
Competing for the Future: Remarks at the George Mason Law Review 23rd Annual Antitrust Symposium

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Introduction

Thank you, Judge Ginsburg, for the introduction, and thank you to the George Mason Law Review and the GMU Law & Economics Center for inviting me to participate in this conversation on *Antitrust's Competing 2020 Visions*.

The theme of the symposium raises a critical question: what *should* the future of competition enforcement look like?

The question is a difficult one—a challenge antitrust enforcers and policy makers grapple with every day. For an answer, we can turn to what Steve Jobs said when unveiling the first iPhone in 2007. During his announcement, Jobs quoted Wayne Gretzky: “I skate to where the puck is going to be, not where it has been.”¹ Jobs has proven that guidance wise—off the ice and in the market.

Just as in sports, we have learned that fierce competition, unfettered by unlawful monopoly or by needless regulation, yields the best results. Throughout the American economy, we have seen agile companies predict the location of the puck and bring the benefits of innovation to the market.

As firms partake in the sport, however, critics of the modern antitrust consensus approach increasingly call upon enforcers to intervene in the game. Some fault antitrust law for failing to achieve certain outcomes, including failing to rein in “bigness” itself and the parade of horrors that follow.² This desire for a fragmented market structure impliedly selects

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¹ Linus Zaman, *Steve Jobs Unveils the Original iPhone - Macworld San Francisco 2007*, YOUTUBE, at 1:38:06 (July 19, 2013), <https://perma.cc/6WZF-45Z9> (republishing Steve Jobs' announcement speech from January 9, 2007).

² Elyse Dorsey, Geoffrey A. Manne, Jan M. Rybnicek, Kristian Stout & Joshua D. Wright, *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 PEPP. L.

new winners in the market—often smaller ones in favor of larger ones, regardless of how the larger ones earned their market position.

But when it comes to answering the question posed—what should the future of competition enforcement look like?—we should be mindful that “winning isn’t everything.” Although there is some dispute over its origin, this familiar saying is most often associated with Coach Vince Lombardi, one of the most renowned football coaches in American history, who likely heard it himself from the UCLA Bruins football coach, “Red” Sanders.³ What is less well-known, however, is what Coach Lombardi may have intended to say: “Winning isn’t everything. The *will* to win is the only thing.”⁴

As an antitrust enforcer, I like to imagine the coach was alluding to antitrust law as well as to football. Coach Lombardi’s message serves as a good reminder of what the proper focus of antitrust enforcers should be—safeguarding the competitive process, rather than determining who should win or lose.

I. Protecting the Competitive Process and Consumer Welfare

During our time this morning, I will share the steps the Antitrust Division has taken to tend to the all-important *will* to win.

A. *Protecting Incentives to Innovate*

Let me begin with the Antitrust Division’s recent efforts to protect the incentive to innovate.

As many of you know, the Constitution contemplates that patents and copyrights should secure for “Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”⁵ How antitrust enforcement fits into this mandate, however, is vigorously debated. In the Division’s view, the aim of antitrust enforcement is to protect the competitive process from abuses that harm consumers, including abuses in the intellectual property arena that limit competition. But it would be myopic not to recognize that rewarding innovation is key to spurring economic growth and enhancing competition in the long run.

REV. 861, 865, 872 (2020) (describing how “[p]opulist antitrust notions are suddenly fashionable again”).

³ See DAVID MARANISS, WHEN PRIDE STILL MATTERED: A LIFE OF VINCE LOMBARDI 369–70 (1999).

⁴ Cf. *id.* at 365; see also JAMES A. MICHENER, SPORTS IN AMERICA 493–94 (Dial Press ed. 2015) (1976).

⁵ U.S. CONST. art. I, § 8, cl. 8.

