be, first, to identify artificial impediments to competition in today's economy and, second, to evaluate whether their benefits justify the costs imposed. There can be no question that the American economy, like many others, is laden with such restrictions, many of which protect special interests from competition. Consumer advocates should work to repeal such laws. We also need to ask hard questions about antitrust enforcement and larger economic policy, such as how to foster innovation. But, standing on its own, the claim that U.S. industry needs more competition is simultaneously true and trite.

It is more difficult, and perhaps less fruitful, to evaluate the state of competition in an economy. As I mentioned, the appropriate benchmark is not obvious. Certainly, we can look for indicia of robust, competitive processes, such as high industrial output, innovation, productive efficiencies, employment, and investment. By contrast, enduring supranormal economic rents, limited economic growth, and meager technological progress may tell another story. But for reasons that I will discuss momentarily, it is difficult to reliably analyze the state of competition in an entire economy. It is harder still to tease out and distinguish the various underlying causes. Ultimately, regardless of the degree of industrial competitiveness, the question for policymakers remains how best to facilitate competition.

Those remarks bring me to recent claims by *The Economist*, the CEA, *The New York Times*, and others of an alarming lack of competition in today's markets. I urge caution in accepting their claims of pervasive monopoly power. But before critiquing their views, I want to compliment *The Economist*, the CEA, and others for contributing to an important conversation. We should continuously scrutinize the *status quo*, ask how we can stoke the economy by promoting competition, and evaluate contemporary antitrust enforcement.

[13] Indeed, markets that remained perfectly competitive in the static sense of prices equaling marginal cost would not always be desirable. For instance, they would not permit firms to devote sunk R&D expenditures to innovation. *See, e.g.*, J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. Competition L. & Econ. 581 (2009).

B. Recent Claims of Ubiquitous Monopoly

So, what exactly do critics say about today's U.S. economy? *The Economist* observes that "profits are at near-record highs relative to GDP . . . and free cash flow . . . has grown yet more strikingly. Return on capital is at near-record levels, too[.]"[14] In its view, merger-driven consolidation explains that phenomenon, at least in part. It notes that revenues have risen disproportionately in concentrated industries. The newspaper traces abnormal profits to the healthcare and technology sectors, in particular, as well as to railroads, chemicals, and other industries. *The Economist* draws what it considers to be the "obvious conclusion": "the American economy is too cosy for incumbents."[15] Its solution would be "to unleash a burst of competition"—a task that, in its view, exceeds the constitutional and intellectual abilities of contemporary antitrust enforcement.[16]

The Council of Economic Advisers finds "a possible decrease in competition[.]"[17] Like *The Economist*, it bases that conclusion on rising concentration and rents. The CEA, however, also notes an apparent diminution in firm entry and labor-market mobility.[18] It similarly observes that M&A activity "is at record levels[,]" but grants that the evidence available does not allow clear conclusions about the underlying cause. The CEA notes that possible explanations include the acquisition of scale economies, innovation, mergers, acquisitions, and regulatory barriers to entry.[19] Like *The Economist*, the CEA uses industry concentration data tracked by the U.S. Census Bureau.[20]

I believe that *The Economist*, the CEA, and others draw flawed conclusions by extrapolating the existence of monopoly power from industry concentration and accounting profits. In other words, they trace a causal relationship—from consolidation to market power to supracompetitive rents. If that strikes one as familiar, it is because it reflects the Structure-Conduct-Performance (SCP) paradigm that once reigned within industrial organization (IO). Between the 1930s and 1960s, IO economists studied industries to connect (1) structure (that is, concentration) to (2) conduct (that

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14 *Too Much of a Good Thing*, *supra* note 1.

15 *Id.*

16 *Id.*

17 *Benefits of Competition and Indicators of Market Power*, *supra* note 6, at 1.

18 *Id.* at 4, 14. Some reduction in labor-market mobility is clearly tied to state-licensing requirements for a growing host of occupations. *See* Dep't of the Treasury Off. of Econ. Pol'y, Council of Econ. Advisers & Dep't of Labor, Occupational Licensing: A Framework for Policymakers 4 (July 2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

19 *Benefits of Competition and Indicators of Market Power*, *supra* note 6, at 1.

20 The CEA concedes, however, that those data "are national statistics across broad aggregates of industries, and an increase in revenue concentration at the national level is neither a necessary nor sufficient condition to indicate an increase in market power." *Id.* at 4. That identified shortcoming is why "antitrust authorities direct their attention to concentration at the relevant market level for each product or service." *Id.* Unfortunately, the CEA noted, those "data are not readily available across the economy." *Id.*

is, the exercise of market power through unilateral or coordinated effects) to (3) performance (that is, supranormal profits).

Today, that approach is discredited for several reasons. I shall briefly touch on a few of them relevant to the claims about monopoly within the U.S. economy.

First, it is wrong to infer a causal relationship between industry structure, market power, and profit. In its classic form, the SCP literature supposed that higher concentration gives incumbent firms more market power, which they exercise to enjoy supranormal profits. But there is little empirical support for such a one-directional causal relationship.[21] Other factors in the SCP model may cause concentration, which, as the economists would say, is endogenous. Industry structure may cause high profits, result from high profits, both, or neither.

