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What Are We Talking About When We Talk About Antitrust?
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I. Introduction

Many thanks for your kind introduction. And thank you, all, for attending the Concurrences Review Dinner. It is one of the finest antitrust events of the year, and I am honored to be here.

This evening, I will address a question that lies at the heart of our chosen practice area: what are we talking about when we talk about antitrust? More simply, what defines an antitrust violation? Although that issue might strike you as fundamental, I fear that it is increasingly misunderstood. Specifically, I believe some commentators and competition agencies around the world are blurring the lines between regulation and antitrust.

This evening, I hope to convince you that a defining quality of an antitrust violation is the elimination or dilution of a demand- or supply-side market constraint on a firm's power. I also hope to persuade you that a violation does not simply mean high prices, low output, reduced quality, limited choice, or compromised innovation incentives. Such effects, as unpopular as they may be, are market outcomes. And such outcomes—standing alone—never define an antitrust violation.

[1] The views expressed here are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to thank Alan Devlin for his contributions to this speech.

We sometimes obscure that point by thinking of an antitrust offense in terms of anticompetitive effects. But, properly understood, it is not the ultimate price effect that defines the violation. It is how the scrutinized conduct affects the universe of market constraints facing the relevant firm.

I do not mean to say, of course, that imperfect market outcomes are irrelevant in antitrust law. To the contrary, harms like higher prices can inflict the antitrust injury that allows private plaintiffs to sue.[2] In commentators' rush to scrutinize business conduct and protect consumers, however, sometimes negative market outcomes become synonymous with a problem that antitrust enforcement can solve. That dynamic has led to unfortunate interventions under the name of competition law, when the targeted problem is not one of antitrust, but of regulation.

To make my account more concrete, let me mention—and later elaborate upon—some examples. Many competition regimes around the world prohibit "unfairly" high prices.[3] Some emerging antitrust enforcers require holders of valuable IP rights to license them.[4] We are not immune to the problem here in America. I believe FTC actions under a standalone Section 5

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[2] 15 U.S.C. §§ 15, 26; *see also* Stamatakis Indus., Inc. v. King, 965 F.2d 469, 471 (7th Cir. 1992) ("The antitrust injury doctrine of Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986); and Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977), 'requires every plaintiff to show that its loss comes from acts that reduce output or raise prices to consumers.'") (quoting Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n, 961 F.2d 667, 670 (7th Cir. 1992)).

[3] *See, e.g.*, Art. 102(a), Treaty of the Functioning of the European Union [TFEU]; Case 27/76, United Brands Co. v. Comm'n, 1978 E.C.R. 207, ¶ 250; Anti-monopoly Law of the People's Republic of China, Ch. III, Art. 17(1); The Indian Competition Act, Ch. II, ¶ 4(a); Korean Monopoly Regulation and Fair Trade Act, Art. 3-2(1); Japanese Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Ch. I, Art. II (9)(vi)(b); *cf.* Mexican Federal Economic Competition Law, Book One, Title I, Art. 9 & Book Two, Ch. 3, Art. 56 (not listing an excessive price as an abusive practice, but identifying "the power to exclusively determine, by executive order, the goods and services which may be subjected to maximum prices, provided there are no effective competition conditions in the given relevant market").

[4] *See, e.g.*, KFTC, Review Guidelines on Unfair Exercise of Intellectual Property Rights II.2.A, III.3.B (2016) (KFTC IP Guidelines); State Council Anti-Monopoly Commission, Anti-Monopoly Guideline on Intellectual Property Abuse, III (ii).2 (2015) (NDRC Guidelines); State Administration for Industry & Commerce (SAIC), Regulation on the Prohibition of Conduct Eliminating or Restricting Competition by Abusing Intellectual Property Rights, Art. 7 (2005) (SAIC IP Regulation); SAIC, Guidelines for Anti-Monopoly Enforcement against Abuse of Intellectual Property Rights, Art. 24 (7th ed. 2016) (SAIC Guidelines).

theory for "unfair methods of competition" have raised problematic issues, such as in *Google-MMI* and *Robert Bosch*.[5]