The Schumpeterian disruption innovation brings is not only healthy for a free market, but necessary for it to thrive. Indeed, strong intellectual property rights help level the competitive playing field for small innovative companies. This is because, absent strong IP protection, a larger firm is better able to appropriate the benefits of innovation. First, “if the benefit from an innovation is proportional to the scale of operations that employ the innovation,” a larger firm benefits from greater appropriation due to the larger size of the operations that profit from the innovation.⁶ Second, with a greater market share, a larger firm “can increase appropriation by reducing the share of the market that may imitate the innovation without compensating the innovator.”⁷ Accordingly, strong IP protection reduces the influence of market size and market share on incentives to innovate.

Antitrust enforcers should absolutely intervene when there are abuses that harm competition and consumers. However, they should not impose barriers on the lawful exercise of intellectual property rights, which can promote dynamic competition. Only in this way can we protect the incentive to innovate for the benefit of American consumers.

For this reason, the Antitrust Division—guided by the “New Madison” approach which Assistant Attorney General Makan Delrahim laid out in several speeches—has made efforts to clarify its position on standard-essential patents.⁸ For those who are less familiar, members of standard-development organizations⁹ (“SDOs”) promote interoperability by choosing a technology to serve as a standard in a given industry. In these instances, SDO members agree, in effect, to use only one set of patents that read on the standard, sometimes in exchange for commitments by the patent holders to license on fair, reasonable, and nondiscriminatory—or “FRAND”—terms.

⁶ Richard J. Gilbert & Hillary Greene, *Merging Innovation into Antitrust Agency Enforcement of the Clayton Act*, 83 GEO. WASH. L. REV. 1919, 1925 (2015).

⁷ *Id.* at 1925–26.

⁸ See, e.g., Makan Delrahim, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the Licensing Executives Society 2019 Annual Meeting: “The Times They Are a’Changin’”: the Nine No-No’s in 2019 (Oct. 21, 2019) (remarks as prepared for delivery on file with Dep’t of Justice); Makan Delrahim, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Remarks at the 19th Annual Berkeley-Stanford Advanced Patent Law Institute: “Telegraph Road”: Incentivizing Innovation at the Intersection of Patent and Antitrust Law (Dec. 7, 2018) (transcript on file with Dep’t of Justice) [hereinafter “Telegraph Road”]; Makan Delrahim, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, Keynote Address at the University of Pennsylvania Law School: The “New Madison” Approach to Antitrust and Intellectual Property Law (Mar. 16, 2018) (transcript on file with Dep’t of Justice).

⁹ Some refer to “standard-development organizations” as “standard-setting organizations.” For purposes of this speech and others delivered by Division leadership, we use the two terms interchangeably.

According to some, choosing patented technology for inclusion in a standard may unduly increase the market power of the patent holders.¹⁰ The Division has already described at length why the exercise of that patent right is not a matter for antitrust law if the technology was selected as part of a competitive standard-development process. If bargaining leverage in licensing negotiations flows from the constitutionally-contemplated right of the patent holder to exclude, there should be “no special set of rules for exclusion when patents are part of standards.”¹¹ The Antitrust Division maintains it is inappropriate for antitrust enforcers to use antitrust law to police unilateral FRAND commitments where contract or other common law remedies are available for aggrieved parties to receive the benefit of their competitive bargain.

Today, I would like to focus instead on another aspect of the standard-development process: the SDO’s ex ante decision to adopt a certain technology as the standard. Standard-development activity is a substitute for the free-market competitive process through which one or more technologies emerge over others. When done properly and with the disciplining effect of competition, the standard-development process has the potential to determine a technological standard more efficiently than the ordinary competitive process. This process works best when there is transparency, spirited debate, and meaningful representation from participants in the industry, thus providing confidence that the chosen technology is efficient for the market. Because standard-development activity is a proxy for free market forces, it is crucial that the method for selection be a competitive process.

