



Proceedings of the 2024 Annual Mercatus Center Antitrust Forum

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Note: The following brief provides a summary of the discussion sessions at the Mercatus Center's Antitrust Forum on January 18, 2024, held under the Chatham House Rule, whereby the identity and affiliation of participants remain confidential. The only names cited in the summary are those of the keynote speakers, who agreed to have their presentations attributed to them. The Forum explored governance and policy at the Federal Trade Commission and discussed various visions for the agency moving forward.

Keynote Address: Professor Christopher Yoo

The conference began with a keynote address by Christopher Yoo, a law, communications, information, and computer science professor at the University of Pennsylvania. The address canvassed the pros and cons of using proscriptive rules applied against conduct ex ante rather than using a more malleable ex post case-by-case competition law adjudication regime as a means of regulating economic competition. This address led to a panel discussion on the internationalization of antitrust, including efforts by the Federal Trade Commission (FTC) and Department of Justice (DOJ) to cooperate and engage with competition law authorities and regulators elsewhere in the world.

Professor Yoo began by noting the recent push to shift antitrust law's oversight of business conduct from a primarily ex post adjudication model to one of ex ante regulation. This shift is exemplified by the Digital Markets Act (DMA)¹ in the European Union (EU), the FTC's proposed rules for governing commercial surveillance and data security, and the proposed American Innovation and Choice Online Act² in the United States. Both the European and the American proposals have attracted criticism and controversy. Although ex ante rules and ex post adjudication can be substitutes for each other, they can also complement each other and coexist.

The complementary relationship view predominates in Europe, where the historical expectation that competition law could replace sector-specific regulation of the economy has given way to embracing the coexistence of regulation and competition law. For instance, the European Court of Justice has rejected the idea that the existence of a comprehensive regulatory regime obviates the need for competition law to also address alleged price squeezing.

Conversely, the United States has witnessed the opposite phenomenon. Traditionally, cases like AT&T's breakup evinced antitrust law stepping in when regulation failed. And the use of doctrines such as primary jurisdiction and *Burford*³ abstention to delay judicial action until regulators had investigated the alleged anticompetitive conduct evinced a complementary role for regulatory and antitrust law regimes, with regulation retaining primacy. More recently, however, there has been a shift toward viewing such doctrines as substitutes. For instance, and in stark contrast to Europe's approach, the US Supreme Court's *linkLine*⁴ decision held that price squeezes couldn't be prosecuted under antimonopolization laws because a regulatory framework for addressing this conduct already exists. This principle was also affirmed in the court's earlier decision in *Trinko*.⁵ Similarly, the Federal Trade Commission Act of 1914 exempts highly regulated entities such as common carriers from the agency's authority to prosecute unfair methods of competition. Viewing antitrust and regulation as substitutes or alternatives helps avoid inconsistent judgments, promotes efficiency by addressing conduct through a single adjudication, and allows for focused institutional competence through dividing rather than sharing responsibilities between regulatory agencies and antitrust courts.

Yoo then discussed where ex ante rules-based regulation may be a preferable substitute for antitrust law. For instance, branding business conduct as per se illegal if it could not have a possible procompetitive justification or countervailing benefit promotes efficiency and conserves resources expended in applying antitrust law's default rule of reason analysis to each case. Unlike regulatory agencies, law courts lack specialized technical expertise, depend on the parties to present evidence and issues, restrict opportunities for public participation, and are badly placed to account for the implications of other aspects of the applicable regulatory scheme. Courts are particularly unprepared to undertake endeavors such as ascertaining the right quantity, the right price, and other terms of commercial dealing, as these must constantly be calibrated according to real-time shifts in consumer demand, competitors' entry and exit, and cost changes of production factors and substitute goods.

Creating ex ante rules is costly, requires deep knowledge of the conduct being regulated, almost inevitably results in stipulations that are at least slightly overinclusive or underinclusive in capturing conduct, and is unsuited to regulating more heterogeneous conduct. The cost of making rules also increases where they must regularly be updated to remain relevant after technological and economic changes. However, once created, such rules are relatively inexpensive to enforce and provide certainty to the parties being regulated.

