Office of Commissioner
Mark R. Meador

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The Role of Economics in Antitrust Adjudication

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Today's panel concerns the role economics should play in antitrust adjudication. I would like to address three things as we head into that discussion: what economics should help answer, what has gone wrong in how some courts approach it, and why this is a promising area for international cooperation.

The Role of Economics in Antitrust Adjudication

Economics is unavoidable in antitrust—indeed, it is essential. From their common law foundations, these laws focus on how conduct affects competitive conditions: whether it unreasonably restrains trade, tends toward monopoly, or substantially lessens competition. At bottom, these are questions about economic power.[1] And power cannot be assessed in the abstract. It must be evaluated in context, against bargaining dynamics and market conditions, to see whether it is used to harm trading partners.[2]

Economics provides useful benchmarks, like price, output, and quality, that help evaluate the effects of conduct, and economic analysis can clarify how a market is structured, how firms behave, and what a practice's competitive consequences might be.[3] It sharpens the questions courts ask.

But economics is not a substitute for legal analysis or engagement with real-world evidence, which can contradict preconceived economic assumptions about markets function. Answers must come from facts in the record.[4] Theory does not displace facts, and models are only valid when grounded in credible evidence.

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[1] Mark Meador, *Antitrust Policy for the Conservative* 9 (FED. TRADE COMM'N May 1, 2025), https://www.ftc.gov/system/files/ftc_gov/pdf/antitrust-policy-for-the-conservative-meador.pdf ("[A]ntitrust law exists to protect the people from the dangers of concentrated economic power."); Standard Oil Co. v. United States, 221 U.S. 1, 62 (1911) ("[F]reedom to contract was the essence of freedom from undue restraint on the right to contract."); Am. Column & Lumber Co. v. United States, 257 U.S. 377, 414 (1921) (Brandeis, J., dissenting) ("[T]he essence of restraint is power; and power may arise merely out of position.").
[2] Eastman Kodak Co. v. Image Tech. Servs., 504 U.S. 451, 466–67 (1992) (arguing that antitrust analysis should focus on "actual market realities").
[3] *See, e.g.*, Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 53 n.21 (1977) ("[An] antitrust policy divorced from market considerations would lack any objective benchmarks.").
[4] Standard Oil Co. (Ind.) v. United States, 283 U.S. 163, 175 (1931) (emphasizing that record evidence is necessary to "ascertain the operation and effect" of challenged conduct).

Where Courts Have Gone Wrong in Applying Economics

To answer the question about the role economics should play in adjudication, it's important to reflect on the mounting costs of antitrust litigation. Litigating a case today routinely costs millions.[5] This is in no small part attributable to a growing reliance on complex, data-centric arguments and the use of empirical modeling, which in turn requires parties to lean much more heavily on experts and extensive data productions and expert related discovery.[6] These increased costs fall hardest on private parties, many of whom often cannot afford to vindicate the rights the antitrust laws afford them.

Federal judges have noticed. One court described expert prognostications in antitrust as "costly and conflicting engineering, economic, and scholarly business models" that often "shed[] little light on a clear path to resolving the dispute" and amount instead to "competing crystal balls" that portray "incompatible visions of the competitive future."[7] When courts use those terms to describe evidence, something has gone wrong.

Despite the Supreme Court's insistence on "clear rules,"[8] these costs exemplify how antitrust law has increasingly come to favor protracted litigation over ex ante compliance. Deep-pocketed defendants have incentives to press for standards that increase costs for plaintiffs and extend litigation, whereas companies committed to compliance want predictability, which depends on objectively applying intelligible legal principles to facts confronting a business in real time.[9] But when the legal rules come to depend more on the outputs of an econometric model than on the information businesses produce in the ordinary course, counsel cannot tell a client whether a practice is lawful without first commissioning the analyses that would be presented at trial. Taken to its extreme, that approach would require hiring an economist for every business decision, which is unworkable as a rule of law and, given how contested empirical predictions can be, inconsistent with due process.