What a competitive standard-development process looks like in this context will vary from organization to organization, but there are some commonalities. As set forth in Office of Management and Budget Circular Number A-119, each SDO should value openness, due process, and a desire to reach genuine consensus.¹² In an ideal world, a competitive standard-development process requires meaningful involvement from a broad range of parties in the industry, with no single interest group dominating in the decision making. Under these circumstances, the standard reflects

¹⁰ See, e.g., Richard J. Gilbert, *Deal or No Deal? Licensing Negotiations in Standard-Setting Organizations*, 77 ANTITRUST L.J. 855, 855–56 (2011); Mark A. Lemley, *Ten Things To Do About Patent Holdup of Standards (And One Not To)*, 48 B.C. L. REV. 149, 151–55 (2007).

¹¹ Delrahim, “Telegraph Road,” *supra* note 8.

¹² See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB CIRCULAR NO. A-119, REVISED, “FEDERAL PARTICIPATION IN THE DEVELOPMENT AND USE OF VOLUNTARY CONSENSUS STANDARDS AND IN CONFORMITY ASSESSMENT ACTIVITIES” 16 (Jan. 27, 2016) (noting that under the balance requirement, “[t]he standards development process should be balanced. Specifically, there should be meaningful involvement from a broad range of parties, with no single interest dominating the decision-making”).

a true consensus among the members, and hence the interests of the market as a whole. In contrast, if a single group of interested persons suppresses minority interests, it may extract rents from the standard-development process—preventing the market and consumers from realizing the full benefits of interoperability, innovation, and safety. Accordingly, the Division may intervene when an industry standard itself limits competition or consumer welfare, which is more likely when certain groups have undue influence on the standard-development process.

Recently, the Antitrust Division resolved a probe with GSM Alliance (“GSMA”), a trade association for mobile network carriers that sets standards for embedded subscriber identity module—or “eSIM”—technology. eSIM technology obviates the need for the physical SIM card we use in our phones, allowing users to transfer between cell phone carriers more seamlessly, which is especially valuable for consumers who travel internationally. The Division found the GSMA standard-setting process flawed, because it allowed a single interest group—mobile network operators—to exercise undue influence in the standard-setting process and thus to use the process to skew industry rules and to coordinate anticompetitively.

Specifically, the rules of the GSMA favored its incumbent operator members and discouraged non-operator voices from weighing in on the standard-setting decision.¹³ Although non-operators *could* participate in the standard-development process, this process was controlled by operator-only committees at each stage. Even GSMA recognized that the standard it ultimately adopted was “operator friendly”¹⁴—with provisions serving the business interests of the operators but which were unnecessary from a technical standpoint. The Antitrust Division was especially alarmed by provisions in the standard that could be used by the incumbent operators to limit disruptive competition and comparison shopping for wireless plans. Under the old GSMA standard-setting process, it appeared that the incumbent operators were poised to make those design changes mandatory for all devices with eSIMs.

GSMA agreed to change its procedures for adopting standards as a result of the Division’s probe, and we issued a business review letter in support of these changes.¹⁵ Of course, well-designed procedures may still be flouted or abused. If standard setting results in a rule that limits competition without procompetitive justification, it is problematic even

¹³ See Letter from Makan Delrahim, Asst. Att’y Gen., Antitrust Div., U.S. Dep’t of Justice, to Timothy Cornell, Esq., Clifford Chance US LLP, at 4–5 (Nov. 27, 2019) (on file with Dep’t of Justice).

¹⁴ *Id.* at 5.

¹⁵ See generally *id.*; see also Press Release, Antitrust Div., U.S. Dep’t of Justice, Justice Department Issues Business Review Letter to the GSMA Related to Innovative eSIMs Standard for Mobile Devices (Nov. 27, 2019) (on file with Dep’t of Justice).

if the standard-setting organization had well-designed procedures. We remain vigilant to this sort of outcome in the standard-development context—and we commend changes of the sort that GSMA undertook in order to limit the likelihood of that sort of outcome; changes that represent a step in the right direction.