Yoo then applied these principles to the FTC, noting that the advisability of the FTC’s promulgating rules on subjects such as commercial surveillance and data security depends on (a) whether the agency possesses enough experience with the subject-matter conduct to confidently conclude that consumers will almost always be harmed by it and (b) whether the regulated conduct is stable and homogeneous enough to make it suitable for rules-based regulation. The extent of ongoing supervision required to ensure compliance is another factor to consider. Conversely, Yoo argues that rules outlined under the European Union’s DMA and the United States’ proposed American Innovation and Choice Online Act are inadvisable, as many of the governed practices, such as vertical restraints, are ambiguous or even tend to increase welfare in most cases. This has been recognized in ample economics literature and 70 years of Supreme Court precedent.

In the Q&A that followed the keynote, panelists discussed the motivation for the DMA, including the perception that it singles out or focuses on foreign tech giants and may be protectionist in nature. One panelist opined that the EU’s DMA is less a reflection of a desire to embrace structuralism and protectionism for European companies, and more a reflection of the EU’s desire to hold firms viewed as “gatekeepers” to a higher liability standard because of the potential for them to abuse their purported dominance in certain (digital) markets by controlling “essential facilities.” That panelist noted that the laws in question had also been punitively applied against European “national champion” companies. Another panelist added that major European jurisdictions, especially France, have a history and tradition of vesting power in the administrative state in governing private conduct, with little dissent against large fines being imposed on purportedly bad private actors on somewhat arbitrary grounds. A third panelist noted that although the German tradition of government regulating markets was less “statist” than the French, it still values a greater role for governing authorities to set market conditions than the US tradition. Another countered that in its first nine years, starting from 1957, German competition law regulation valued free markets, and this only shifted when competition law under the EU fell under the influence of the French, Belgians, Luxembourgers, and others.

The discussion then moved to the risks of falsely branding an entity as a natural monopoly or gatekeeper and thereby requiring it to grant access to competitors or third parties. Such concerns can chill investment in future technologies and can lead to legal wrangling and uncertainty over the terms under which access is granted. Discussion also focused on the issue of proscriptive rules that target large firms becoming an opportunity for domestic industries to extract rents from international giants (such as Australian media companies benefiting from legislation requiring American social media companies to share ad revenue with them). A panelist noted that although India was contemplating something similar to the DMA, South Korea had abandoned similar ideas, partly because it was worried about negative impacts on its domestic tech giants and platforms.

Later, panelists noted the disadvantages of the European inquisitorial system, whereby the same individuals effectively function as prosecutor and judge. Something similar occurs in the United

States through the FTC's assigning of disputes for initial resolution to its own administrative law judge (ALJ), whose decisions are then appealed to the commission. However, commission decisions can then be appealed to a fully independent court under an adversarial system. And many remedies are not available through the ALJ.

The discussion ended with one panelist noting the procedural flaws in the EU competition adjudication process, finding them to be less balanced than even the purportedly statist French regime. The panelist described it thus:

Europe is the only jurisdiction on earth where you have no right to compose the record before a decision maker. You have no right to present any evidence or any argument to the decision maker. You're reduced to showing up at this pathetic little hearing with the staff of the commission. . . . The recommendation goes forward through the director general to the competition commissioner to a group of 27 commissioners who have no idea about the record or anything else.

Another panelist added that a previous DOJ antitrust attorney general, Makan Delrahim, had sought to address this problem by advocating for procedural reforms through the International Competition Network and other collaborative networks of antitrust enforcers in various jurisdictions. Enhancing due process protection internationally is important, given the potential adverse impact of inadequate procedures on US companies.

Session I: Internationalization of Antitrust

The first panel discussion of the day considered what role the FTC should play with regard to extraterritorial antitrust regulation, including the ambit of the commission's constitutional authority, and how competent it is internally. The panel noted that both the FTC and DOJ regularly interact and cooperate with competition regulators and enforcers from other nations, including through memberships in international forums such as the International Competition Network, with the DOJ acting as part of the US government's executive branch and the FTC officially considered a quasi-independent agency. This independence allows the FTC to invite foreign nationals to participate in exchanging and studying best practices at the agency, something the DOJ cannot do with non-US nationals. One panelist noted that recent cases such as *Axon*⁶ had flagged future challenges to the constitutional authority of the FTC as a quasi-independent agency that both writes complaints and prosecutes them, because this practice departs from the notion of a unitary executive originally envisaged under the US Constitution. It is especially notable that the FTC, through its international engagement activities, independently engages in foreign affairs and policy on behalf of the US government.