In a devastating critique of the SCP literature, Harold Demsetz showed that scale economies can produce a concentrated industry structure, in which efficient firms enjoy cost advantages and hence higher profits.[22] There is simply no evidentiary basis for assuming—as the classic SCP studies did and *The Economist* recently did—that concentration necessarily bestows market power. Persevering in that assumption results in econometric models that suffer from simultaneity bias and may produce false positives.

Second, to trace a causal relationship between industry concentration and market power, one must define the industry as economists would define a "relevant market" in an antitrust case. But, in calculating statistics, governments do not define industries that way. It is therefore unreliable to attach causal significance to a correlation between profit and the concentration of a broadly defined "industry."[23] *The Economist*, the CEA, and others use census data to measure industry concentration. But neither the Federal Trade Commission (FTC) nor Department of Justice (DOJ) would use such data to define antitrust markets because they do not yield reliable information. Indeed, factual discovery and careful economic analysis often reveal a gulf between a relevant antitrust market and the informal industry classification.

The CEA also uses an unreliable measure of concentration. Concentration, of course, reflects the percentage of total market sales for which the largest firms account. Economists usually examine four-firm or eight-firm concentration ratios. For example, if the four largest firms account for 90 percent of the sales in a market, one can confidently say that the industry is concentrated. The CEA, however, used the exceptionally large ratio of *fifty* firms. There are at least two shortcomings with that measure. First, in many

21 Dennis W. Carlton & Jeffrey M. Perloff, Modern Industrial Organization 244–67 (Pearson 4th ed. 2004).

22 *See* Harold Demsetz, *Industry Structure, Market Rivalry and Public Policy*, 16 J.L. & Econ. 1 (1973).

23 Economists have long understood this problem. *See, e.g.*, Gregory Werden, *The Divergence of SIC Industries from Antitrust Markets: Some Evidence from Price-Fixing Cases*, 28 Econ. Letters 193 (1988).

properly defined product and geographic markets, a fifty-firm concentration ratio would likely be 100 percent. Second, industries defined by U.S. census-data classifications may be broader than actual antitrust markets. Hence, concentration may rise for reasons having nothing to do with lost competition in a properly defined relevant market.

Third, profits are themselves difficult to measure. Economists working in the SCP tradition had to use accounting measures, such as returns on assets. Accountants define "profit" differently than do economists. In economics, the term captures the opportunity cost of capital. Long-term profits under perfect competition would be zero in economic terms, for example, but positive in accounting terms. Further, accountants define capital costs by book value, reducing asset prices over time through depreciation. In contrast, economists value capital by replacement value, which may differ significantly. We must also properly discount rents to account for investment risk. It may therefore be a mistake to equate accounting profits—like the returns on invested capital that the CEA uses—with economic profits indicative of monopoly power.[24] That is especially true when the profits that do exist may reflect returns on high-risk investment, such as in technology.

Finally, SCP cross-sectional studies may be biased when the markets they examine are in disequilibrium. For instance, an industry with high economic profits in the short run will generally attract entry, causing profits to decline over time. Snapshot pictures of industry profits are misleading because they overlook that dynamic.

For these reasons, among others, contemporary empirical work in the "New Industrial Organization" field generally focuses on single industries, estimating discrete parameters useful to antitrust policy that are not subject to those issues. Indeed, economists have understood the problems with cross-sectional, inter-industry studies for over thirty years.[25]

Yet, those proclaiming an absence of competition today seem to fall prey to those earlier errors. The articles and op-eds that I have discussed observe that U.S. firms have high accounting profits and that U.S. industries (loosely defined) are becoming more concentrated. They infer that high profits reflect a lack of competition associated with market structure. That is

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[24] *See, e.g.*, Franklin M. Fisher & John J. McGowan, *On the Misuse of Accounting Rates of Return to Infer Monopoly Profits*, 73 Am. Econ. Rev. 82 (1983); Robert H. Bork & J. Gregory Sidak, *The Misuse of Profit Margins to Infer Market Power*, 9 J. Competition L. & Econ. 511 (2013).

[25] *See* Timothy Bresnahan & Richard Schmalensee, *The Empirical Renaissance in Industrial Economics: An Overview*, 35 J. Indus. Econ. 371, 373 (1987) ("While some econometric industry studies were done in the 1970s, the early part of that decade saw the publication of many more cross-section studies of industry-level, government-supplied data. But critics of this approach became more vocal and persuasive during the 1970s. They argued that industry-level cross-section data could not be used to identify and estimate structural relationships of interest. And, by the end of the decade, the critics had generally prevailed. The study of industry-level cross-section data had fallen from fashion, and fewer studies of this sort appeared in leading journals.").

the same fallacious reasoning to which the classic SCP approach succumbed. Notably, only the CEA alluded to the serious econometric problems of inferring a causal relationship between industry concentration and profits.