To be sure, once a technology emerges as a standard from a *competitive* standard-setting process, antitrust enforcers and private litigants should not then deprive the victor of its reward for successful innovation. Specifically, the Antitrust Division recognizes that the value of a standard-essential patent, as with any patent, stems from the right to exclude. In recognition of this right, along with the United States Patent and Trademark Office (“USPTO”) and National Institute of Standards and Technology (“NIST”), the Antitrust Division jointly issued a new policy statement in December 2019 on remedies for SEP holders subject to voluntary FRAND commitments.¹⁶ In contrast to the 2013 joint policy statement it replaced, which implied that an SEP holder “may harm competition” simply by seeking an injunction against infringers,¹⁷ the present statement clarifies that exercising the right to exclude—by seeking judicial enforcement of a valid patent pursuant to the four-part test for injunctive relief from *eBay, Inc. v. MercExchange, L.L.C.*¹⁸—does not, by itself, violate antitrust law. The same also applies when a party seeks an exclusion order from the International Trade Commission under the balancing test applied there.

Indeed, the new policy statement recognizes that when licensing negotiations fail, SEP holders should have recourse to the full range of remedies, including injunctive relief, to combat infringement of a valid patent. These remedies are necessary to encourage continued participation in the standard-development process, which produces dynamic efficiency that benefits all consumers.

B. *Preserving Structural Incentives to Compete*

Outside the IP context, the Antitrust Division safeguards the competitive process by preserving the structural incentives to compete. When it comes to merger enforcement, the Division recognizes that a

¹⁶ See Press Release, Antitrust Div., U.S. Dep’t of Justice, Department of Justice, United States Patent and Trademark Office, and National Institute of Standards and Technology Announce Joint Policy Statement on Remedies for Standard-Essential Patents (Dec. 19, 2019) (on file with Dep’t of Justice).

¹⁷ U.S. DEP’T OF JUSTICE AND U.S. PATENT & TRADEMARK OFFICE, POLICY STATEMENT ON REMEDIES FOR STANDARDS-ESSENTIAL PATENTS SUBJECT TO VOLUNTARY F/RAND COMMITMENTS 6 (Jan. 8, 2013) (on file with Dep’t of Justice).

¹⁸ 547 U.S. 388 (2006).

competitive market tends not to result from behavioral remedies, which are inherently regulatory, but from structural remedies. Among other reasons, a behavioral remedy is inefficient because it mutes the benefits of the free market, in which the competitive process, and not the government, ought to guide the actions of firms. Returning to the hockey analogy, a behavioral remedy substitutes the enforcer's decision making for that of the players on the ice—the ones most attuned to where the puck will be.

The Division has therefore expressed a strong preference for structural relief over behavioral ones in merger enforcement. We have pursued structural remedies even when that path has been the more difficult one. For example, the Division challenged the AT&T and Time Warner merger because behavioral relief would not be effective in remedying the harms to competition, innovation, and consumers resulting from the merger's restructuring of the market.¹⁹ It was clear to the Division that the merged firm had incentives to raise rivals' costs, to the detriment of consumers. It would have been extremely difficult—if not impossible—to design and enforce effective behavioral relief.

Recently, the Division secured the largest structural remedy in over a decade in the banking industry. The merging parties—BB&T Corporation and SunTrust Banks—agreed to divest 28 branches with \$2.3 billion in deposits to an approved buyer.²⁰ Further, in 2018, the Division required Bayer to divest businesses and assets, including certain intellectual property and research capabilities, worth \$9 billion in order to proceed with its proposed acquisition of Monsanto²¹—one of the largest merger-related divestitures to preserve competition in the agricultural sector. These comprehensive divestitures resolved all horizontal and vertical competition concerns the Division had with the transaction, allowing farmers and consumers to continue benefitting from competition.