Although some panelists referred to the FTC as “dominant” relative to the DOJ in terms of engaging in international antitrust activities and engagement, another panelist countered that this dominance was primarily because the FTC leadership has historically allocated more resources for this purpose and prioritized it more. Panelists described the clearance process, whereby FTC and DOJ representatives come to agree on a single US government position on antitrust matters at international forums, as being “painful,” typically being made at the staff level and cleared by higher-ups. Another panelist noted that DOJ enforcers, as part of the executive branch, sometimes feel they have to compromise their positions because the FTC could potentially use its superior relationships with foreign agencies to compromise what the enforcers want to accomplish. A different panelist noted that the FTC and DOJ sometimes have differing views on matters such as intellectual property policy (especially on regulating standard essential patents), and that the DOJ has sometimes had to pull back the FTC from being front and center in expressing US government policy, as the commission is quasi-independent and not solidly part of the executive branch, unlike the DOJ. The panelist noted times when the FTC had gone ahead with public positions without consulting the DOJ or without its agreement. It was further noted that the embassies of foreign governments have to give clearance before DOJ or FTC officials can travel and engage in international deliberations and sometimes have strong views on this matter.

Panelists bemoaned that the historically strong reputation of the DOJ and FTC as policy leaders in international forums, built through prior leaders who established trust and consistency, is in danger of being eroded today by the current leadership’s departure from the antitrust orthodoxy of consumer welfare standard that the agencies promoted for four decades. Thus, the influence that these agencies have in shaping international antitrust policy is at a nadir. It was noted that the agencies’ reputation and influence have also been sullied by the more general post-2013 trend for the US government and its agencies to evince major inconsistencies in policy between administrations.

Session II: FTC Rulemaking

This session’s panel discussion focused on the limits of the FTC’s jurisdiction for issuing rules relating to competition, including whether the commission’s powers are limited to issuing procedural rules or include substantive ones under Section 6(g) of the FTC Act, and whether substantive rules on unfair methods of competition can be issued under Section 5 of the FTC Act, as argued by current agency leadership.

The first part of the discussion focused on the DC Circuit Court decision in the *National Petroleum Refiners*⁷ case, which is the primary precedent cited by those who argue that the FTC Act confers upon the agency the authority to promulgate substantive rules pertaining to unfair methods of competition under Section 5. A panelist noted the case and the FTC Act’s history, including the decision’s basis on an error of law. The DC Circuit Court relied on the supposed plain-meaning

construction of an erroneously codified version of the statute that has not appeared on the books since 1976 and that is at odds with the statute's actual wording as well as the legislature's intent. It is unlikely, then, that the Supreme Court would uphold the agency's competition rulemaking authority on the basis of this precedent, should a substantive competition rule issued by the agency face a court challenge. The panelist further noted that Section 5 has "over 1000 words about procedures for case-by-case adjudication, but there's nothing in there about how to do a rulemaking."

Regarding Section 6(g), another panelist noted that the text's plain meaning does confer authority to make rules pertaining to the FTC Act, which would include Section 5. However, the rest of Section 6(g) deals only with administrative procedure rules and not substantive ones, making this argument for the FTC's authority to pass substantive rules tenuous. Another panelist added that the current Supreme Court is unlikely to apply the *Chevron* doctrine,⁸ whereby a court defers to how a federal agency interprets its own statute whenever there is some ambiguity, thus making the FTC's fight to justify its own substantive rulemaking authority even harder. The panel also noted the Supreme Court's friendliness toward the controversial major questions doctrine, which presumes that Congress does not grant authority to agencies to resolve or dictate answers to "major questions" of political or economic significance (such as promulgating substantive rules about what counts as an unfair method of competition) without clear authorization in a relevant statute. The discussion went on to consider (a) whether the plain meaning of Section 6(g) could still conceivably be stretched out to include substantive rulemaking and (b) whether the FTC's less controversial authority to pass substantive rules governing consumer protection could be used to promulgate rules touching on competition. Panelists largely concluded that these arguments are also tenuous, although they may be less so in the case of some rules relative to others.

The discussion then shifted to whether it is desirable for the FTC to issue substantive competition rules from a competition policy perspective. One panelist argued that there is no reason why the FTC cannot formulate well-reasoned, substantive rules that are backed by economic evidence and favor procompetitive, proinnovation, or proconsumer outcomes, such as a rule prohibiting invitations to collude. The panelist cited examples of other federal agencies that had promulgated substantive rules (with less ambiguous congressional authority) that did not unduly extend their authority and that delivered positive policy outcomes.