Now, does my critique show that U.S. markets are optimally competitive? Of course not. But it does suggest that recent pronouncements of monopoly are questionable. That is especially so when there are indicia of fierce competition within the economy. Consider the new economy, which is a hotbed of technological innovation. That environment does not strike me as one lacking competition. It involves markets driven by technological progress, characterized by fleeting consumer loyalty, and an urgent need to invest in innovation. We have seen all manner of businesses rise and fall. Static models of unconcentrated markets that produce low prices and small economic rents in the short run do not resemble such dynamic, new-economy industries. But when the nature of competition changes, so too must the nuance of one's analysis.

II. Can Antitrust Enforcers Do More?

Although I question claims of a systemic monopoly problem, I agree that consumers would benefit from more competition. The key question, however, is *how* to realize that policy objective. As I will explain shortly, some commentators and even government agencies think of competition in erroneous terms. Thinking it a function of only industry structure, they advocate policies that reduce concentration by increasing the number of firms. Their worst prescription is mandatory sharing through prescriptive *ex ante* regulation, which may reduce innovation and lead to a reduction in dynamic competition. That "solution" is none at all.

A. The FTC and DOJ Effectively Enforce Competition Law

What about antitrust? Some critics argue that the FTC and DOJ must enforce competition law more aggressively.[26] Optimal enforcement, however, must reflect the competitive realities of each market in which a restraint, practice, or merger arises. That means *not* intervening when an investigation reveals a lack of harm to competition, despite what reporters or professors might say later.

Some commentators suggest that antitrust should prevent merger-driven consolidation in itself.[27] But banning a merger on antitrust grounds simply because the firms are big would be to pursue a goal other than protecting competition. The era when antitrust promoted populist goals, typically at

[26] *See supra* notes 1, 8-9; *see also infra* note 30.
[27] *See supra* notes 1, 8-9; *see also infra* note 30.

consumers' expense, is rightly behind us. Efficiencies are real and, depending on the industry, scale can be critical to effective competition. In short, better enforcement does not always mean more enforcement.

An equally problematic argument is that the FTC and DOJ should challenge every merger that involves some worrisome horizontal overlap, instead of agreeing upon divestitures that remedy the potential loss of competition.[28] Such calls are unrealistic. To sue to enjoin every merger that involves a competitive overlap would require enormous resources. The agencies must also prevail in court, which is unlikely when the merging parties could point to a simple fix that would remove the competitive issue.

More generally, in my view, properly calibrated divestitures are effective mechanisms both for protecting competition and for allowing merging parties to realize efficiencies. The agencies closely scrutinize the effectiveness of their remedies. Indeed, the FTC is currently doing a retrospective study of its remedial orders in ninety mergers between 2006 and 2012, building on its 1999 divestiture study.[29] The FTC will continue to refine the sophistication of its antitrust toolkit in light of new learning. But to do away with divestitures would not only be unworkable, it would harm the agencies' enforcement mission.

Some critics nevertheless persist in their claim that the government has not effectively enforced antitrust laws.[30] That charge, however, simply cannot be squared with the facts. For example the FTC, from late 2015 to May 2016, has sued to enjoin four mergers: Staples-Office Depot, Pinnacle-Hershey, Advocate-NorthShore, and Cabell-St. Mary's.[31] The Commission won the *Staples-Office Depot* in May 2016.[32] The agency has also protected

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[28] *See* Khan, *supra* note 11 ("[T]he agency should commit to blocking anticompetitive mergers outright, rather than trying to fix them by regulating conduct or forcing merged companies to divest parts of their businesses as has been the trend in recent decades."); David Balto & James Kovacs, *Health Insurance Merger Frenzy: Why DOJ Must Say No*, Law360 (Aug. 17, 2015) (observing that "the antitrust enforcement agencies have remedied anti-competitive mergers though cut and paste divestitures, requiring spinoffs of assets where there are competitive overlaps" but arguing—if only in the context of health-insurance mergers—that "limited divestitures are inadequate and the right course is simply to block the merger"); *see also* John Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy (MIT Press 2014) (questioning the efficacy of the agencies' divestiture orders in protecting against post-merger price increases).

[29] Fed. Trade Comm'n, *Remedy Study*, https://www.ftc.gov/policy/studies/remedy-study; Staff of the Bureau of Competition of the Fed. Trade Comm'n, A Study of the Commission's Divestiture Process (1999), https://www.ftc.gov/sites/default/files/documents/reports/study-commissions-divestiture-process/divestiture_0.pdf.

[30] *See* Sagers, *supra* note 9; Khan, *supra* note 11 (deriding the FTC as "an agency adrift, squandering resources on trivial cases while failing to address the structural lack of competition that afflicts our economy"); *see also Too Much of a Good Thing*, *supra* note 1.

[31] Complaint, FTC v. Staples, Inc., No. 1:15-cv-2115 (D.D.C. Dec. 7, 2015); Complaint, FTC v. Penn State Hershey Med. Ctr., No. 1:15-cv-2362 (M.D. Pa. Dec. 9, 2015); Complaint, FTC v. Advocate Health Care Network, No. 1:15-cv-11473 (N.D. Ill. Dec. 22, 2015); *see also In re* Cabell Huntington Hosp./St. Mary's Med. Ctr., File No. 141-0218, Complaint (F.T.C. Nov. 6, 2015).