We have pursued structural remedies to resolve competitive concerns in the telecommunications industry as well. When T-Mobile and Sprint announced their proposed merger, the Division approved the transaction

¹⁹ See Trial Brief of the United States at 14, 63–64, *United States v. AT&T Inc.*, 310 F. Supp. 3d 161 (2018) (No. 1:17-cv-02511-RJL).

²⁰ See Press Release, Antitrust Div., U.S. Dep't of Justice, Justice Department Requires Divestitures in Order for BB&T and SunTrust to Proceed with Merger (Nov. 8, 2019), <https://perma.cc/E2JT-JTKH>.

²¹ See Press Release, Antitrust Div., U.S. Dep't of Justice, Justice Department Secures Largest Negotiated Merger Divestiture Ever to Preserve Competition Threatened by Bayer's Acquisition of Monsanto (May 29, 2018), <https://perma.cc/XT82-5XJM>.

only after the parties agreed to divest substantial assets to Dish.²² The relief is fundamentally structural, as it requires significant divestitures from the merged entity designed to facilitate the ability of the divestiture buyer (Dish) to compete as a national facilities-based mobile wireless carrier. Although there are transitional agreements supporting the divestiture, these agreements are akin to the transitional agreements used to facilitate other structural remedies, such as in the merger of Bayer and Monsanto.

II. Ensuring Effective Enforcement

I turn now to the second key requirement for safeguarding the competitive process and protecting consumers: effective enforcement.

A. *Transparency in the Game*

In antitrust law, we talk often of over- and under-enforcement, but antitrust agencies must ensure, above all, that enforcement is *effective*. Effective enforcement requires, at minimum, that the rules of the game be clear. Transparency in enforcement promotes due process, helps deter violations before they occur, and is important to promoting faith in the rule of law itself. As James Madison expressed in *Federalist Paper No. 62*:

It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow. Law is defined to be a rule of action; but how can that be a rule, which is little known, and less fixed?²³

The Antitrust Division remains committed to predictability and transparency in our criminal and civil enforcement efforts.

On the criminal side, the Division announced in July 2019 that it would begin to consider compliance at the charging stage in criminal antitrust investigations.²⁴ This policy change was immediately reflected in revisions to the Justice Manual and the Antitrust Division Manual. The Division also published a document on evaluating compliance programs

²² See Press Release, Antitrust Div., U.S. Dep't of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish (July 26, 2019) <https://perma.cc/DP48-CTW3>.

²³ THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961) (1788).

²⁴ See Makan Delrahim, Asst. Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Remarks at the New York University School of Law Program on Corporate Compliance and Enforcement: Wind of Change: A New Model for Incentivizing Antitrust Compliance Programs (July 11, 2019) (transcript on file with Dep't of Just.).

in the context of criminal violations of the Sherman Act.²⁵ This document was intended not only to assist Division prosecutors in their evaluation of compliance programs but also to provide compliance officers and the public greater transparency into the Division's compliance analysis.

On the civil side, the Division and the Federal Trade Commission jointly issued a proposed draft of revised Vertical Merger Guidelines,²⁶ marking the first revamp of guidelines on this topic in over three decades. The draft guidelines are open for public comment and the agencies welcome insights that can enhance certainty and highlight areas for improvement.

B. *Clarity in Institutional Purpose*

This brings me to another necessary condition for safeguarding the competitive process and consumer welfare: ensuring each institution serves a clear role. From the Antitrust Division's point of view, law is best developed thoughtfully through legislation or the courts—not by a regulatory state. While the Division can provide important perspectives in the legislative process and to courts (as we do through our amicus program), antitrust enforcers themselves should no more make law than a goalie should wander off the post to play as a forward in the middle of a game.