These examples involve a common theme. In each one, an antitrust agency first identifies a market outcome that it deems unsatisfactory. For instance, an antitrust enforcer may observe high prices that reduce consumer welfare, at least in the short run.[6] Similarly, the owner of an essential facility or key patented technology restricts choice, and denies consumers higher output, when it refuses to deal with rivals.[7] And using a FRAND-encumbered, standard-essential patent to try to enjoin an unlicensed technology user threatens to deny consumers the full array of benefits they currently enjoy in the downstream product market.[8]

Having identified the "problem," the antitrust agency then moves to correct it by condemning behavior that it traces to negative market outcomes. But that behavior did not lift a competitive constraint on the firm's market power. Simply condemning a high price, a refusal to deal, or the use of a SEP without showing harm to supply- and demand-side limits on market power, however, is not antitrust. It is a regulatory action meant to reengineer market outcomes to reflect enforcers' preferences.

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[5] *In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Dissenting Statement of Commissioner Maureen K. Ohlhausen, Jan. 3, 2013, https://www.ftc.gov/public-statements/2013/01/statement-commissioner-maureen-ohlhausen-0; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of Commissioner Maureen K. Ohlhausen, Nov. 26, 2012, https://www.ftc.gov/public-statements/2012/11/dissenting-statement-commissioner-maureen-ohlhausen-matter-robert-bosch.

[6] *See, e.g.*, *In re* Negotiated Data Solutions, FTC File No. 051-0094, Analysis of Proposed Consent Order to Aid Public Comment, Jan. 23, 2008 (purporting to find an "adverse effect . . . on competition" from behavior that did not lift a demand- or supply-side constraint on market power because of "the conduct's adverse impact on prices for autonegotiation technology"), https://www.ftc.gov/enforcement/cases-proceedings/051-0094/negotiated-data-solutions-llc-matter. *But see id.*, Dissenting Statements of Chairman Majoras & Commissioner Kovacic.

[7] *See*, *e.g.*, Official Airline Guides, Inc. v. Fed. Trade Comm'n, 630 F.2d 920, 927 (2d Cir. 1980) (reversing the FTC's determination that a refusal to deal constituted a standalone violation of Section 5's "unfair methods of competition prong" due to the refusal's negative effects in markets in which the owner did not compete).

[8] *See In re* Motorola Mobility LLC & Google Inc., FTC File No. 121-0120, Statement of the Fed. Trade Comm'n, p. 2, Jan. 3, 2013 (arguing that "the threat of an injunction can also lead to excessive royalties that may be passed along to consumers in the form of higher prices. Alternatively, an injunction or exclusion order could ban the sale of important consumer products entirely"). *But see* Ohlhausen Motorola Dissent, *supra* note 5 (explaining why there was no reason to believe that the challenged conduct amounted to an antitrust violation).

This distortion of antitrust does a disservice to the field. Principled analysis requires that antitrust violations involve a restraint, practice, or acquisition that removes a market constraint.[9] Going beyond that inquiry to require particular conduct or market results abandons the core premise on which the Sherman Act rests. That is our belief that a market economy, free of private restraints and unnecessarily burdensome regulations, produces superior outcomes over time.[10]

In its 1978 opinion, *National Society of Professional Engineers*, the Supreme Court embraced the "assumption that competition is the best method of allocating resources in a free market[.]"[11] This evening, I echo that call. We should trust in competition as the lodestar of economic policy. Even market outcomes that appear to be imperfect at a static moment in time may be part of a longer process toward efficiency.[12] In short, as antitrust enforcers, we should trust the market to get it right and intervene only when firms corrupt the competitive process.