[32] FTC v. Staples, Inc., No. 15-2115, 2016 WL 2899222 (D.D.C. May 17, 2016).

competition in a score of recent matters with consents and divestitures that protect competition, while allowing merging firms to achieve efficiencies.[33]

I am proud of the agency's achievements, which are too lengthy to recount here. To offer but a brief example, I suggest one consider the FTC's section 6(b) study of healthcare mergers in 2002, following a spate of losses in the area for both antitrust agencies.[34] With the benefit of its findings, the FTC launched a period of extraordinarily successful antitrust challenges to allegedly anticompetitive healthcare mergers.[35] Its only setback since 2002 occurred in May 2016, when a district court refused to enjoin a merger between Pinnacle's and Hershey's healthcare systems in Pennsylvania.[36] As of June 2016, that matter is on appeal to the Third Circuit.

Even beyond healthcare mergers, the FTC has done much to protect competition in the life-sciences industry. The agency fought for years to challenge pay-for-delay agreements, ultimately resulting in the Supreme Court's rejection of the scope-of-the-patent test in *Actavis* in 2013.[37] The Commission continues aggressively to challenge anticompetitive conduct in the pharmaceutical industry. Its most recent action in a pay-for-delay case came in March 2016 in *Endo*.[38]

Perhaps most important, the FTC has opposed private restrictions on competition cloaked as government action. It has done so, in part, through successive wins at the Supreme Court in *Phoebe Putney*[39] and *North Carolina Dental*.[40] Both decisions, of course, narrowed the state-action-immunity doctrine. And where governments contemplate anticompetitive legislation, the FTC's advocacy program is a powerful voice for consumers.

33 *See, e.g.*, *In re* Am. Air Liquide Holdings, Inc., File No. 161-0045, Analysis of Proposed Agreement Containing Consent Orders to Aid Public Comment (May 13, 2016); *In re* Victrex plc, File No. 141-0042, Analysis of Agreement Containing Consent Order to Aid Public Comment (Apr. 27, 2016); *In re* Lupin, File No. 151-0202, Complaint, Decision & Order (Apr. 26, 2016); *In re* Hikma Pharm., File No. 151-0044, Complaint, Decision & Order (Mar. 31, 2016); *see also infra* note 38.

34 Timothy J. Muris, Everything Old Is New Again: Health Care and Competition in the 21st Century, at 19–20 (Nov. 7, 2002), https://www.ftc.gov/public-statements/2002/11/everything-old-new-again-health-care-competition-21st-century; *see also* Fed. Trade Comm'n & Dep't of Justice, Improving Healthcare: A Dose of Competition (2004), https://www.ftc.gov/reports/improving-health-care-dose-competition-report-federal-trade-commission-department-justice.

35 St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd., 778 F.3d 775 (9th Cir. 2015); ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014); FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069 (N.D. Ill. 2012); *In re* Reading Health Sys., File No. 121-0155, Comm'n Order Dismissing Complaint (Dec. 7, 2012); *In re* Inova Health Sys., File No. 061-0166, Order Dismissing Complaint (June 11, 2008); *In re* Evanston Nw. Healthcare Corp., File No. 011-0234, Opinion of the Comm'n (Aug. 6, 2007).

36 FTC v. Penn State Hershey Med. Ctr., No. 1:15-cv-2362, 2016 WL 2622372 (M.D. Pa. May 9, 2016).

37 FTC v. Actavis, Inc., 133 S. Ct. 2223 (2013).

38 FTC v. Endo Pharm., No. 2:16-cv-1440, Complaint (E.D. Pa. Mar. 31, 2016). I dissented from filing the complaint because I believed the facts do not warrant disgorgement and because it was in the public interest to bring the matter administratively in Part 3. Nevertheless, I saw reason to believe that the pay-for-delay agreements violated section 5 of the FTC Act. *In re* Endo Pharma., Inc., File No. 141-0004, Dissenting Statement of Commissioner Maureen K. Ohlhausen (Mar. 31, 2016), https://www.ftc.gov/public-statements/2016/03/dissenting-statement-commissioner-maureen-k-ohlhausen-matter-endo.

39 FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

40 North Carolina State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015).

That brief account, of course, says nothing of the DOJ's active enforcement of the antitrust laws. As of May 2016, the Justice Department stopped the Halliburton-Baker Hughes deal,[41] challenged United Airlines' proposed acquisition of various takeoff and landing slots at Newark Airport from Delta Airlines,[42] and prevailed in its controversial action against Apple and five book-publishing companies for conspiring to fix the price of e-books.[43] Prominent examples from 2015 include the DOJ's case against American Express's anti-steering rules[44] and preventing the GE-Electrolux, Comcast-Time Warner, and Applied Materials-Tokyo Electron mergers.[45]

B. *Those Claiming That the DOJ and FTC Should More Aggressively Enforce Antitrust Laws Misunderstand Competition Policy*

With that factual backdrop in place, I do not understand how an academic can write of "the administration's failure to enforce the antitrust laws[.]"[46] In more balanced fashion, *The Economist* calls for "more active, albeit cruder, antitrust actions[,]" but that again presupposes a failure to bring meritorious cases.[47] Such high-level prescriptions are troublesome, for at least two reasons.

