Office of Commissioner
Melissa Holyoak

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

REDISCOVERING ADAM SMITH:
AN INQUIRY IN THE RULE OF LAW, COMPETITION, AND THE FUTURE OF THE FEDERAL TRADE COMMISSION

MELISSA HOLYOAK*
COMMISSIONER, U.S. FEDERAL TRADE COMMISSION

MAY 31, 2024

REMARKS AT THE COMPETITIVE ENTERPRISE INSTITUTE'S ANNUAL SUMMIT
Celebrating CEI's 40th Anniversary and the Tercentenary of Adam Smith

* The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner.

I. Introduction

It is my privilege to be here to celebrate the 40th anniversary of CEI, along with the 300th birthday of Adam Smith. CEI has been at the vanguard of free-market advocacy and it is wonderful to combine CEI's anniversary with a celebration of Adam Smith. I will start with a standard disclaimer: the views I express today are my own. They do not necessarily represent those of the Federal Trade Commission or any other Commissioner.

It has been a little over two months since I joined the Federal Trade Commission and I am thrilled to share a few of my thoughts on the future of the Commission.

In July 2021, President Biden declared that the previous forty years of competition policy was a failed experiment.[1] And since that declaration, senior federal government leaders have taken extraordinary efforts to cast doubt over the legal and economic theories that enjoyed decades of bipartisan support.[2] Indeed, we are witnessing a revolution and an attempt to transform the economy through antitrust policy. The FTC and DOJ are working tirelessly to reinvigorate dismissed doctrines, restore long-disused precedent, and upset long-standing principles.[3]

The proposed overhaul also reflects deeply held beliefs about antitrust law's currently untapped potential to effectuate—or at least facilitate—broad and expansive policy goals. For example, some proponents believe antitrust is a tool to address market structures that reflect significant power imbalances, including as they relate to labor, or equity and racism.

It is an important feature of a pluralistic society that we periodically reevaluate and debate the direction of government policy. Healthy dialogue can lead to positive outcomes and improvements in law and policy. But a careful reconsideration of longstanding views and policy—accompanied with thoughtful change, consistent with the rule of law—is not how I would describe the last three years. Instead, we have seen a general trend away from the ideal of competition and toward a

---

[1] *See* Remarks by President Biden At Signing of An Executive Order Promoting Competition in the American Economy (July 9, 2021) ("We're now 40 years into the experiment of letting giant corporations accumulate more and more power. And [] what have we gotten from it? Less growth, weakened investment, fewer small businesses. Too many Americans who feel left behind. Too many people who are poorer than their parents. I believe the experiment failed. We have to get back to an economy that grows from the bottom up and the middle out."), *available at* https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/09/remarks-by-president-biden-at-signing-of-an-executive-order-promoting-competition-in-the-american-economy/. Similarly, Tim Wu—who served as a special assistant to President Biden for competition policy—has argued that in the United States, there has been a "weaken[ing of] laws meant to control the size of industrial giants," "unrestricted growth of concentrated private power," and an "abandon[ment of] most curbs on anticompetitive conduct." TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE 14 (2018).

[2] For a comprehensive critique of these claims, *see* Todd J. Zywicki, *The Law and Political Economy Project: A Critical Analysis* (May 22, 2024), George Mason Law & Economics Research Paper No. 24-12, *available at* https://ssrn.com/abstract=4836562 or http://dx.doi.org/10.2139/ssrn.4836562.

[3] *See generally, e.g.*, J. Howard Beales III and Timothy J. Muris, *Achieving Change at the Federal Trade Commission*, Competitive Enterprise Institute, at 2-5 (May 2024), https://cei.org/wp-content/uploads/2024/05/Achieving-Change-at-the-Federal-Trade-Commission.pdf; Zywicki, *supra* note 2, at 2-11; Franklin Foer, *Biden Declares War on the Cult of Efficiency*, The Atlantic (July 21, 2023) ("This week, the Biden administration very quietly published a manifesto for a counterrevolution. It didn't arrive trumpeted with flaming rhetoric. There was no televised speech or Oval Office photo op—just a draft memo from the Justice Department and Federal Trade Commission laying out the new standards they will use to assess the legality of corporate mergers. This is, to say the least, not the most scintillating piece of reading that will be released this year. But it may turn out to be one of the most consequential."), *available at* https://www.theatlantic.com/ideas/archive/2023/07/biden-administration-corporate-merger-antitrust-guidelines/674779/.

bankrupt idea of protecting competitors at the expense of competition and consumers. Perhaps most concerning, the recent approach ignores the wealth of experience we gained over the last several decades.[4]

As we determine the best path forward, we cannot ignore the lessons history has taught us, nor the extraordinary bipartisan consensus that emerged over decades of antitrust enforcement.[5] As Hayek once wrote, "[i]f old truths are to retain their hold on men's minds, they must be restated in the language and concepts of successive generations."[6] And while I am sympathetic to some of the concerns voiced these last three years—particularly the threat that misused corporate power can present to individual liberty—I have strong concerns about the current trend and the means by which the DOJ and FTC have acted.