II. The Supreme Court Focuses on Competition

Let's get into these issues further. Modern antitrust lawyers embrace economics as the proper tool with which to analyze business conduct.[13] For many in this room, then, it may be axiomatic that an antitrust violation requires actual or (in *per se* cases) presumed corruption of the competitive process.[14] And we all know that "antitrust laws were passed for 'the protection

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[9] For a rare alternative view, see Fed. Trade Comm'n v. Ovation Pharma., Inc., Concurring Statement of Commissioner J. Thomas Rosch, Dec. 16, 2008 (arguing that an asset acquisition that lifted a reputational constraint on the seller's pricing could violate Section 7 of the Clayton Act), https://www.ftc.gov/public-statements/2008/12/concurring-statement-commissioner-j-thomas-rosch-federal-trade-commission.

[10] *See, e.g.*, Verizon Comm'cns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407-08 (2004); Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 694-95 (1978); Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 464 (D.C. Cir. 2008).

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

[12] *Trinko*, 540 U.S. at 407-08.

[13] *See, e.g.*, RICHARD A. POSNER, THE PROBLEMATICS OF MORAL AND LEGAL THEORY 229 (1999) (observing that "antitrust law has become a branch of applied economics").

[14] *See, e.g.*, Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 885-87 (2007).

of competition, not competitors.'"[15] For the next few minutes, I would like to briefly address some case law that illustrates my core point.

A. *Absent Harm to Competition, There Is No Antitrust Violation*

First, a firm can harm consumers without damaging a competitive limit on its market power. In those situations, there is no antitrust issue. I will mention three Supreme Court cases that support that proposition.

First, consider *Trinko*, a lawsuit that accused Verizon of monopolizing a telecommunications market by not sufficiently interconnecting with competitive local exchange carriers.[16] Reversing the Second Circuit, the Supreme Court dismissed the antitrust claim. It did so even though the compulsory-access requirements of the 1996 Telecommunications Act may have produced lower prices, greater output, and more varied choice for consumers. But liability did not turn on whether exclusion caused higher prices. Something more fundamental was at stake.

Markets encourage competition only if prevailing firms can reap what they sow. Taking away that prize would undermine the competitive process, replacing market forces with a more "competitive" market structure featuring low prices, but lacking incentives that drive investment in infrastructure, technology, and advancement.[17] Hence, the Court's famous observation that "charging . . . monopoly prices . . . is an important element of the free-market system."[18]

Second, in *NYNEX*, a buyer allegedly conspired to purchase a higher-priced telecommunications removal service over a cheaper alternative, passing the inflated costs onto

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[15] Brooke Grp. Ltd. V. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (2008) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).
[16] *Trinko*, 540 U.S. at 403-05.
[17] *Id.* at 407-08.
[18] *Id.* at 407.

customers through higher, regulator-approved rates.[19] The Supreme Court found that the *per se* rule did not apply because the telephone monopolist that allegedly passed on the higher rates enjoyed a regulatory monopoly.[20] Hence, the Court explained, the "consumer injury naturally flowed not so much from a less competitive market for removal services . . . as from the exercise of market power that is lawfully in the hands of a monopolist . . . combined with a deception[.]"[21]

Finally, in *Weyerhaeuser*, a sawmill accused its competitor of trying to monopolize the market by bidding up the price of logs to unaffordable levels.[22] The Court observed that the "actions taken in a predatory-bidding scheme are often 'the very essence of competition.'"[23] Liability thus requires harm to competition, meaning that market forces no longer constrain monopsony power. Hence, a cause of action follows only if the dominant firm enjoys a dangerous probability of recouping its losses from predatory bidding or pricing. Importantly, that "dangerous probability" condition implicitly requires injury to the competitive process.

Each of these cases — *Trinko*, *NYNEX*, and *Weyerhaeuser* —respects market competition and its ability to deliver long-term benefits for consumers. There is much more to competition than whether the restraint at issue tends to increase price in the short run. And the mere fact that consumers benefit or suffer from market outcomes in the short term says nothing in itself about an antitrust violation.[24]

[19] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 131-32 (1998).
[20] *Id.* at 135-36.
[21] *Id.* at 136.
[22] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312 (2007).
[23] *Id.* at 323 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).
[24] Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456, 464 (D.C. Cir. 2008) (observing that "an otherwise lawful monopolist's use of deception simply to obtain higher prices normally has no particular tendency to exclude rivals and thus to diminish competition").