First, competition law is not regulatory. It should not intervene to order more competition or to reengineer market structure.[48] Rather, it should protect the competitive process by which firms vie for sales opportunities by offering superior prices, terms, technology, and so on.[49] When

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41 Press Release, Dep't of Justice, Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal (May 1, 2016), https://www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal.

42 Press Release, Dep't of Justice, United Airlines Abandons Attempt to Enhance Its Monopoly at Newark Liberty International Airport (Apr. 6, 2016), https://www.justice.gov/opa/pr/united-airlines-abandons-attempt-enhance-its-monopoly-newark-liberty-international-airport.

43 United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013), *aff'd*, 791 F.3d 290 (2d Cir. 2015), *cert. denied*, 136 S. Ct. 1376 (2016).

44 United States v. Am. Express Co., 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

45 Press Release, Dep't of Justice, Electrolux and General Electric Abandon Anticompetitive Appliance Transaction After Four-Week Trial (Dec. 7, 2015), https://www.justice.gov/opa/pr/electrolux-and-general-electric-abandon-anticompetitive-appliance-transaction-after-four-week; Press Release, Dep't of Justice, Applied Materials Inc. and Tokyo Electron Ltd. Abandon Merger Plans After Justice Department Rejected Their Proposed Remedy (Apr. 27, 2015), https://www.justice.gov/opa/pr/applied-materials-inc-and-tokyo-electron-ltd-abandon-merger-plans-after-justice-department; Press Release, Dep't of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

46 Sagers, *supra* note 9.

47 *Too Much of a Good Thing*, *supra* note 1.

48 The rare exception involves a structural remedy for a distinct antitrust violation. The classic example, of course, is the Justice Department's breakup of AT&T in the 1980s. *See* United States v. Am. Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983).

49 For my larger views on the issues explored in this paragraph, see Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 19 Stan. Tech. L. Rev. (forthcoming 2016) (manuscript on file with author).

a merger or practice leaves intact the various demand-side and supply-side constraints that limit market power, there is no antitrust issue. Protecting the competitive process also means nurturing the incentives bestowed by the capitalist system, which rewards success and punishes failure. Those nuances explain core tenets of antitrust policy, including a deep-rooted reluctance to make firms share the platforms or infrastructure that they themselves built. Some calls for more antitrust intervention dismiss those basic antitrust principles.[50]

Indeed, I worry about the increasingly prevalent view that the government should act to increase competition by decreasing industry concentration. The Federal Communications Commission (FCC), for instance, has expressed a structuralist view of competition. Most recently, its proposed set-top box rules would require cable and satellite firms to share their video content, programming information, and entitlement information with the creators of rival devices or apps that deliver video.[51] The idea is to allow competitors to bypass the set-top boxes that multichannel video programming distributors (MPVDs) rent to their subscribers, thus increasing consumer choice. The FCC apparently overlooked the fact that competition is already leading MVPDs and others to introduce video-streaming services that avoid set-top boxes. And, through its Open Internet Order in 2015, the FCC banned paid prioritization between ISPs and edge providers, despite there being no evidence of harm to competition, because it views the broadband wireline and even wireless industries as being too concentrated to be competitive.[52]

Both of those actions mistakenly view dynamic phenomena in static terms. They overlook market forces that respond to consumer demand and confer incentives that drive investment in intellectual and physical infrastructure. Tellingly, the CEA's recent report claiming a lack of sufficient competition in U.S. markets applauded the FCC's net-neutrality regulation in this regard. Again, the mistake traces back to simply equating structure with competition.

A second reason why calls for more stringent antitrust enforcement are problematic is that they are often abstract. Which specific deals did the agencies allow to proceed that they ought to have blocked? Invariably, criticism focuses on politically charged matters that the FTC or DOJ cleared

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[50] Recent calls to use antitrust to deconcentrate U.S. industry are mistaken, but they are not unprecedented. For an insightful, historical account, see William Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105 (1989).

[51] FCC, *In re* Expanding Consumers' Video Navigation Choices, MB Dkt. No. 16-42, Feb. 18, 2016.

[52] For my larger critique of the FCC's action in this regard, see Maureen K. Ohlhausen, *Antitrust over Net Neutrality: Why We Should Take Competition in Broadband Seriously*, 15 Colo. Tech. L.J. (forthcoming 2016) (manuscript on file with author).

after scrutinizing evidence and data to which the public (and critics) are seldom privy.[53]

Examining the FTC's and DOJ's recent antitrust enforcement, I see expert agencies that aggressively litigate cases, scrutinize mergers to protect competition and to facilitate efficiencies, and rigorously identify anticompetitive effects. The agencies' analysis today is data-driven, empirical, and nuanced. The agencies act with discretion, closing cases when a careful assessment of the facts reveals no harm to competition. But neither agency shies away from bringing difficult matters, where there is reason to believe an antitrust violation has occurred and where intervention is in the public interest.