Yet the Division has faced increasing calls to do just that. A handful of critics posit that the draft Vertical Merger Guidelines are insufficiently aggressive for failing to consider effects on democracy, concentration of power, and other implications.²⁷ Some also faulted the Guidelines for cementing a status quo that doesn't create the outcomes that people want.²⁸ These demands showcase precisely the dangers of leaving law to be made by agencies. Of course, there is no clear compass for creating guidelines that help achieve the economic or political outcomes people

²⁵ *See id.*

²⁶ *See* U.S. DEP'T OF JUSTICE & U.S. FED. TRADE COMM'N, DRAFT VERTICAL MERGER GUIDELINES RELEASED FOR PUBLIC COMMENT ON JANUARY 10, 2020; *see also* Press Release, Antitrust Div., U.S. Dep't of Justice, DOJ and FTC Announce Draft Vertical Merger Guidelines for Public Comment (Jan. 10, 2020), <https://perma.cc/V5DR-5RP2>.

²⁷ *See, e.g.*, OPEN MARKETS & AMERICAN ECONOMIC LIBERTIES PROJECT, THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE SHOULD ABANDON THE PROPOSED VERTICAL MERGER GUIDELINES AND EMBRACE THE FRAMEWORK OF THE 1968 GUIDELINES 3–4 (Feb. 10, 2020) (“Concentration also aggrandizes the political power of corporations—and their corporate executives and financiers—in ways that subvert democratic institutions.”).

²⁸ *See id.* at 14–15, 18. The DOJ and FTC issued the new Vertical Merger Guidelines in June 2020. *See* Press Release, Antitrust Div., U.S. Dep't of Just., Department of Justice And Federal Trade Commission Issue New Vertical Merger Guidelines (June 30, 2020), <https://perma.cc/HZ2E-PAK4>.

want. Under our Constitution, the role of antitrust enforcers is to enforce the law—not to make it. And it is certainly not to enforce outcomes of what *we* think people want.

I want to be clear, however, that although the draft Vertical Merger Guidelines describe the current enforcement practice of the agencies, it in no way cements the law—similar to how the 1984 non-horizontal merger guidelines did not cement the law.²⁹ The Division will always pay attention to how antitrust doctrine ought to evolve and will bring appropriate cases to the courts when developing the law is necessary to protect competition and advance consumer welfare. We do not avoid that debate and, indeed, welcome sensible answers to these thoughtful and valuable questions. I only remind us that in the backdrop of this conversation is an important assumption about which decision maker ought to make these important changes. In crafting the merger guidelines to be descriptive of our enforcement priorities, rather than prescriptive as to what the law should be, we recognize the rightful limits of our institution.

I view this restraint as a welcome exercise in humility. Indeed, even if the Division *wished* to expand the consumer welfare standard into a general public interest standard, it would be almost impossible to define with specificity. The antitrust laws have been understood for decades as “a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,”³⁰ and it still took decades to introduce a coherent economic framework to the law. Abstract moral and political goals would serve only to dilute the defining goal of the antitrust laws, which are regarded by the Supreme Court as the “Magna Carta of free enterprise.”³¹ If they became instead the Magna Carta not only of competition, but of the “public interest” and of democracy itself, the antitrust laws could risk coming dangerously close to undermining the Constitution itself as the supreme law of the United States.

C. *Forward-looking Enforcement*

Finally, I recognize that there is inherent uncertainty in trying to predict the future of competition. Effective enforcement thus requires antitrust agencies to take swift and appropriate action to address future harms to competition and consumers by seeking to stop them in their incipency.

²⁹ Cf. U.S. DEP’T OF JUSTICE, NON-HORIZONTAL MERGER GUIDELINES 1 (Jun. 14, 1984) (on file with Dep’t of Justice) (“Because the specific standards set forth in the Guidelines must be applied to a broad range of possible factual circumstances, strict application of those standards may provide misleading answers to the economic questions raised under the antitrust laws.”).

³⁰ N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4 (1958).

³¹ United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

For example, in the merger enforcement setting, agencies must be willing to bring challenges in the face of competitive harm even when we do not have the benefits of a structural presumption from the Supreme Court's decision in *United States v. Philadelphia National Bank*.³² *Philadelphia National Bank* formulated a rebuttable presumption that a merger is anticompetitive if it results in a significant increase in concentration in an already concentrated market.³³ The presumption serves as a helpful framework to guide the analysis and has been central to the resolution of many merger cases.