To that end, my remarks will describe what I believe to be the proper goals of the Federal Trade Commission. And in celebrating the 300th birthday of Adam Smith, I begin by exploring what Smith can offer to understand these goals. As former FTC Chairman Tim Muris put it, "[a]ntitrust beckons the social scientist in all of us [and] [p]erhaps most clearly, antitrust appeals to the professionally trained or self-taught economist."[7] Who better than Smith, then, to help us understand the proper goals of antitrust?

Adam Smith is widely hailed as the father of economics and modern-day capitalism. But he is so much more than that. While Smith of course studied what we today call economics, he was a professor of moral philosophy, not economics. He published two books, the most famous of which is *An Inquiry into the Nature and Causes of the Wealth of Nations*; the less famous is *The Theory of Moral Sentiments*.

In *Wealth of Nations*, Smith gives "moral authorization" for the pursuit of "honest profit"—that is, he argues in favor of a market economy.[8] But to understand *why* Smith gives his moral authorization, we must first look to the *Theory of Moral Sentiments*.

---

[4] *See generally* Zywicki, *supra* note 2; *see also* J. Howard Beales III and Timothy J. Muris, *supra* note 3, at 2-3.

[5] *See e.g.*, Robert Pitofsky, *Past, Present, and Future of Antitrust Enforcement at the Federal Trade Commission*, 72 U. Chi. L. Rev. 209, 209 (2005) ("The period from 1970 to the present--roughly a third of a century--has witnessed profound changes in the quality of regulation at the Federal Trade Commission and a remarkable convergence of antitrust enforcement policy between left and right, and between primarily legal as opposed to primarily economic approaches. With respect to substantive law, areas of intellectual debate and uncertainty remain, but viewpoint differences that existed between the 1960s and the 1980s are today vastly reduced."); Timothy J. Muris, *Principles for a Successful Competition Agency*, 72 U. Chi. L. Rev. 165, 165 (2005) (noting agreement with former Chairman Pitofsky's characterization of broad consensus in antitrust enforcement).

[6] F.A. HAYEK, THE CONSTITUTION OF LIBERTY 47 (1960). The epigraph to Hayek's text is equally instructive to today's inquiry: "Our inquiry is not after that which is perfect, well knowing that no such thing is found among men; but we seek that human Constitution which is attended with the least, or the most pardonable inconveniences." *Id.* at 37 (quoting Algernon Sidney, DISCOURSES CONCERNING GOVERNMENT at 151 (London. Printed for W. Strahan Iun., 1772)).

[7] Timothy J. Muris, *How History Informs Practice—Understanding the Development of Modern U.S. Competition Policy*, American Bar Association Antitrust Section Fall Forum (Nov. 19, 2003), *available at* https://www.ftc.gov/sites/default/files/documents/public_statements/how-history-informs-practice-understanding-development-modern-u.s.competition-policy/murisfallaba.pdf.

[8] Dan Klein on *The Theory of Moral Sentiments*, EconLib (April 6, 2009) at 6:30 to 7:30, *available at* https://www.econtalk.org/klein-on-the-theory-of-moral-sentiments-episode-1-an-overview/#audio-highlights.

II. Smith's *Theory of Moral Sentiments*: The Epiphenomenal Nature of Morality

Smith's central goal in *Moral Sentiments* was to describe the process by which we form moral judgments.[9] What Smith found was that individual sentiments emerge through the daily, decentralized exchange of ideas—a spontaneous or unintended order.[10]

A simple example is illustrative. Just recently, a new family moved into my neighborhood. My neighbors across the street gave them a welcome package. According to Smith, I would first sympathize with the motives of my neighbors across the street: "they are thoughtful."[11] *Second*, I would think about the gratitude the new neighbor feels toward not just my neighbors across the street but perhaps the new community generally.[12] And *third*, whether I praise the conduct of my neighbors depends on whether their actions are aligned with established rules or norms—clearly in this instance they are.[13] (Of course, I felt terrible because it took me way too long to deliver our family's welcome cookies—delayed in part by preparing for this speech.)

These sources of moral approval are *micro* in nature. Little by little, we learn from these interactions and develop as we instinctively seek this "mutual sympathy" of sentiments, as Smith describes.[14] Even though we are routinely considered selfish creatures, contrary to some opinion, Smith did not regard individuals as motivated solely by selfishness.[15] Smith observed that these countless micro-level interactions can be messy and have no overall plan—but because we develop them together with others in our community, they lead to, on the *macro* level, a shared system of behaviors and moral judgment.[16]

It is quite beautiful when you think about it, these countless human interactions that lead to an unplanned but relatively stable societal order. Our family is very musical so I liken it to a musical metaphor (as does Smith, on numerous occasions)—individual musicians practicing and tuning their instruments and coming together, with no sheet music and no conductor, to create a spontaneous symphony of complementing harmonies.

Professor Dan Klein observed that the ideas found in *Theory of Moral Sentiments* lay the foundation for *Wealth of Nations*—that is, together they help us understand how commercial society fits within this macro-level order and how individual transactions make up a decentralized market economy.[17] But before I get to *Wealth of Nations*, let me mention two other principles from *Theory of Moral Sentiments* that are relevant here.