In *Steris* last year, for example, the FTC failed in challenging a merger based on a loss of potential competition.[54] The court did not accept the quantum of evidence presented about the likelihood of entry but for the merger. And in *Lundbeck* the agency lost on narrow market definition grounds its case against the acquisition of a patented drug that preceded a 1300 percent price increase.[55]

What to make of losses like *Steris* and *Lundbeck*? Setbacks of that nature reflect a healthy enforcement agenda. The DOJ and FTC have grown to be sophisticated enforcers precisely because the courts hold them to their proof. I welcome the high standards set by the judiciary and relish the challenge of litigating against some of the country's finest lawyers. Sometimes the courts will get it wrong and so, too, will the agencies. But the critical point is that an optimal system of agency design and appellate review will inevitably produce a win rate of less than 100 percent for the FTC and DOJ. It also bears noting that the federal courts have been instrumental in injecting U.S. antitrust law with an economic sophistication that was painfully absent before the 1970s.

C. *Proposals to Weaken Intellectual-Property Laws Are Misguided*

I have explained why the government should not expand antitrust liability to solve a claimed monopoly problem. Beyond antitrust, however, critics also blame the patent system for entrenched monopoly.

The Economist, in particular, calls for "a loosening of the rules that give too much protection to some intellectual-property rights."[56] Finding a disproportionate share of abnormal profits flowing from the healthcare

[53] Still, criticism is inevitable. On the FTC's side, the recurring example is the Commission's unanimous decision—consistent with staff's recommendation—not to sue Google for alleged bias of its search results to favor its own services. On the DOJ side, some commentators disapprove of the decision to clear certain airline mergers only to investigate the more concentrated industry later for possible collusion.

[54] FTC v. Steris Corp., 133 F. Supp. 3d 962 (N.D. Ohio Sept. 24, 2015).

[55] FTC v. Lundbeck, Inc., 650 F.3d 1236 (8th Cir. 2011).

[56] *Too Much of a Good Thing*, *supra* note 1.

industry, the newspaper questions the "patent rules that allow firms temporary monopolies on innovative new drugs and inventions."[57] And it queries the FTC's and DOJ's capabilities to remedy inadequate competition because they "cannot consider whether the length and security of patents is excessive in an age when intellectual property is so important."[58]

Those proposals are troubling. It has become popular to question the IP system. But I fear that stakeholders who would benefit from diluted patent rights have effectively leveraged some legitimate grievances into something larger.[59] Some critics even call for outright abolition of the patent system.[60]

In an article forthcoming in the *Harvard Journal of Law & Technology*, I find abundant evidence consistent with the proposition that a strong patent system encourages R&D investment and economic growth.[61] The econometric and survey literature in the field finds that patents are indispensable to innovation in the life-sciences industry, which makes *The Economist*'s issue with drug patents odd.[62] In some industries, factors like a first-mover advantage and trade secrecy are sometimes more important to *some* inventors than patents, but the evidence shows that many inventors in those fields regard patents as important appropriation mechanisms, too.[63]

America is the world's most innovative economy. A strong patent system lies at the heart of its innovation platform, even enjoying explicit constitutional recognition.[64] Leading studies find a positive correlation between patent protection, private firm R&D, and macroeconomic growth, at least in developed countries.[65] And it is clear that firms respond to changes in patent protection.[66] Patent scope and innovation may have an inverse-U

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57 *Id.*

58 *Id.*

59 To be sure, some firms have abused the patent system. On occasion, the FTC has intervened to bring such abuse to a close. *See, e.g.*, *In re* MPHJ Tech. Investments, LLC, File No. 142-3003, https://www.ftc.gov/enforcement/cases-proceedings/142-3003/mphj-technology-investments-llc-matter; Press Release, Fed. Trade Comm'n, FTC Approves Final Order Barring Patent Assertion Entity from Using Deceptive Tactics (Mar. 17, 2015), https://www.ftc.gov/news-events/press-releases/2015/03/ftc-approves-final-order-barring-patent-assertion-entity-using.

60 *See* Michele Boldrin & David K. Levine, Against Intellectual Monopoly (Cambridge Univ. Press 2010); *see also* Adam B. Jaffe & Josh Lerner, Innovation and Its Discontents: How Our Broken Patent System Is Endangering Innovation and Progress, and What to Do About It (Princeton Univ. Press 2007).

61 Maureen K. Ohlhausen, *Patent Rights in a Climate of IPR Skepticism*, 30 Harv. J.L. & Tech. (forthcoming 2016) (manuscript on file with author).

62 *Id.*

63 *Id.*

64 U.S. Const. art. 1, § 8, cl. 8.

65 *See, e.g.*, Sunil Kanwar & Robert Evenson, *Does Intellectual Property Protection Spur Technological Change?*, 55 Oxford Econ. Papers 235 (2003); Walter G. Park & Juan Carlos Ginarte, *Intellectual Property Rights and Economic Growth*, 15 Contemp. Econ. Pol'y 51 (1997).