B. *An Antitrust Violation May Occur Absent Negative Market Effects*

Now consider a different question. What happens when a firm damages the competitive process, but no harmful market effects seem to result? Interestingly, many—though not all—such decisions recognize an antitrust violation. To me, that is a telling outcome.

There is a fascinating line of cases involving competition for a natural monopoly. In such cases, firms vie to own a regulated monopoly or to run a franchise for which no good economic substitute exists. Competition usually benefits consumers, but if a monopoly results no matter who wins the race, it might sever the link between competition and market outcomes.[25]

These cases are illuminative because, if antitrust law recognizes a claim at all in such circumstances, it can only be because it focuses on the competitive process, as opposed to demonstrable market effects.

A leading case is the Seventh Circuit's decision in *Fishman*, where two firms competed to buy the Chicago Bulls.[26] One of the prospective buyers lost its bid when the owner of the Chicago Stadium—a natural monopoly—would only rent it to another purchaser.[27] The disappointed buyer sued, alleging a conspiracy and group boycott to deny it access to the Chicago Stadium. The district court found violations of Sections 1 and 2 of the Sherman Act.[28]

On appeal, the defendants made an interesting argument, namely that "competition between IBI and CPSC to acquire a natural monopoly was not protected by the antitrust laws because substitution of one competitor for another would not injure competition: Whether CPSC

[25] *See* Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 338 (2003) (observing that, in natural monopolies, "All antitrust law could do would be to assure fair competition to try to assure that the most efficient firm wins the natural monopoly").
[26] Fishman v. Estate of Wirtz, 807 F.2d 520 (7th Cir. 1986).
[27] *Id.* at 525-31.
[28] *Id.* at 530-31.

or IBI ultimately managed to acquire the Bulls was a matter of indifference to the Chicago fans, who would face a monopoly in any event."[29]

That position raises the question of what defines an antitrust violation. Is it identifiable consumer harm that flows from a restraint or is it the restraint that corrupts the competitive process, even if no discernible antitrust injury results?

Writing for the Seventh Circuit, the late Judge Cudahy considered the issue to be profound.[30] The court concluded that the "antitrust laws are concerned with the competitive *process*, and their application does not depend in each particular case upon the ultimate demonstrable consumer effect. A healthy and unimpaired competitive process is presumed to be in the consumer interest."[31] Judge Cudahy explained that the Supreme Court "has never given us [reason] to believe that anything save unfettered competition is the key to consumer well-being."[32] For that reason, "we should not be so quick to assume that there is no consumer interest in this case" and "there seems to be no way of telling whether IBI or CPSC would be a 'better' owner from the perspective of basketball fans."[33] Thus, "the Sherman Act requires that the choice between them result from unconstrained competition on the merits."[34]

Other decisions confirm the principle.[35] They generally hold that harm to the competitive process defines the antitrust violation, even if one cannot trace that harm to an identifiable

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[29] *Id.* at 532.
[30] *Id.* at 535 ("The defendants further argue that, even if some natural monopoly cases are within the purview of the Sherman Act, this one is not because the plaintiffs have failed to articulate just how the ultimate consumers—Chicago fans—will be hurt by this violation. . . . This proposition, we think, presents a difficult question requiring the most careful analysis and the weighing of conflicting policies and lines of authority in the application of the antitrust laws.").
[31] *Id.* at 536 (emphasis in original).
[32] *Id.* at 537.
[33] *Id.*
[34] *Id.*
[35] *See, e.g.*, Nat'l Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1024 (8th Cir. 1985) (accepting the argument, at least in theory, that "if a natural monopolist has attained its position by unfair means, for example, predatory pricing, then it is guilty of a violation of Section 2 even though the market is a natural monopoly"); Cent. Telecomm'cncs, Inc. v. TCI Cablevision, Inc., 610 F. Supp. 891, 908 (W.D. Miss. 1985) ("[T]he notion that the

consumer injury. Clearly, an antitrust jurisprudence that began with the quality of market outcomes and traced those outcomes to a restraint would not reach the same result.