---

[9] Adam Smith, THE THEORY OF MORAL SENTIMENTS (D.D. Raphael and A.L. Macfie eds., Liberty Fund, Inc. 1982) (1790) (hereinafter *TMS*).

[10] The term "spontaneous order" preceded Smith by two centuries, but the idea animates Smith's writing. *See* James Otteson, *The Essential Adam Smith*, Frasier Institute at 27 (2018) (explaining that Smith's explanation for the development of moral standards is a process we would refer to today as "spontaneous order" a phrase that "was developed by twentieth-century thinkers like Michael Polanyi and Friedrich Hayek [and] referred to the development of an orderly system that arose from the decentralized actions of individuals but without their intending to design any overall system.").

[11] *See TMS*, *supra* note 9 at 326.

[12] *Id.*

[13] *Id.*

[14] *Id.* at 13.

[15] *Id.* at 9.

[16] *Id.* at 326.

[17] *See* Dan Klein on *The Theory of Moral Sentiments*, EconLib (April 6, 2009) at 31:15 to 32:30, *available at* https://www.econtalk.org/klein-on-the-theory-of-moral-sentiments-episode-1-an-overview/#audio-highlights.

First, in refining his notion of moral sentiments, Smith compares two types of men. He describes the "man of public spirit" who respects the choices and decisions of his fellow citizens, even when he himself may find the decisions or consequences problematic.[18] When the man of public spirit is unable to use reason and persuasion to convince someone of their wrong or poorly reasoned decision or choice, he will not attempt to change their mind using force.[19]

The "man of the system," by contrast, is "often so enamored with the supposed beauty of his own ideal plan of government, that he cannot suffer the smallest deviation from any part of it. . . . . He seems to imagine that he can arrange the different members of a great society with as much ease as the hand arranges the different pieces upon a chessboard."[20] Back to my analogy, this man not only wants to pick up the symphony conductor's wand and hand out his own sheet of music, he wants to tell you what instrument to play and how to play it.

As everyone here can attest to, Washington D.C. has its fair share of men and women of system.

Second, and possibly most importantly, Smith explains three types of justice—which together govern human interaction. The first type of justice, commutative justice, "consists in abstaining from what is another's."[21] In other words, commutative justice proscribes violations of another's person, property, or contract.[22]

Distributive justice relates to the proper use of one's *own* energy, attention, and love.[23] It encompasses social virtues such as self-control, prudence, temperance, generosity, and kindness.[24] And finally, estimative justice describes conduct as problematic where one does not estimate or properly evaluate the value of things including objects, ideas, and actions.[25]

In line with Smith's unique rhetorical flair, he employs a helpful metaphor to illustrate his understanding of the different types of justices, comparing the rules of justice to the rules of composition.[26] Commutative justice is compared to the rules of grammar, whereas distributive and estimative justice are "the rules which critics lay down for the attainment of what is sublime and elegant in composition."[27] The former are "precise, accurate, and indispensable"; the latter are "loose, vague, and indeterminate."[28] So while everyone agrees that violations of rules of grammar (commutative justice) are wrong, disagreement on composition (distributive and estimative justice) are inevitable. For example, I may think that someone who dislikes my beloved Jane Austen has violated estimative justice, but others will disagree.

Such indefiniteness cautions us against government rules or intervention in parts of our lives that do not fall under commutative justice. We all agree that government should protect our person, property, or contract, but Smith understood that individuals would have wildly different opinions about important subjective policy issues—do we like Jane Austen, or do we prefer Stephen King? And, when government steps in to regulate inherently subjective issues—particularly issues that

---

[18] *TMS*, *supra* note 9 at 233.
[19] *Id.*
[20] *Id.* at 233-34.
[21] *Id.* at 269.
[22] *Id.*
[23] *Id.* at 269-70.
[24] *Id.* at 270.
[25] *Id.*
[26] *Id.* at 175.
[27] *Id.*
[28] *Id.*

are unrelated to commutative justice—the regulation has the effect of stopping the evolutionary process that is critical to human nature.

III. *Wealth of Nations*: The Moral Authorization for Pursuit of Honest Profit

How government should regulate a market economy is the question taken up by Smith's second, and more famous book, *The Wealth of Nations*.[29] To many readers of Adam Smith, his two greatest books are in tension with one another. But as Professor James Otteson concludes, "such investigations [into human nature] would ultimately be empty and pointless unless they were connected to recommendations that would enable people to lead better lives."[30]

And that is what Smith set out to do. Smith understood that for nearly all of recorded history, ordinary humans were, as Smith put it, "miserably poor." As he described it:

> Such nations, however, are so miserably poor, that, from mere want, they are frequently reduced, or, at least, think themselves reduced, to the necessity sometimes of directly destroying, and sometimes of abandoning their infants, their old people, and those afflicted with lingering diseases, to perish with hunger, or to be devoured by wild beasts.[31]

It is easy to take for granted the unprecedented wealth we enjoy today—and more importantly, it is easy to take for granted *why* we enjoy the unprecedented wealth we have today.[32] Smith set out to understand *why* some countries were wealthier than others, in his aptly titled *An **Inquiry** into the Nature and Causes of the Wealth of Nations*. He understood that examining and understanding the institutions, rules, and laws that facilitated the creation of wealth was not just an academic exercise—it was an issue of life and death.