66 *See, e.g.*, Bronwyn H. Hall & Rosemarie Ham Ziedonis, *The Patent Paradox Revisited: An Empirical Study of Patenting in the US Semiconductor Industry, 1979-1995*, 32 RAND J. Econ. 101, 104 (2001).

relationship,[67] but given what we know it would be reckless to compromise a pillar on which so much of our innovation policy stands.

Of course, there are problems. For instance, *ex post* enforcement of weak patents may sometimes reduce downstream incentives to commercialize technology.[68] But one must weigh *The Economist*'s and others' calls for weakening the patent system in light of recent changes. In 2011, Congress passed the America Invents Act. Among other things, the AIA introduced *inter partes* and post-grant review by the Patent Trial and Appeal Board, which has invalidated a high percentage of patent claims that it had deemed worthy to review.[69] Further, the Supreme Court has taken many patent cases recently to rein in perceived abuses. Its *Alice* decision, in particular, limited the patentability of computer-implemented processes.[70] That decision has resulted in the invalidation of many abstract, software-related patents that were popular with patent-assertion entities (PAEs).[71] Collectively, such developments represent a sea change for patentees. It would be wise to let these steps' collective effects work their course before adopting radical policy changes.

There is every reason to think that the U.S. patent system is an important driver of R&D and hence competition. But if patents work effectively in a given industry, the result may well be higher concentration. Far from a symptom of sickness, high concentration in a relevant market due to important patents may reflect dynamic efficiency and competition in the laboratory.

The Council of Economic Advisers, for its part, recognizes that "[a]llowing firms to exercise the market power" flowing from a worthy patent grant can "promote long term economic growth."[72] I agree with its view that patent assertion may not be socially productive "if a firm's business model is to earn profits by asserting royalty rights to patents it knows to be invalid under threat of costly patent litigation."[73] The extent to which that theoretical danger materializes in the real world, however, is unclear.

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67 *See, e.g.*, Mariko Sakakibara & Lee Branstetter, *Do Stronger Patents Induce More Innovation? Evidence from the 1988 Japanese Patent Law Reforms*, 32 RAND J. Econ. 77 (2001).

68 *See, e.g.*, Fed. Trade Comm'n, The Evolving IP Marketplace: Aligning Patent Notice and Remedies with Competition 8–9, 50–71 (2011), https://www.ftc.gov/reports/evolving-ip-marketplace-aligning-patent-notice-remedies-competition.

69 The implications of the high invalidation rate before the PTAB are subject to competing interpretations. *See, e.g.*, Rochelle Cooper Dreyfuss, *Giving the Federal Circuit a Run for Its Money: Challenging Patents in the PTAB*, 91 Notre Dame L. Rev. 235, 250–56 (2015).

70 Alice Corp. v. CLS Bank Int'l, 134 S. Ct. 2347 (2014); *see also* Octane Fitness, LLC v. ICON Health & Fitness, Inc., 134 S. Ct. 1749 (2014) (making it easier for prevailing accused infringers to recoup their attorneys' fees and costs); Nautilus Inc. v. Biosig Instruments Inc., 134 S. Ct. 2120 (2014) (bolstering the definitiveness requirement of patentability); Limelight Networks, Inc. v. Akamai Techs. Inc., 134 S. Ct. 2111 (2014) (making it harder for patentees to establish induced infringement).

71 Although many software-related patents have fallen under *Alice*, not all such patents are unpatentable. *See, e.g.*, Enfish, LLC v. Microsoft Corp., No 2015-1244, 2016 WL 2756255 (Fed. Cir. May 12, 2016).

72 *Benefits of Competition and Indicators of Market Power*, *supra* note 6, at 3.

73 *Id.* at 6.

Rhetoric has too often crowded out evidence, especially given broad attacks against so-called "patent trolls." In that respect, I look forward to the FTC's forthcoming section 6(b) study on PAEs.[74]

III. What Is the Right Way to Promote Competition?

To recap, claims of abundant monopoly derive from faulty analysis, and demands for more aggressive enforcement are unrealistic at best and damaging at worst. Nevertheless, the U.S. economy can benefit from more competition. What, then, is the appropriate policy response? We are already clamping down on price-fixing cartels, anticompetitive mergers, and predatory conduct. And our IP laws fuel America's uniquely successful innovation economy. To my mind, an obvious hole in competition policy lies in government itself, and that is where I propose further procompetitive efforts should focus.

As an FTC Commissioner, and in my former role as Director of the FTC's Office of Policy Planning, I have opposed unjustified, state limits on entry. Anticompetitive laws and regulations arise in two distinct settings. In "Mother, May I?" cases, the government controls entry into a profession or trade. One danger is political capture, whereby incumbents influence the passage of protectionist laws. But even well-intentioned regulations can reduce consumer welfare. That is most likely to occur when states underestimate the harm to competition imposed or overestimate the purported benefits of controlling entry. That is why I consistently advocate a humble approach to regulatory design that recognizes the limitations of government oversight.[75]

A separate situation arises when incumbents directly control entry into a market. I call that the "Brother, May I?" problem.[76] When the state allows competitors to choose who may join their club, the risk of consumer harm reaches its zenith.