Of course, there is still some uncertainty in the law governing competition for monopoly. Some cases may go the other way and, even within the Seventh Circuit, there is a question surrounding the necessity of consumer injury.[36] I believe that we can best resolve that ambiguity by distinguishing the elements of antitrust standing that a private litigant must satisfy to bring a claim under the Clayton Act—elements that include antitrust injury—from the distinct question of whether a substantive violation of the Sherman Act exists.[37]

III. Going Astray: Competition Enforcers Adopt a Regulatory Mindset

Now let's move beyond the basic principles that I have highlighted in the case law, which inform my understanding of antitrust. We'll consider the real-world dangers of accepting a less rigorous approach to enforcing competition law. Done properly, antitrust requires disciplined focus on the competitive process. When agencies instead look to market outcomes, however, they can stray into the realm of regulation.

I whet your appetite earlier by mentioning some examples, and here they are. EU competition law has long prohibited "unfair purchase or selling prices" by dominant

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antitrust laws protect competition 'for' the market in a natural monopoly situation enjoys ample support in the law."); TV Signal Co. of Aberdeen v. Am. Tel. & Tel. Co., No. CIV 70-6, 1981 WL 2049, at *4 (S.D. Dakota Mar. 13, 1981) ("We must believe that CATV business competition is beneficial even if, as Defendants assert, it often results in a natural monopoly."); Ovitron Corp. v. Gen. Motors Corp., 295 F. Supp. 373, 378 (S.D.N.Y. 1969) (even in "a market which cannot support more than one supplier[,]" a natural monopolist violates Section 2 if it acquires its position by "means which are 'exclusionary, unfair or predatory'") (citation omitted); Omega Satellite Prods. Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982) ("[T]he antitrust laws protect competition not only in, but for, the market—that is, competition to be the firm to enjoy a natural monopoly, and by a modest extension competition to replace the existing natural monopolist.")..

[36] JetAway Aviation, LLC v. Bd. of Cty. Comm'rs of Cnty of Montrose, 754 F.3d 824, 838 (10th Cir. 2014) (Holmes, J., concurring); *Fishman*, 807 F.2d at 563 (Easterbrook, J., dissenting in part); *see also* Banks v. NCAA, 977 F.2d 1081, 1097 (7th Cir. 1992) (Flaum, J., concurring in part and dissenting in part); *see also* Flip Side Productions, Inc. v. Jam Productions, Inc., 843 F.2d 1024, 1032 (7th Cir. 1988) ("[I]njury to . . . consumers is . . . an essential ingredient of liability").

[37] *Cf.* Br. of Amicus Curiae Fed. Trade Comm'n in Support of No Party, *In re* Nexium Antitrust Litig., pp. 8-16 (1st Cir. Feb. 12, 2016), https://www ftc.gov/policy/advocacy/amicus-briefs/2016/02/re-nexium-esomeprazole-antitrust-litigation.

undertakings, though—to its credit—the European Commission has seldom used that provision of Article 102.[38] Nevertheless, emerging competition jurisdictions have adopted that rule and may be less scrupulous in wielding it.

The KFTC's 2016 IP guidelines prohibit the "act of unfairly demanding royalt[ies]" by a patentee.[39] In China, the NDRC's draft guidelines forbid a dominant firm from "licensing IPRs with unfairly high royalties" and SAIC's guidelines have a similar provision.[40] Further, we've seen enforcement actions in Asia where an underlying allegation seems to be excessive royalty charges.[41]

These developments are troubling because, although done under the flag of antitrust, they have nothing to do with enforcing competition law. Antitrust protects market constraints, which in turn determine pricing. To go beyond the market to condemn pricing alone is to bypass the competitive process altogether, turning antitrust policy on its head.