---

[29] Adam Smith, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 10 (1776) (hereinafter *WN*).

[30] Otteson, *supra* note 10 at 9 ("So Smith thought the political economist needed to know, first, what the human and other material was with which he had to work, and what the possibilities and limitations of that material were; but, second, the political economist should then use what he learns to recommend behaviors and policies that could enable creatures constructed as we are in conditions like those we face to lead lives worth living. For Smith, this meant he should study human nature the way an empirical moral psychologist today might, but then would draw conclusions about public policy based on his findings. Smith believed that human happiness was a great good, indeed the *summum bonum*, and it required both empirical inquiry and moral philosophy to understand what genuine happiness for human beings is. But Smith also assumed that attempting to achieve it, as well as helping others to achieve it, was a moral imperative".); *see also* Vernon Smith, *The Two Faces of Adam Smith* S. ECON. 65 J. 1, 3 (1998) ("Thus, Smith had but one behavioral axiom, 'the propensity to truck, barter, and exchange one thing for another,' where the objects of trade I will interpret to include not only goods, but also gifts, assistance, and favors out of sympathy, that is, 'generosity, humanity, kindness, compassion, mutual friendship and esteem.").

[31] *WN* at 10.

[32] *See* James Pethokoukis, *How the West Got Rich?* AEIdeas (May 23, 2016) (comparing average world income two centuries ago of $3 versus $33 today and noting that in advanced economics, average income is four times higher than that in advanced economies). Deidre McCloskey, channeling Adam Smith, explains precisely why we got rich:

> The answer, in a word, is "liberty." Liberated people, it turns out, are ingenious. Slaves, serfs, subordinated women, people frozen in a hierarchy of lords or bureaucrats are not.…To use another big concept, what came—slowly, imperfectly—was equality. It was not an equality of outcome, which might be labeled "French" in honor of Jean-Jacques Rousseau and Thomas Piketty. It was, so to speak, "Scottish," in honor of David Hume and Adam Smith: equality before the law and equality of social dignity. It made people bold to pursue betterments on their own account. It was, as Smith put it, "allowing every man to pursue his own interest his own way, upon the liberal plan of equality, liberty and justice."

Bourgeois Equality: A Discussion with Deirdre McCloskey on How ideas Enriched the World (May 3, 2016).

Let me highlight just a few of Smith's insights in the *Wealth of Nations* that relate directly to my broader inquiry into the goals of the FTC.

First, contrary to critics of markets who cite *perfect* competition—or the lack thereof—as a basis for policy, Smith's definition of competition focused on the importance of rivalry between competing individuals seeking to satisfy consumer preferences.[33] In other words, Smith was concerned with the process of competition,[34] and practices that may impede that process to favor special interests at the expense of the public—particularly government practices.

Of course, while Smith is famous for his invocation of the invisible hand, much of the *Wealth of Nations* includes detailed knowledge of real-world institutions that Smith had to investigate and examine.[35] Smith understood that only by examining the institutions he was studying could he fully appreciate whether the market process was competitive or not. And he knew better than anyone how private business was keen to engage in rent-seeking and other conduct to curry favor from government and undermine competition.[36]

And *second*, Smith's *normative* analysis of the market process, discrete rules, and regulations is driven by a *comparison* of alternative institutions and how effective each set of institutions is at reducing transaction costs and otherwise facilitating market activity.[37]

Contrary to how detractors of market solutions characterize Smith, it was not his belief in efficiency or perfect markets that led him to favor private exchange over government direction of the economy. Rather, it was Smith's *empirical* observation that markets promote the good of ordinary people, better than government had historically done, which led to his endorsement of market exchange.[38]

---

[33] *See, e.g.*, *WN* at 146:

> The pretence that [exclusive] corporations are necessary for the better government of the trade is without any foundation. The real and effectual discipline which is exercised over a workman, is not that of his corporation, but that of his customers. It is the fear of losing their employment which restrains his frauds and corrects his negligence. An exclusive corporation necessarily weakens the force of this discipline. … It is in this manner that the policy of Europe, by restraining the competition in some employments to a smaller number than would otherwise be disposed to enter into them, occasions a very important inequality in the whole of the advantages and disadvantages of the different employments of labour and stock.

[34] The idea of competition as a discovery process would be taken up by several leading 20th century economists. *See e.g.*, F.A. Hayek, *The Meaning of Competition, Individualism and Economic Order* (Chicago: University of Chicago Press, 1948) at 92-106.

[35] Smith used the phrase *invisible hand* on three occasions in three separate works. For a discussion on the meaning of *invisible hand* across Smith's work, *see* Daniel B. Klein *In Adam Smith's Invisible Hands: Comment on Gavin Kennedy* 6 ECON. J. WATCH 264 (2009).

[36] *See e.g.*, *WN* at 471.