Economics can clarify market behavior and explain patterns of harm, but it does not float free of institutional context or render law enforcement self-executing.[10] Economic models generally presuppose that parties abide by their commitments.[11] Whether transactions create value depends on whether they occur on voluntary and informed terms, whether contracts are enforceable, and whether property rights are secured. The legal and moral judgments underlying those commitments are embedded in the institutional conditions that make economic analysis

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[5] *See, e.g.*, FED. TRADE COMM'N, FY 2025 AGENCY FINANCIAL REPORT 37 (2026).
[6] *Id.* at 37, 79–80. The Office of the Inspector General has identified "unpredictable and rising" expert witness costs as a challenge for the FTC in "increasingly complex markets."
[7] New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 187 (S.D.N.Y. 2020).
[8] Pac. Bell Tel. Co. v. linkLine Commc'ns., Inc., 555 U.S. 438, 452 (2009).
[9] U.S. DEP'T OF JUST., CRIMINAL DIV., EVALUATION OF CORPORATE COMPLIANCE PROGRAMS 1 (2024), https://www.justice.gov/criminal/criminal-fraud/page/file/937501/dl?inline.
[10] Daniel Francis, Making Sense of Monopolization, 84 ANTITRUST L.J. 779, 882 (2022) ("The fragile quantifications of economic modeling make a wonderful servant but an indecisive master.").
[11] Insofar as parties do *not* abide by their commitments, there are economic models to explain that, too. *See, e.g.,* A. Mitchell Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LITERATURE 45, 47 (2000) (assuming the existence of legal sanctions and enforcement).

possible.[12]

Markets arise to support private transactions, which are only efficient to the extent parties have access to courts and other institutional arrangements to resolve disputes when agreements fail. To treat the moral and legal commitments embedded in these arrangements[13] as secondary to particular welfare metrics, as some commentators insist,[14] is to abandon sound economic reasoning altogether.[15]

It is therefore critical to distinguish between using economics to illuminate conduct and using it to resolve cases. The latter treats economics as an unqualified absolute, encouraging courts to analyze conduct in a vacuum. Economics is useful to the extent it explains actual business operations and reveals connections intuition might miss, but it is not a deterministic tool for resolving cases. Human beings change their behavior in response to unpredictable events, and real-world evidence does not always conform to the assumptions embedded in econometric models, particularly those constructed post hoc to support a side's preferred litigation position.

Against that backdrop, several recurring methodological problems emerge.

The first is the rote application of economic concepts without grounding them in the record. Courts sometimes transform economic insights drawn from precedent into categorical

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[12] *See, e.g.*, ADAM SMITH, THE THEORY OF MORAL SENTIMENTS 115 (Wells and Lilly 1817) (1759) ("Justice, on the contrary, is the main pillar that upholds the whole edifice. If it is removed, the great, the immense fabric[] of human society, that fabric[] which, to raise and support, seems, in this world, if I may say so, to have been the peculiar and darling care of nature, must in a moment crumble into atoms."); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (The Free Press 1985) ("[C]apitalism is prone to undervalue dignity . . . institutional safeguards can sometimes be forged that help to correct the condition."); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 43 (1960) ("[P]roblems of welfare economics must ultimately dissolve into a study of aesthetics and morals.").

[13] *Cf.* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 502 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structures."); FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 427 (1990) ("Equality and freedom are preconditions of a free market, and not commodities to be haggled over within it."); Nat'l Soc'y of Pro. Eng'rs v. United States, 435 U.S. 679, 695 (1978) (quoting Standard Oil Co. v. FTC, 240 U.S. 231, 248 (1951)) ("The heart of our national economic policy long has been faith in the value of competition."); *see also* Am. Column & Lumber Co. v. United States, 257 U.S. 377, 417–418 (1921) (Brandeis, J., dissenting) ("The illegality of a combination under the Sherman Law lies not in its effect upon the price level, but in the coercion thereby affected.").

[14] *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX 90 (The Free Press 1993) (1978) ("Consumer welfare, as the term is used in antitrust, has no sumptuary or ethical component."); Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting in part) ("Real competition is dastardly."); HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 47 (1st ed. 2008) (stating that federal antitrust laws do not have "any moral content" and exist solely to "make the economy bigger."); *cf.* United States v. Colgate & Co., 250 U.S. 300, 307 (1919) ("The purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."); FTC v. Sinclair Refining Co., 261 U.S. 463, 475–76 (1923) (explaining that "the great purpose of both [the Clayton Act and the FTC Act] was to advance the public interest by securing fair opportunity for the play of contending forces engendered by an honest desire for gain.").