Other panelists countered that bestowing such authority on the FTC would likely result in overbroad rules or rules that are applied on an overbroad basis to areas or cases where even the cited economic evidence would not support such application. One panelist noted that the legislature under separation of powers principles is best placed to judge the strength and limits of the economic evidence asserted by the FTC, since the agency has an incentive to make its own job of prosecuting wrongdoers and scoring wins in court and elsewhere easier, even if the end outcome is not actually procompetitive. The panelist also noted the FTC's tendency to issue policy statements investigating or targeting entire industries, even though industries often include a diverse range

of product and geographic markets that can have widely varying competitive dynamics, thereby making it likely that economic evidence forwarded by the agency will be used to justify overbroad rules. Another panelist referred to the legal and economic flaws in the DOJ and FTC's jointly and recently issued merger guidelines and reforms to the Hart-Scott-Rodino Act (HSR) compliance rules, saying they contradict the notion that the agency, at least under its current leadership, is likely to issue rules grounded in solid economic evidence with such authority. Yet another panelist added that the extent of the agency's independence is also under question given that it has walked in lockstep with the executive orders of the administration. It was also noted that rules are hard to undo once promulgated, even if their ill effects become apparent, suggesting that such rulemaking authority could stymie innovation. Other issues raised by the panel included (a) the possibility of regulatory capture through vested interests lobbying the agencies to pass favorable rules or rules that would hurt their competitors and (b) the possibility of rules being skewed by the influence of the political party that has more commissioners in the agency. The current FTC was noted to have only Democratic commissioners.

The discussion concluded with a reference to the Magnuson-Moss Warranty Act of 1975, whereby Congress conferred on the FTC clear authority to promulgate substantive consumer protection rules under an extensive, formalized procedure that requires the agency to weigh costs against benefits, among other standards it is expected to meet, before finalizing a rule. It was noted that the FTC's substantive rulemaking authority for competition is unsupported, since no such standards for it are included in any statute promulgated by Congress.

Session III: FTC Unfair Methods of Competition (UMC) Enforcement Authority

This session dealt with the FTC's authority to enforce rules against what it deems to be unfair methods of competition (UMC).

The opening panelist drew attention to the agency's UMC policy statement,⁹ which alludes to the agency treating a range of potential business conduct as per se illegal as a UMC under Section 5 of the FTC Act, regardless of procompetitive justifications. This expansive approach attacks conduct that "violates the spirit," but not the letter, of the antitrust laws. It even goes beyond language in old cases, saying that UMC involves "things that are coercive, exploitative, collusive, abusive, deceptive, predatory, or involve use of economic power of a similar nature." The panelist noted that this is a far cry from the FTC's prior challenges of invitations to collude as UMC "gap fillers" that went "one step beyond Section 1 of the Sherman Act," which requires an agreement for a collusion violation (although the DOJ apparently recently prosecuted an invitation-to-collude case as a Sherman Act, Section 2, monopolization).¹⁰ Other examples of conduct that could attract FTC prosecution as a UMC include, for example, tacit coordination, parallel exclusionary conduct, and false interactive advertising or marketing that tends to create or maintain market power. The panelist expressed concern that a broad theory of UMC would allow the FTC to challenge

conduct that the DOJ cannot, thus making the clearance process that determines what agency handles a particular case determinative of the case's outcome. This situation would undermine the current dual enforcement system for the antitrust laws. Another panelist responded by noting that although these are valid points, there should be no problem with prosecuting invitations to collude as a UMC, since they could have no procompetitive justification.

A different panelist noted that a constitutional challenge to Section 5 (UMC) could have the section declared void for vagueness, as there is no discernible underlying principle elucidated by Congress for determining what a UMC is. The panelist added that courts today may disfavor the *Chevron* doctrine, whereby judges defer to executive agencies' interpretations of their own statutory authority in the event of statutory ambiguity.

This comment drew a response that there was, in fact, a broad understanding at law about what is meant by "unfair method of competition," one cited in multiple academic articles and elucidated in cases like *Standard Oil* as far back as the 1910s.¹¹ A version of this interpretation is found in a memo provided to then-president Woodrow Wilson in 1914:

Fair competition is competition which is successful through superior efficiency. Competition is unfair when it resorts to methods that shut out competitors who, by reason of their efficiency, might otherwise be able to continue in business and prosper.¹²

Although competition on the merits is a tricky concept to define, ambiguities in the FTC Act are no different than ambiguities in other antitrust statutes, such as the Sherman Act, which courts have addressed.