[37] As discussed in Section IV.1 below, comparative institutional analysis is a necessary element of effective government policy, including and especially antitrust and consumer protection. On the importance of comparative institutional analysis, *see* Thomas W. Hazlett, David Porter & Vernon Smith, *Radio Spectrum and the Disruptive Clarity of Ronald Coase*, 54 J. L. & Econ. S126, S156 (2011) ("What Coase fundamentally contributed was a symmetric analysis of property regime choices, explaining that the costs of the price system were real, but so were the costs of any alternative."), discussing R. H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960).

[38] Smith—like our founding fathers—was not concerned with situations where humans behaved like angels. Rather, he advocated in favor of markets precisely because men are not angels. As Hayek put it, markets are the system where "bad men can do [the least] harm." F.A. Hayek, INDIVIDUALISM AND ECONOMIC ORDER 11-12 University of Chicago Press (1948).

IV. Applying Adam Smith's Lessons to the Federal Trade Commission's Mission

Reviewing Smith's major works for this speech, I cannot help but observe that many of the important academic contributions in antitrust and consumer protection fall within the intellectual tradition that Smith—the father of economics—bequeathed to us. One of the many features of the Commission that I hold in high regard is its history of using economics to further its mission to prevent harm in the marketplace.

Like Smith, the Commission seeks to understand the real-world impact on individuals. Economic analysis can meaningfully assist every administrative agency, of course. But for the Federal Trade Commission in particular, economic analysis is critical.[39]

Exploring the history and significance of the Commission has also revealed to me what an extraordinary agency it has become, particularly because of the esteemed leadership it has been lucky to have, like former Chairman Tim Muris, who is with us here today.

Chairman Muris has described our economic system as a three-legged stool: the first leg is the marketplace, the second leg are legal rights (contract, property, and other rights) enforced through the legal system, and the third is public agencies.[40] "When competition and contract rights cannot adequately restrain market participants who don't play by the rules, public agencies must help bear the weight of policing the markets."[41] But as we have seen the last three years, the stool is made unsteady when the agency embarks on an aggressive agenda divorced from the rule of law and sound economics.

Rather than continuing down the current path, I believe a different way forward is possible. The path I propose respects the authority delegated to the Commission by Congress and dedicates the Commission's resources to promoting and protecting the competitive process and consumers. Here are four guideposts that will lead me—and the agency—on that path.

1. The FTC Should Comprehensively Evaluate the Economic Impact of Rulemakings.

For better or worse, rulemakings are a central feature of day-to-day Commission life. In my remarks on the Noncompete Rule, as well as my statement on the FTC's Health Breach Notification rulemaking, I emphasized that Article I of the Constitution provides that Congress, not the Executive, has legislative powers.[42] At times, in the heat of the debate about a policy issue we all may feel strongly about, agencies can lose sight of where lawmaking authority resides.

[39] The Federal Trade Commission has historically organized economists into a separate unit, a critical element of its success. For a discussion on the relationship between the organization of economists and the quality and consideration of economic analysis in federal agencies, *see* Luke Froeb et al. The Economics of Organizing Economists 76 ANTITRUST L. J. 569 (2009); *see also* Jerry Ellig, *Agency Economists* Final Report for the Administrative Conference of the United States (2019).

[40] Timothy J. Muris, *The Federal Trade Commission and the Future Development of U.S. Consumer Protection Policy*, Remarks before the Aspen Summit, Cyberspace and the American Dream, The Progress and Freedom Foundation (Aug. 19, 2003), *available at* https://www.ftc.gov/news-events/news/speeches/federal-trade-commission-future-development-us-consumer-protection-policy.

[41] Brian Johnson, *Towards a 21st Century Approach to Consumer Protection*, Remarks to Consumer Action (Nov. 15, 2018), *available at* https://www.consumerfinance.gov/about-us/newsroom/toward-21st-century-approach-consumer-protection.

[42] *Cf.* Oral Statement of Comm'r Melissa Holyoak, In the Matter of the Non-Compete Clause Rule, Matter Number P201200 at 1 (April 23, 2024), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/non-compete-oral-statement-holyoak.pdf; Statement of Comm'r Melissa Holyoak, Health Breach Notification Rule, File No. P205405 at 1 (April 26, 2024), *available at* https://www.ftc.gov/system/files/ftc_gov/pdf/p205405_hbnr_mhstmt_0.pdf.

"[N]o matter how important, conspicuous, and controversial the issue, [however]… an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress."[43]

The history of the FTC teaches that pursuing a rulemaking and enforcement agenda that goes beyond the agency's delegated authority wastes substantial resources on long-term projects that, because they are ultimately held unlawful, confer no benefits to consumers.[44] It not only diverts resources away from the agency's core mission, it undermines the legitimacy of the agency and reduces the chances that Congress will provide the Commission with resources and authority it *does* need.[45] Unfortunately, the Commission's recent actions suggest history may be repeating itself.