But the existence of a structural presumption should not gain an outsized role in an enforcer's decision to sue. That is, the lack of a presumption should not unduly chill an enforcer from challenging a merger that harms consumer welfare. A proposed merger may not meet the Herfindahl-Hirschman Index ("HHI") thresholds required to trigger a structural presumption in the Division's favor, but it can nevertheless harm competition. The Division will not shy away from challenging anticompetitive mergers in these instances. Although there is good reason to be cautious of over-enforcement, "false negative" errors—errors in which the enforcer or court fails to condemn anticompetitive conduct or transactions—can also be costly to competition and consumers.

To strike the right balance, antitrust enforcers must be comfortable with some degree of uncertainty. We must be especially vigilant to ensure a dominant firm does not attempt to eliminate present *and* future competition from a disruptive and innovative competitor. Our vision into the future competitive landscape may not be 20/20, but we have perfect vision only in hindsight. If we challenged cases only when we could guarantee proof of competitive harm, enforcers would convert a forward-looking exercise into a backward-looking one—which renders antitrust law a less effective tool. The same principle applies not only to merger enforcement but to other attempts to monopolize under section 2 of the Sherman Act.

Conclusion

I hope my remarks this morning illustrate how seriously the Division takes its mission to protect the competitive process and to harness it for the benefit of American consumers. I would like to end, however, on a note of caution as the rest of the impressive people in this room begin to debate important ideas about the future of antitrust law.

³² 374 U.S. 321 (1963).

³³ *See id.* at 364–66.

In recent years, more people have questioned whether the central purpose of antitrust enforcement should adapt. Some of these cries are partisan, treating antitrust law as another tool for political gain. Though the expertise of agencies certainly can change with time and by industry, the enforcer's focus on remedying harm to competition and consumers must not ebb and flow with the vogue of the season. This is true even if the "winners" we are tempted to support are small players rather than large ones. Nostalgia for smaller firms is not a sufficient reason automatically to use the heavy-handed remedies available in antitrust enforcement; doing so may be helping the perceived "losers" of a game become its winners. And it is not the job of enforcers to dictate outcomes; rather, it is to protect and promote the competitive process in order to ensure the ability and incentive of those struggling to compete.

This view is not mine alone, but supported by decades of Supreme Court precedent. As the Court said in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*³⁴ and *Brown Shoe Co. v. United States*,³⁵ antitrust laws are enacted for "the protection of competition, not competitors."³⁶ The sentiment is more than an ornament on antitrust law—the view that our economy should reward competition on the merits is foundational to the free market and to economic prosperity. It is therefore counterproductive if recent calls to curb "Bigness" were to punish the Big only because they are Big, even if these firms achieved their market position as a consequence of their "superior skill, foresight and industry."³⁷ The proper concern, as the Division often repeats, is not Bigness itself, but Big behaving badly. Punishing a victor who has succeeded in the market due to its "superior product [or] business acumen"³⁸ may instead dissuade competition on the merits and hence harm competition and consumers themselves.

Accordingly, I'd like to conclude by returning to the famous saying—that "winning isn't everything." From the perspective of an antitrust enforcer, winning is indeed not everything—but the *will* to win must be zealously guarded, in 2020 and beyond. If this is done well, then antitrust enforcers can ensure American consumers become the true winners of a competitive and dynamic economy.

Thank you.

³⁴ 429 U.S. 477 (1977).

³⁵ 370 U.S. 294 (1962).

³⁶ *Pueblo Bowl-O-Mat*, 429 U.S. at 488 (emphasis omitted) (quoting *Brown Shoe Co.*, 370 U.S. at 320).

³⁷ *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 430 (2d Cir. 1945).

³⁸ *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).