A panelist replied that the use of an efficiency standard to determine what is fair is at odds with statements by current FTC Commissioner Alvaro Bedoya that the laws task him with upholding fairness, not efficiency, thus indicating that the concept remains tenuous within and outside the FTC.

Another panelist added that under the 1910s standard considered by Congress and courts at the time, a range of complex contracting practices that are regarded by economists and courts today as efficiency enhancing or procompetitive or benign, such as some forms of tying and bundling arrangements, would be classed as UMCs—an approach the current FTC seemingly favors a return to.

A different panelist noted that the FTC may not be reliable or trustworthy when it comes to appropriate use of Section 5, since unlike the Sherman Act's provisions, Section 5 does not require that the FTC demonstrate actual harm to competition. Another panelist cited the *American Airlines*¹³ case as evidence that invitations to collude do not need to be prosecuted as collusion (which requires agreement) or as a Section 5 UMC, since they can be prosecuted as an attempt to monopolize. It was also noted that the differing interpretations from district and circuit courts and the Supreme Court about what the permanent or temporary injunction remedies mean under the

antitrust statutes indicate that the FTC will face difficulty upholding its definition of UMC if the Supreme Court favors the nondelegation doctrine (which requires specific statutory instructions from Congress to an agency) and disfavors *Chevron* deference.

The discussion then moved on to how the panelists would ideally do UMC policy in the FTC's shoes. One panelist would address issues with the current and prior (2015) FTC UMC policy statement by formalizing a process for adopting UMC rules that involves public and stakeholder input and by reconciling policy with existing case law. That panelist would also target behavior falling outside competition "on the merits" that has no procompetitive justifications. This approach would capture invitations to collude, for instance, thereby going beyond the Sherman Act's ambit, albeit doing so according to discernible principles. The panelist also highlighted that giving different enforcement powers to the DOJ and FTC would create absurd results that violate the rule of law—such as a finding of an antitrust violation depending simply on the industry in which the company operates, since the two agencies often target and have expertise in different industries.

However, another panelist opined that the dual enforcement issue is exaggerated, since the clearance process for cases between the DOJ and FTC could be resolved by one agency simply passing on cases to the other, where the other has greater enforcement powers or ability to secure remedies in the relevant case. This already happens, for example, when the FTC passes matters on to the DOJ because of the latter's ability to bring criminal charges. So the DOJ could simply pass on cases that could not be prosecuted under the Sherman Act to the FTC for prosecution as a UMC.

Another panelist added that nothing in Section 5's legislative history indicates that it was intended to include conduct not already illegal under the Sherman Act. It was instead intended to make prosecuting these practices more efficient. Legislative history also supports its intended use to prosecute unilateral rather than coordinated conduct.

The discussion then shifted to the potential use of UMC prosecution authority to target the use of algorithms to fix prices, collude, or otherwise engage in anticompetitive conduct. It was acknowledged that anticompetitive conduct that is illegal remains equally so, whether achieved through an algorithm or manually, even if the algorithm achieves the result more rapidly and efficiently. There are difficulties in establishing the Sherman Act standard of showing an "agreement" between parties using the algorithm to engage in anticompetitive conduct, but the difficulties could possibly be overcome through a rule requiring pricing algorithms to record their decision process and the information inputs used. The use of price-matching or checking algorithms that raise prices could also have procompetitive justifications, such as preventing unsustainably low prices, which would preclude a long-term procompetitive and consumer-benefiting business strategy of undercutting competitors. Conversely, some legal scholars now suggest that the use of algorithms that monitor other firms' prices and result in price increases should be illegal per se as an unfair method of competition, even though this would effectively prohibit firms from setting prices with competitors' prices in mind simply because an algorithm was used.