Further, an important economic element of each new rule is not just the consideration of costs and benefits but also a broader analysis in line with standard economic principles. Rulemakings should include an evidence-based discussion of the market failure or economic harm the rule purports to solve. Accurately describing the problem assists both the Commission and the public in determining "whether the regulation is necessary and, if so, what type of regulation would best address the problem."[46]

The analysis of the pre- and post- rule environment should be careful to avoid comparing an *imperfect* market to a *perfectly implemented* government solution—markets are not perfect but neither are government solutions.[47] The issue is which solution better promotes the welfare of consumers.[48]

2. <u>When Enforcing Antitrust Violations, We Should Fish Where the Fish Are</u>.

I spoke earlier of the debate that is going on concerning the role of antitrust broadly and whether the country is better off today relative to three or four decades ago. Before turning to what antitrust is, it is important to identify what it is not. Antitrust is not a panacea. It is not a cure for every perceived ill in the American economy.

While other agencies are tasked with regulating labor, employment, or even corporate governance, the Federal Trade Commission's role is to prosecute conduct that impedes the competitive process

---

[43] *Food & Drug Admin. v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000) (internal citations omitted).

[44] *See e.g.*, J. Howard Beales III and Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?* 83 GEORG. WASH. L. REV. 2157, 2162-2171 (2015).

[45] *See e.g*., Miles W. Kirkpatrick, *Report of the ABA Commission to Study the Federal Trade Commission*, 427 Supp Antitrust & Trade Reg Rep 1, 1 (Sept. 16, 1969) ("Over the past 50 years, a succession of independent scholars and other analysts have consistently found the FTC wanting in the performance of its duties by reason of inadequate planning, failure to establish priorities, excessive preoccupation with trivial matters, undue delay, and unnecessary secrecy…Through lack of effective direction, the FTC has failed to establish goals and priorities, to provide necessary guidance to its staff, and to manage the flow of its work in an efficient and expeditious manner.").

[46] Jerry Ellig, *Regulatory Impact Analysis for Financial Regulations*, Regulatory Studies Center: The George Washington University, 5 (July 21, 2020), *available at* https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/Insights/GW%20Reg%20Studies%20-%20RIAs%20for%20Financial%20Regulations%20-%20JEllig_.pdf.

[47] Harold Demsetz referred to this error as the "Nirvana Fallacy." *See* Harold Demsetz, *Information and Efficiency: Another Viewpoint*, 12 J. of L. & Econ. 1, 3 (1969).

[48] *See e.g.*, R.H. Coase *The Regulated Industries: Discussion* 54 AM. ECON. REV. 194, 195 (1964) (arguing that "[u]ntil we realize that we are choosing between social arrangements which are all more or less failures…" we cannot effectively prescribe policy solutions).

or that harms consumers. Understanding the Federal Trade Commission's proper role, relative to other administrative agencies and most importantly Congress, is critical.[49]

To sustain that charter, the Federal Trade Commission must promote the competitive process over competitors. Drawing on my earlier discussion of Smith, he criticized what modern economists call rent-seeking.[50] And he understood business would look to government to remove its competitors and that good governance required avoiding the provision of such special privileges. Consistent with this insight, the Federal Trade Commission must resist calls to protect *competitors* at the expense of competition.

A central question for every new Commissioner is where they believe enforcement resources should be directed. As former Bureau of Competition Directors Susan Creighton & Bruce Hoffman felicitously put it, when fishing for law violations, "the best place to fish is where the fish are plentiful, and the things you catch are likely to be fish."[51] And naturally, the fish are likely most plentiful where economists broadly agree that the conduct at issue harms consumers or the competitive process.[52] Along those lines, horizontal mergers and agreements are, and remain, a fertile area where anticompetitive conduct surfaces.

An example is Tapestry's recent proposal to acquire Capri—for those who may not be familiar, this is the handbag merger where Kate Spade and Coach proposed to acquire, among other brands, Michael Kors.[53] I voted yes to issue a complaint because—consistent with Section 7—there were serious concerns that the acquisition would substantially lessen competition and harm consumers.[54] While there was editorializing regarding gratuitous and unrelated labor and serial acquisition concerns in the complaint, the critical issue in *Tapestry* was the evidence of substantial head-to-head competition between Tapestry and Capri and the probable unilateral pricing power the combined firm would have.[55]

Empirically grounded economic analysis remains a vital tool for identifying anticompetitive conduct. Smith emphasized the critical importance of institutional analysis, but this is true not just for the economic study of an industry or market, but also whether a particular business practice is anticompetitive. Under the *rule of reason*, courts balance the competitive effects, analyzing the

---

[49] *See e.g.*, Herbert Hovenkamp, *Antitrust's Place in Regulation* 1-2, 5-6 (May 25, 2024), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4841731 (explaining that although President Biden's Executive Order states that antitrust laws form "Statutory Basis of a Whole-of-Government Competition Policy," the Executive Order did not change antitrust laws nor other regulatory regimes: "It certainly does not suggest that antitrust law should displace labor law, act as a substitute for the Consumer Product Safety Commission, enforce civil rights, or make environmental law in the place of Congress and the United States Environmental Protection Agency. All of these tasks have been assigned elsewhere.").

[50] *See* Gordon Tullock, *The Welfare Costs of Tariffs, Monopoly, and Theft*, 5 W. Econ. J. 224 (1967); Anne O. Kreuger, *The Political Economy of the Rent Seeking Society*, 64 Am. Econ. Rev. 291 (1974).