There are other examples from overseas where enforcers have made antitrust issues of conduct that either promotes or does not restrict competition. But I wish to conclude my remarks by focusing on the United States. The most prominent area of enforcement to raise the "antitrust as regulation" issue involves standard-setting. As I have argued this evening, the foundation of

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[38] *See, e.g.*, European Commission Report on Competition Policy ¶ 207 (1994) ("[T]he Commission in its decision-making practice does not normally control or condemn the high level of prices as such. Rather it examines the behavior of the dominant company designed to preserve its dominance, usually directly against competitors or new entrants who would normally bring about effective competition and the price level associated with it."); *cf.* European Comm'n, Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, 2009 O.J. (C 45) 7, ¶¶ 7, *passim* (acknowledging the possibility of exploitative abuses through excessive pricing, but focusing instead on exclusionary conduct).

[39] KFTC IP Guidelines, *supra* note 4, at III.3.A(3).

[40] NDRC Guidelines, *supra* note 4, at III.(ii)1; SAIC Guidelines, *supra* note 4, at Ch. 4, Art. 23.

[41] *See*, *e.g.*, NDRC, Administrative Penalty Decision on Qualcomm's Monopolistic Conduct (2015) (fining Qualcomm $975 million and observing that, "[i]n conclusion, Qualcomm was held liable for directly or indirectly charging the licensees at an unfairly high royalty rate.").

an antitrust violation is harm to a demand- or supply-side constraint on market power. The courts agree, which is why the FTC's enforcement action in *Rambus* failed.[42]

As you may recall, the Commission found Rambus liable for deceiving an SSO—JEDEC—about its patents and patent applications.[43] The FTC concluded that the deception allowed Rambus *either* to acquire a monopoly through standardization of its patented technologies over substitute technologies *or* to avoid a RAND licensing encumbrance.[44] The D.C. Circuit granted Rambus's petition for review because the second alternative—avoiding limits on its patenting fees—did not involve harm to competition.[45]

The key to understanding the opinion is that, if JEDEC would have adopted Rambus's patented technologies even with full disclosure, then Rambus enjoyed a monopoly in the relevant upstream licensing market.[46] As the D.C. Circuit explained, "Even if deception raises the price secured by a seller, but does so without harming competition, it is beyond the antitrust laws' reach."[47] Because there was insufficient evidence that "JEDEC would have standardized other technologies had it known the full scope of Rambus's intellectual property", the court refused to find liability.[48]

Those principles limit the scope of liability under the Sherman Act. Rather than embrace them in the standard-setting area, however, the FTC retreated into the murky waters of

[42] Rambus Inc. v. Fed. Trade Comm'n, 522 F.3d 456 (D.C. Cir. 2008).
[43] *In re* Rambus, FTC Dkt. No. 9302, Opinion of the Comm'n, Aug. 2, 2006, https://www.ftc.gov/sites/default/files/documents/cases/2006/08/060802commissionopinion.pdf.
[44] *Rambus*, 522 F.3d at 459, 463.
[45] *Id.* at 459, 464-67.
[46] *Id.* at 466 ("Here, the Commission expressly left open the likelihood that JEDEC would have standardized Rambus's technologies *even if Rambus had disclosed* its intellectual property. Under this hypothesis, JEDEC lost only an opportunity to secure a RAND commitment from Rambus. But loss of such a commitment is not a harm to competition from alternative technologies in the relevant markets.") (emphasis in original).
[47] *Id.* at 464.
[48] *Id.*

standalone Section 5 enforcement.[49] In doing so, it has breezed past the difficult—but critical—details that define a meritorious antitrust case.

In *Google-MMI* and *Robert Bosch*, for example, the Commission found reason to believe that SEP owners had engaged in unfair methods of competition by trying to enjoin accused infringers.[50] In arriving at that result, the Commission did not ask whether the patentees had caused the SSO to adopt their technologies over alternatives. The FTC did not identify any injury to competition in an upstream technology market. It did not evaluate the firms' market power. Nor did it identify actual anticompetitive effects. Instead, the Commission embraced the conclusory rule that the owner of a RAND-encumbered SEP cannot ask a court to enjoin a willing licensee.[51]

Last year, of course, the FTC issued a one-page statement on its enforcement principles under Section 5.[52] I dissented because the statement was vague, failed to grapple with relevant case law, and perhaps most importantly did not require substantial harm to competition.[53] Although the statement purportedly requires some injury to the competitive process, some of my fellow Commissioners have opined that the statement merely codified existing practice and principles.[54] So, it leaves us with the deeply unsatisfactory result that modern FTC enforcement

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[49] *See* Maureen K. Ohlhausen, *Section 5: Principles of Navigation*, July 25, 2013, https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation.