Session IV: FTC General Legal Authority and Reforming the FTC

This session discussed the procedural and substantive reforms that ought to be made at the FTC. Panelists expressed broad criticism of the recently released joint DOJ and FTC merger guidelines,¹⁴ which depart significantly from recent case law jurisprudence and prior iterations of the guidelines while failing to provide clarity to commercial parties about what mergers are unlikely to be challenged by the agency. Some panelists favored a return to the 2010 horizontal merger guidelines, while another suggested that the 2010 guidelines may be reinterpreted and fleshed out in light of case law since 2010. The high likelihood that the 2023 guidelines will need to be walked back in the future and the embarrassment that this could cause the US federal government were noted, given that courts are unlikely to favor principles departing so substantially from what was established over the past 40 years. Panelists largely concurred that the 2023 guidelines are replete with ambiguities and thus fail their purpose of providing guidance to prospective merging parties, with some panelists suggesting that the guidelines could be retained and fixed by fleshing out the ambiguities or interpreting them differently than how the agencies do. It was sardonically noted that the guidelines' ambiguities may be favored by antitrust attorneys in the private bar, as they "make work" for them. Other panelists opined that the guidelines are so flawed and replete with ambiguities and inconsistency with the past 40 years' antitrust jurisprudence that they cannot be salvaged and must be shelved in favor of fleshing out previous iterations of the guidelines that were not perfect, but certainly less flawed. It was noted that this wholesale abandonment of a federal government position in a short time span may damage the United States' reputation as the global leader in antitrust, but it may still be necessary.

Other flaws noted in the guidelines were that they have departed from established legal definitions, such as the hypothetical monopolist test for relevant markets, and have reworded less ambiguous wording from previous iterations to make them more ambiguous. The guidelines also fail to cite cases for some of their propositions and wrongly cite cases for other propositions that they do not support. Some panelists still favoring reform to the 2023 merger guidelines noted that flaws and ambiguities, such as describing a trend in market concentration as generally bad, could be resolved by adding citations to recent case law describing situations where concentration trends are more likely to raise anticompetitive concerns. Similarly, the guidelines could provide additional clarity on vertical mergers by distinguishing the vast majority, which are likely to be efficiency enhancing and unproblematic, from those where the possibility of production input foreclosure raises anticompetitive concerns. Although the guidelines have seemingly rejected current legal standards such as the hypothetical monopolist test for market definition, this problem can be remedied by reconciling that test with the elements in other tests (such as *Brown Shoe*¹⁵ case factors) that the agency favors.

The discussion then shifted to the recently proposed HSR disclosure rule changes, which require prospective merging parties to provide much more information to the FTC than before. It was noted that these changes would burden parties with disclosure requirements comparable to those

previously only required of merging parties that the agency had identified as problematic and flagged for prosecution. It was further noted that the increased disclosure would mostly impact parties whose mergers would not have raised anticompetitive concerns and would thus be likely to increase the workload for the agency and strain its resources without making it more effective. Panelists broadly favored scrapping the proposed HSR changes. It was noted that the agency's strategy seems to be to increase the cost and time delays for all mergers, rather than creating an efficient process that allows or incentivizes procompetitive deals while capturing those that are likely to be anticompetitive. One panelist opined that the new processes are just as likely, if not more likely, to let bad deals slip through because of the resource constraints they will impose on the agency and its current tendency to prosecute unwinnable cases, which drains its limited resources even further. Other damning problems flagged with the current FTC include the lack of any commissioners from the opposition party, who could provide balance to the cases the agency decides to challenge, and the agency's reported failure to provide important information to Republican commissioners when they still held their positions. Constitutional defects to the agency's authority as an independent agency in light of its changing circumstances since the *Humphrey's Executor* case,¹⁶ and the redundancy of having two separate merger enforcement agencies essentially undertaking the same function, were also discussed. It was noted that Senator Mike Lee (R-UT) had already proposed a bill that would fully shift the FTC's competition and antitrust authority to the DOJ antitrust division, though such moves may lack sufficient political support. One panelist noted that the intended benefit of the FTC's competition enforcement jurisdiction was that the agency could deal with competition matters more efficiently through its internal administrative process than through more cumbersome lawsuits, which are the DOJ's only option where it cannot secure voluntary compliance.

Some panelists opined that the FTC's internal administrative process, whereby an ALJ adjudicates complaints brought by commissioners and the commissioners can then overrule the ALJ's determination on appeal, violates due process. It was noted that the purported advantages of the FTC's jurisdiction include that a specialist commission could stabilize legal development and standards better than generalist judges, who may lack antitrust expertise. Conversely, however, specialized commissioners are more likely than generalist judges to confine themselves to views prevailing at the time within the antitrust law and economics community, rather than critically or pragmatically evaluating these from the outside. It was noted that having two separate agencies and enforcement processes (internal and in court) has led to inconsistencies in application of antitrust rules and has thus failed to achieve the legal standardization objective. It was noted that FTC commissioners often "talk to each other" and enforce rather than correct errors. One panelist suggested having a single "body that is charged with civil enforcement of antitrust reporting into a single [political appointee] commissioner" under the Department of Commerce (DOC), since it would make prosecution decisions and principles more democratic. Other panelists criticized this view because it would politicize antitrust enforcement to an even greater degree than under the status quo and because the DOC is a less-than-ideal choice for homing antitrust enforcement