Whether imposed directly or delegated to market participants, government restrictions on entry are common. Of course, public safety and other concerns justify *ex ante* regulation in many settings. In reality, however, state controls on entry often exceed what is necessary to protect consumers. Many

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[74] Press Release, Fed. Trade Comm'n, FTC Seeks to Examine Patent Assertion Entities and Their Impact on Innovation, Competition (Sept. 27, 2013), https://www.ftc.gov/news-events/press-releases/2013/09/ftc-seeks-examine-patent-assertion-entities-their-impact.

[75] *See* Maureen K. Ohlhausen, *Regulatory Humility in Practice*, Remarks Before the Am. Enterprise Inst. (Apr. 1, 2015), https://www.ftc.gov/public-statements/2015/04/regulatory-humility-practice-remarks-ftc-commissioner-maureen-k-ohlhausen; Maureen K. Ohlhausen, *The Procrustean Problem with Prescriptive Regulation*, 23 CommLaw Conspectus 1 (2014), https://www.ftc.gov/public-statements/2014/12/procrustean-problem-prescriptive-regulation-commlaw-conspectus-journal.

[76] *See* Maureen K. Ohlhausen & Gregory P. Luib, *Brother, May I?: The Challenge of Competitor Control over Market Entry*, 4 J. Antitrust Enforcement 111 (2016), https://www.ftc.gov/public-statements/2015/09/brother-may-i-challenge-competitor-control-over-market-entry.

appear to be naked, albeit government-sanctioned, restraints on trade. State-imposed restrictions are uniquely harmful because market forces cannot self-correct around an inefficient law. Worse still, they are abundant. If we wish to increase the amount of competition in U.S. markets, our next-best step should be to prune government regulations that inhibit entry, stifle business in red tape, and distort economic activity without offsetting gains. To their credit, *The Economist* and the CEA recognize as much.[77]

I am not so naïve as to think that we can rid politics of special-interest groups and laws that disproportionately harm competition. But I think the more egregious examples of unjustified government restrictions on entry are appropriate targets for consumer advocacy. The FTC will continue to play its part in those efforts. And although federalism prevents U.S. antitrust authorities from prohibiting anticompetitive state action, the FTC and DOJ can force governments to own the exclusionary laws and regulations they pass at consumers' expense.

In light of the FTC's wins at the Supreme Court in *North Carolina Dental* and *Phoebe Putney* in 2015 and 2013, respectively, it is now harder for states to inhibit competition.[78] They may not give private market participants unsupervised control over entry into a market, even if they act via a designated state agency.[79] And if states wish to limit competition, they must do so without ambiguity, pursuant to a "clearly articulated and affirmatively expressed" policy to displace competition.[80] Those are important developments in the law, but we need to do more.

Conclusion

In this essay, I have addressed the competitiveness of American industry and the role of antitrust, patent, and regulatory policy in spurring a vibrant economy. Although my remarks have focused on U.S. markets, I should note that these issues are by no means unique to America. I conclude with four short points.

First, the fact that industry concentration and firm profits trend upward for a time does not show that competition is in decline. The causal chain between market structure and firms' economic rents is complex and multidirectional. Due to statistical challenges, and the lack of benchmarks to gauge competition across industries, the better path is to scrutinize individual

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77 *The Economist*, for example, calls for "a serious effort to remove the red tape and occupational-licensing schemes that strangle small businesses and deter new entrants." *Too Much of a Good Thing*, *supra* note 1.

78 N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015); FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013).

79 *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1117, *passim*.

80 *Phoebe Putney Health Sys.*, 133 S. Ct. at 1011.

markets, identify anticompetitive conduct or unjustified government restrictions on competition, and work to remedy them.

Second, antitrust should remain a precision tool: a scalpel rather than a hammer.[81] Recent calls for an antitrust solution to the "problem" of rising consolidation, independent of material horizontal overlap, are misplaced. That perspective harkens back to an era I thought wisely confined to the history books.[82]

Third, although it is fashionable to pile on the patent system today, it is easy to discount the role that IP rights may play in driving an economy's technological output. When one looks dispassionately at the empirical evidence, and recognizes the economic activity that relies on patent-related investments, there are good reasons to favor strong patent protection.

Finally, a loophole in today's antitrust enforcement is government restrictions on entry. Well-crafted regulations inform and protect consumers, but too often they become overbearing and, sometimes, blatantly exclusionary. Governments and consumer-advocacy groups should take a hard look at occupational-licensing regulations and legislation that shields firms from competition. Those rules that inhibit market forces without an offsetting gain warrant particular scrutiny. Given today's effective antitrust-enforcement policies and IP protections, we have more to gain by scrutinizing exclusionary laws.

[81] In that respect, I disagree with *The Economist*'s suggestion to embrace "more active, albeit cruder, antitrust actions." *Too Much of a Good Thing*, *supra* note 1.

[82] In 1966, for instance, the Supreme Court in *Von's Grocery* condemned a merger that gave the parties a mere 8 percent share of the market. United States v. Von's Grocery Co., 384 U.S. 270 (1966).