[50] *In re* Google Inc., FTC File No. 121-0120, Statement of the Federal Trade Commission, Jan. 3, 2013, https://www.ftc.gov/enforcement/cases-proceedings/1210120/motorola-mobility-llc-google-inc-matter; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Statement of the Fed. Trade Comm'n, Apr. 24, 2013, https://www.ftc.gov/enforcement/cases-proceedings/1210081/bosch-robert-bosch-gmbh. *But see supra* note5.

[51] *Id.*; *see also In re* Google Inc., FTC File No. 121-0120, Analysis of Agreement Containing Consent Order and Compl., Jan. 3, 2013; *In re* Robert Bosch GmbH, FTC File No. 121-0081, Analysis of Agreement Containing Consent Order, Apr. 24, 2013, and Compl., Nov. 26, 2012 (see links in note 50 *supra*).

[52] Fed. Trade Comm'n, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act, Aug. 13, 2015, https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

[53] Dissenting Statement of Commissioner Maureen K. Ohlhausen, FTC Act Section 5 Policy Statement, Aug. 13, 2015, https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioner-ohlhausen-ftc-act-section-5-policy.

[54] *See, e.g.*, Interview with Terrell McSweeny, Commissioner, Federal Trade Commission p. 9 ANTITRUST SOURCE (Aug. 2016) (opining that "the Statement reflected the principles that we have been following all along") *and*

actions under Section 5 do not rigorously require harm to competition. Rather, cases like *Google-MMI*, *Robert Bosch*, and *N-Data* challenge conduct divorced from demonstrable injury to the competitive process.[55] Well intentioned as those cases may be, in my view, they diverge from appropriate antitrust enforcement.

IV. Conclusion

In summation, it is a serious error to equate a negative market outcome with harm to competition. Yet, it is a mistake to which many people and even an expert antitrust agency—the FTC—have fallen prey. In applying its standalone Section 5 authority to condemn "unfair methods of competition," the FTC has gone beyond the competitive process to challenge behavior as unfair because it could yield suboptimal market outcomes in the short run. In its recent standard-setting cases, it has challenged practices simply because they may arguably lead to higher prices or excluded products.

When we worry that the competitive process has not produced the optimum—or perhaps more realistically—an acceptable outcome, it is tempting to look for easy solutions. I encourage antitrust enforcers to reject the quick fix of regulating market outcomes in the guise of antitrust enforcement. Instead, they should trust that competitive forces will produce the right results for consumers. As the Supreme Court recently observed in *North Carolina Dental*, "Federal antitrust law is a central safeguard for the Nation's free market structures."[56] We should take that charge seriously.

Remarks by Chairwoman Edith Ramirez Regarding Section 5 Enforcement Principles, Aug. 13, 2015 ("Again, the policy statement marks no change in course; it merely makes explicit what has been evident to close observers of FTC enforcement actions over the past few decades.") https://www.ftc.gov/public-statements/2015/08/remarks-chairwoman-edith-ramirez-regarding-section-5-enforcement-0.

[55] *See supra* notes 5-6.

[56] N. Carolina State Bd. of Dental Examiners v. Fed. Trade Comm'n, 135 S. Ct. 1101, 1109 (2015).

If you are interested in my larger take on these issues, please keep an eye out for my forthcoming article in the *Stanford Technology Law Review*.[57]

Thank you and I look forward to hearing your questions.

[57] Maureen K. Ohlhausen, *The Elusive Role of Competition in the Standard-Setting Antitrust Debate*, 20 STAN. TECH. L. REV. __ (forthcoming 2017).