given the conflict of interest between that objective and some of its other objectives. One of these critics opined that the DOJ would be a better choice and that antitrust enforcement ought to be the purview of a law enforcement agency like the DOJ rather than the FTC, which can only seek civil penalties or injunctive relief. Another panelist added that the DOJ makes more sense than the FTC as an antitrust enforcement agency because of its greater criminal litigation expertise as well as expertise in investigative techniques, including securing judicial authorization for and conducting surveillance. That panelist opined that it makes sense to have a unitary executive where the elected president can veto agency prosecution decisions or, conversely, push for them. The panelist cited President Ronald Reagan's decision to ask that prosecution of British Airways for antitrust violations be withdrawn upon then-British prime minister Margaret Thatcher's request, as this allowed for the procompetitive outcome that the airline was privatized. It was further noted that the DOJ's separate (to the FTC) criminal antitrust enforcement jurisdiction had likely increased the number of successful criminal antitrust prosecutions in the United States relative to comparable nations such as Canada and the United Kingdom. Another panelist remarked that this was also partly due to the British legal system's process of conducting cartel prosecutions through independent attorneys (barristers) rather than a specialized prosecutor agency. This process makes it harder to win cartel cases. One panelist suggested that antitrust prosecution jurisdiction could also fall more to state attorneys general, with another disagreeing since state attorneys general tend to make prosecution decisions for political reasons and are thus less likely to prioritize price-fixing violations over prosecuting kidnappers. The discussion closed with a panelist opining that "different agencies having different language affecting their ability to enjoin the same statutory conduct [is] in tension with the rule of law."

Keynote: Professor Richard Langlois

The conference ended with a keynote address from University of Connecticut economics professor Richard Langlois, author of *The Corporation and the Twentieth Century: The History of American Business Enterprise*. Langlois canvassed cases including the 1969 antitrust lawsuit against IBM in the personal computer market and the 1998 case against Microsoft involving the Internet Explorer web browser.¹⁷ He referred to these two as "the great antitrust battles of the latter half of the 20th century." Both cases are often cited as examples where decisive antitrust enforcement restored competition by forcing corporate giants to abandon business strategies that would have monopolized their relevant markets. Langlois cites historical facts, however, to argue that the lawsuits made little difference in either situation, and that the defendant companies' decisions to abandon purportedly anticompetitive conduct were instead driven by market forces and their competitors' innovations in dynamic markets.

In the 1960s, IBM manufactured large mainframe computers. At the time, the company led the mainframe computer sector, as its product was valued for its technical quality, its complementary products, and the customer service that accompanied it. The DOJ sued IBM for bundling

its software products with mainframe computers. Over the lawsuit's duration, IBM continued to develop the personal computer (PC) internally, which rapidly evolved and also faced challenges from a legion of "clone" makers that made competing products. By the latter stages of the DOJ lawsuit, which was eventually dropped in 1982, IBM had lost its leadership position in the PC market, and competition from PCs had killed off the market for mainframe computers. These factors of a dynamic, innovative market, rather than the pressure of an antitrust lawsuit, ultimately forced IBM to abandon its bundling arrangement, as it could no longer supply the variety of software products now demanded by users. Notably, during the burgeoning years of the PC product, IBM discontinued its independent PC development division because of internal concerns that the product would eventually cannibalize its mainframe computer business. This ill-advised decision may have caused the firm to lose ground in both the mainframe and PC product markets.

Similarly, the DOJ sued Microsoft in 1998 for pressuring customers who acquired its operating system to adopt its Internet Explorer web browser, and for engaging in contracting practices to facilitate the same. Although these practices were subjected to penalties under the lawsuit, Internet Explorer's main rival, Netscape Navigator, still went out of business by 2001. However, this victory for Microsoft in the browser market was short-lived. Internet Explorer was eventually discontinued more than a decade later after fierce competition from newer web browsers that were favored by users, despite not being the default product bundled with the operating system. The DOJ lawsuit ultimately made little to no difference. And rather than taking advantage of its premier position in the operating system market to dominate the web browser market and then the internet itself, Microsoft instead failed to do this in the face of firms like Google, which was not burdened with existing assets and capabilities and eventually exploited the internet fully. Microsoft could have theoretically taken advantage of the opportunities that Google eventually did by specializing in web search through its one-time favorable position in the browser market, but instead it decided to deprioritize its browser business to focus on its computer operating system business, where it retains a favorable market position and share. Ironically, Google later overtook Microsoft in the mobile phone operating system market. It was speculated that the constant, costly antitrust scrutiny directed at Microsoft may have played a role in stalling its progress in that market.