[51] Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker, Ernest A. Nagata, *Cheap Exclusion*, 72 Antitrust L. J. 975, 978 (2005) ("In the efficient allocation of always-scarce enforcement resources, exclusionary conduct that is likely to be common (relative to other forms of exclusion), and lacks any legitimate competitive benefit, makes an attractive target.").

[52] Additionally, focusing enforcement where there is broad agreement has the added benefit of reducing errors costs. *See* Frank H. Easterbrook, The Limits of Antitrust, 63 TEX. L. REV. 1 (1984).

[53] FTC Press Release, *FTC Moves to Block Tapestry's Acquisition of Capri* (April 22, 2024), *available at* https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-moves-block-tapestrys-acquisition-capri.

[54] *Id.* ("Commissioner Melissa Holyoak voted yes because she has reason to believe that the merger will eliminate substantial head-to-head competition between the parties.").

[55] *Id.*

relevant institutional details to determine whether the alleged anticompetitive harms outweigh any offsetting procompetitive benefits or efficiencies.[56]

The importance of the Commission's continued reliance on the *rule of reason* cannot be overstated. Only by evaluating conduct by its *effects on competition* can we know whether consumers or the market process are harmed. The approach is consistent with sound economic policy and is good governance.

3. We Must Avoid an Identity Crisis in our Consumer Protection Efforts.

Just as we must understand what antitrust is and is not, we must understand who we are and who we are not in our consumer protection enforcement. When it comes to Section 5 of the FTC Act, we are not prudential regulators. The Federal Reserve or the Office of the Comptroller of the Currency assess the safety and soundness of banks with prudential tools like supervision and examination. The FTC's consumer protection—and antitrust—enforcement authority under the FTC Act are not prophylactic. Our job is to remedy unlawful conduct—generally speaking, harm that is happening in real time to consumers.

This approach has yielded tremendous benefits to the American economy because it facilitates what Adam Thierer calls permissionless innovation.[57] New technologies represent tremendous promise for Americans. For example, we are at an exciting time of technological development, as large language models and other forms of AI are revolutionizing how we make decisions, conduct research, and interact with each other. For consumers to realize the benefits of AI, however, they need to be able to trust the technology. The Commission plays an important role in making sure that AI is used to benefit, and not to harm, consumers.

The Commission's recent Voice Cloning Challenge is a great example of that work.[58] Voice cloning can be an important medical aid for consumers who have lost their voices from accidents or illness. But bad actors can also use voice cloning to target individuals or small businesses in impersonation frauds. Last week, the Commission announced the winners of its "Voice Cloning Challenge," which offered a prize for innovative solutions to the threats voice cloning can pose.[59] Some winners of the challenge used AI themselves, such as algorithms to differentiate between genuine and synthetic voice patterns.[60]

When thinking about AI development, it's useful to compare AI to data security. For decades, the Commission has, on a bipartisan basis, called for reasonable data security, which requires assessing and controlling for risks to the security of consumers' personal information and engaging in ongoing monitoring for threats. But reasonable security is not strict liability. Nor does it mean that a practice is unlawful where injury is speculative. We must continue our consumer protection efforts to address existing harms and not seek to regulate, *ex ante*, the development of emerging technologies, unless Congress has determined otherwise. Such an approach ensures that the Commission protects consumers while not stifling innovation.

---

[56] *Leegin Creative Leather Prod., Inc. v. PSKS, Inc*., 551 U.S. 877, 885-86 (2007).
[57] Adam Thierer, *Permissionless Innovation: The Continuing Case for Comprehensive Technological Freedom*, Mercatus Center at 1 (2016), available at https://www.mercatus.org/system/files/Thierer-Permissionless-revised.pdf.
[58] Press Release, *FTC Announces Winners of Voice Cloning Challenge* (April 8, 2024), *available at* https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-winners-voice-cloning-challenge.
[59] *Id.*
[60] *Id.*

4. We Should Skate to Where the Puck is Going.

My son plays on a pee-wee hockey team. When we go to his games everything moves a bit slower, like watching the NHL under water. But it's also interesting to see that as the kids get older, they start to understand that you don't skate to where the puck was, you skate to where it is going.[61]

The FTC has the authority under Section 6(b) of the FTC Act to conduct industry-wide studies.[62] And, in fact, the FTC has previously issued orders to social media and video streaming companies regarding their privacy and advertising practices.[63] FTC reports based on these orders may shed some light onto these practices. We must remain proactive in researching emerging industries—we need to skate to where the puck is going.

One of our country's most pressing concerns is the relationship between large tech companies and individual liberty. The concern transcends political parties. Of course, as I alluded to earlier, a guiding principle is that federal enforcers should faithfully execute the law. And antitrust law has no exemption for large companies—tech or otherwise. The Trump Administration rightly undertook significant investigations, and brought enforcement against, several of the largest technology companies.[64] Likewise, many of the states—including Utah—have played a key role in investigating and challenging potentially anticompetitive efforts of these firms.[65] I was personally involved in many of these cases. As my track record as a state law enforcer suggests, when the facts warrant it, I will bring antitrust cases against large technology companies.

I am watching to see how the current suite of antitrust cases are resolved. How courts decide these cases will guide future enforcement efforts, to be sure. But my concern about large corporations and individual liberty has consumer protection implications as well. Of course, making judgments and decisions about whether to provide someone with a service on the basis of economic data and quantifiable standards is the basis of legitimate market activity. But I am concerned about technology or financial services companies using opaque terms and conditions to employ subjective evaluations of certain consumer conduct that are inconsistent with consumers' reasonable expectations—sometimes in response to political or other pressure unrelated to traditional market constraints.[66]

---

[61] "Skate to where the puck is going to be, not where it has been," is often attributed to hockey legend Wayne Gretzky.

[62] 15 U.S.C. § 46(b).

[63] *See, e.g.,* Press Release, *FTC Issues Orders to Nine Social Media and Video Streaming Services Seeking Data About How They Collect, Use, and Present Information* (Dec. 14, 2020), *available at* https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-issues-orders-nine-social-media-video-streaming-services-seeking-data-about-how-they-collect-use; Press Release, *FTC Issues Orders to Social Media and Video Streaming Platforms Regarding Efforts to Address Surge in Advertising for Fraudulent Products and Scams* (March 16, 2023), *available at* https://www.ftc.gov/news-events/news/press-releases/2023/03/ftc-issues-orders-social-media-video-streaming-platforms-regarding-efforts-address-surge-advertising.

[64] *See, e.g.,* DOJ Press Release, *Justice Department Sues Monopolist Google For Violating Antitrust Laws* (Oct. 20, 2020), *available at* https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

[65] *See* Press Release, *Utah Leads Bipartisan Lawsuit Against Google* (Aug. 6, 2021)*, available at* https://attorneygeneral.utah.gov/utah-ag-leads-bipartisan-lawsuit-against-tech-giant-google/.

[66] *See e.g.*, *The Censorship-Industrial Complex: How Top Biden White House Officials Coerced Big Tech to Censor Americans, True Information, and Critics of the Bident Administration,* Interim Staff Report of the Committee on the Judiciary and the Select Subcommittee on the Weaponization of the Federal Government, U.S. House Rep. at 1

The effect of denying access to financial services or deplatforming can have the effect of reducing those consumers to second class citizens. I believe it is critical to do more to understand the role that platforms play in controlling access to the digital commons. In a time when cancel culture is rampant—including in corporate America—such concerns are real. To the extent we can wield existing enforcement authorities to combat some of these problems, we should do so aggressively.[67] I also believe it is critical to do more to understand the role that platforms play in controlling access to the digital commons. To that end, the Commission should use its 6(b) authority to better understand how platforms enforce their terms of agreement or service—and how the enforcement of those terms impacts consumers. The study should also, in part, evaluate the Commission's jurisdiction over such conduct.

V. Conclusion

My remarks today have highlighted what I consider to be the critical components of an effective Federal Trade Commission. In my view, the American economy has suffered—and will continue to suffer—significant harm when antitrust is administered in a manner not consistent with the promotion of the interests of consumers, but rather some other social goal. Adam Smith understood that when government is the arbiter of what is good for consumers—rather than preserving the agency of free citizens to pick and choose which businesses to patronize—the only beneficiaries of such a system were the businesses that received the special privileges from government. The Federal Trade Commission has made this error before. The sustained development of a coherent theory of antitrust and consumer protection is critical to the continued maintenance of our world leading economy. There can be no doubt that American exceptionalism is driven in part by the free and competitive markets that are unique to our country. Undermining those markets not only harms ordinary Americans, it also undermines our place in the world. For the benefit of our fellow citizens, free enterprise, and American exceptionalism—the Federal Trade Commission must return its focus to protecting consumers.

(May 1, 2024), *available at* https://judiciary.house.gov/sites/evo-subsites/republicans-judiciary.house.gov/files/evo-media-document/Biden-WH-Censorship-Report-final.pdf; *see also* Brief of Respondent Ken Paxton at 6-10, *NetChoice v. Paxton*, No. 22-555 (Sup. Ct.).

[67] Precedent related to the FTC Act's unfairness standard is instructive here. When evaluating whether an act or practice is unfair, the FTC and courts have held that whether an injury is reasonably avoidable depends in part on whether "people know the physical steps to take in order to prevent" injury. *See, e.g.*, *In the Matter of Int'l Harvester Co.*, 104 F.T.C. 949, 1066 (1984). The evaluation turns on whether the consumer can anticipate and avoid injury through consumer choice. *See, e.g.*, *Orkin Exterminating Co. v. F.T.C.*, 849 F.2d 1354, 1365 (11th Cir. 1988). For example, where the potential harm is not disclosed, courts have found the consumer cannot anticipate the harm. *Id*. Additionally, where the facts and evidence warrant it, the FTC has promulgated trade regulation rules that prohibit companies from using certain contractual provisions, found to harm consumers, that have no redeeming benefits to the market generally. *See* Credit Practices Rule, 16 C.F.R. §§ 444.2-.3 (prohibiting certain practices and requiring disclosures about cosigner liability).