Professor Langlois contrasted the IBM and Microsoft cases with what he deemed to be an example of a successful antitrust lawsuit that spurred technological development and innovation, the one that broke up telecommunications giant AT&T in 1982.¹⁸ Rather than being an example of competitive outcomes achieved through regulation, that lawsuit succeeded because it took away the company's government-conferred regulatory monopoly and was, thus, actually an act of deregulation that removed an anticompetitive barrier created by the government rather than by business conduct. Thus, explained Langlois, "rapidly changing technology and unforeseen opportunities created market conditions that these juggernauts were imperfectly equipped to confront. . . . When firms possess general-purpose capabilities, as may be the case with cloud computing today, they

may be able to adapt to market changes. But that also suggests that large incumbent firms are strong potential competitors for one another.”

In the discussion that followed, panelists discussed other trends in business models and antitrust enforcement in the 20th century, including the tendency for large holding companies that accommodated various businesses to “demodularize” or create spin-off divisions. There was argument about whether this trend was due to demodularization being more efficient or whether it was a response to fears that antitrust enforcers in the early 20th century would break the companies up. It was noted that demodularization incentivized product differentiation and arguably thus spurred competition in various industries, such as the automobile sector. The role of vertical integration was noted, with some firms like Ford benefiting immensely from a strategy of vertically integrating various stages of car production as they pioneered the assembly line. In contrast, other car companies, such as Chrysler and Toyota, benefited from the opposite strategy of focusing on vehicle manufacturing and instead encouraging fierce price competition among external input suppliers. It was noted that some regulatory decisions had inadvertently harmed the competitive position of US companies and industries. An example cited was consent decrees against RCA that forced it to grant rivals access to its patent pool if they owned a single patent within it. That requirement reduced RCA’s ability to make money in the US market, leading it to profit from licensing its patents to Japanese firms, which eventually eroded the domestic market share of US consumer electronics manufacturers. It was also noted that antitrust enforcement against complex contracting had encouraged more firms, and firms in more industries, to vertically integrate, not because vertical integration is more efficient generally, but because undertaking the same arrangements in-house would avoid antitrust scrutiny. Thus, antitrust enforcement could increase rather than deter consolidation and could incentivize firms to act inefficiently, just to avoid the threat of litigation or civil and criminal sanctions and scrutiny. One panelist added that the harms to competition caused by antitrust enforcement could never be fully known due to the counterfactual being unobservable.

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Notes

1. Regulation 2022 (EU) 2022/1925.
2. American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).
3. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943).
4. *Pacific Bell Telephone Co. v. linkLine Communications, Inc.*, 555 U.S. 438 (2009).
5. *Pacific Bell Telephone Co.*, 555 U.S. 438.
6. *Axon Enterprise, Inc. v. Federal Trade Commission*, 598 U.S. ____ (2023).
7. *National Petroleum Refiners Association v. FTC*, 340 F. Supp. 1343 (D.D.C. 1972).
8. *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
9. Federal Trade Commission, "Policy Statement Regarding the Scope of Unfair Methods of Competition under Section 5 of the Federal Trade Commission Act," Commission File P221202, November 10, 2022.
10. *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir. 1984).
11. *Standard Oil Co. v. United States*, 221 U.S. 1, 43 (1911).
12. George Rublee, Memorandum Concerning Section 5 of the Bill to Create a Federal Trade Commission 3 (July 10, 1914) (unpublished memorandum).
13. *American Airlines, Inc.*, 743 F.2d 1114.
14. US Department of Justice and Federal Trade Commission, "Merger Guidelines," December 18, 2023.
15. *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).
16. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).
17. *United States v. AT&T*, 552 F.Supp. 131 (1982).
18. *United States v. IBM* 69 Civ. 200 (S.D.N.Y. 1969); *United States v. Microsoft Corp.*, 147 F.3d 935 (D.C. Cir. 1998).