[15] Douglass C. North, *Economic Performance through Time*, THE NOBEL PRIZE (Dec. 9, 1993), https://www.nobelprize.org/prizes/economic-sciences/1993/north/lecture/ ("In the analysis of economic performance through time [traditional economic theory] contained two erroneous assumptions: one that institutions do not matter and two that time does not matter."); *see also supra* note 12.

presumptions that operate independent of case-specific evidence. One example is what commentators call "*Trinko* creep":[16] the broad application of certain economic propositions from *Verizon v. Trinko*,[17] a unilateral refusal-to-deal case, beyond the facts necessary to decide it.

Trinko presents a narrow holding: antitrust liability does not generally attach where a regulatory regime already performs an antitrust function by actively supervising routine noncompliance issues associated with mandatory infrastructure sharing.[18] But the opinion also included broader dicta reflecting contested economic assumptions, such as the relative costs of false positives and false negatives and the effect of liability on investment incentives.[19] Lower courts have increasingly treated those concerns as universal principles untethered from market realities, without considering whether those concerns were necessary to decide the case or still reflect the consensus view.[20]

In doing so, courts overlook an important legal principle: antitrust doctrine is not economically static. In *Kimble v. Marvel*, the Court said it has "felt relatively free to revise our legal analysis as economic understanding evolves and . . . to reverse antitrust precedents that misperceived a practice's competitive consequences."[21] And in *NCAA v. Alston*, it reiterated that when "market realities change, so may the legal analysis."[22]

Accordingly, whatever force *Trinko*'s economic observations once carried, their rote application risks economically incoherent and legally incorrect outcomes. More contemporary understandings confirm that the magnitude and direction of error costs, and the effect of liability on investment incentives, depend heavily on the conduct, market structure, and remedy at issue, which in turn requires contextual analysis.[23]

Lower courts should therefore distinguish contested economic propositions, which may carry less precedential weight, from the binding legal rules those cases establish. Absent that distinction, courts risk elevating economic priors, such as those of the Chicago or Harvard schools, into immutable rules that apply without regard to commercial context. As one court observed, several appellate decisions citing *Trinko* have "misread or deliberately extend[ed]" the case, imposing evidentiary burdens unsupported by its holding.[24]

A second concern is the "CSI effect": evidence appears more persuasive when it looks technical

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[16] Andrew I. Gavil, *Trinko Creep*, PROMARKET (July 20, 2023), https://www.promarket.org/2023/07/20/triko-creep/.
[17] Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, 540 U.S. 398 (2004).
[18] *Id.* at 407, 408.
[19] *Id.* at 414.
[20] Gavil, *supra* note 15.
[21] Kimble v. Marvel Ent., LLC, 576 U.S. 446, 461 (2015).
[22] NCAA v. Alston, 594 U.S. 69, 93 (2021).
[23] *See* Jonathan B. Baker, *Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right*, 80 Antitrust L.J. 1, 5–6, 37 (2015); Steven C. Salop, *A Modern Economic Approach to Antitrust Law: Industrial Organization, Decision Theory and Antitrust* 2-1 to 2-3 (Feb. 2, 2026), (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5379164.
[24] Steward Health Care Sys., LLC v. Blue Cross & Blue Shield of R.I., 311 F. Supp. 3d 468, 483 (D.R.I. 2018) (in reference to *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1074 (10th Cir. 2013), In re *Elevator Antitrust Litig.*, 502 F.3d 47, 52 (2d Cir. 2007), and *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1049 (11th Cir. 2004)).

or scientific. Regressions, simulations, and models may receive greater weight than ordinary-course documents or market testimony simply because they appear more rigorous.[25] Judge Easterbrook once justified it as, "[s]tripping intent away brings the real economic questions to the fore at the same time as it streamlines antitrust litigation."[26]

Even setting aside that this claim gets cost and administrability backwards, it trades on an ambiguity in the word "intent." Motive is what a firm subjectively wished to accomplish; intent is what its conduct was designed to do as a matter of fact, as reflected in business plans and contemporaneous strategy.[27] While some caution is warranted as to motive, intent evidence can be the most concrete and direct evidence of what conduct was structured to achieve, and it comes from documents the firm already produced in the ordinary course. Stripping intent away discounts information drawn from those most knowledgeable about the industry and forecloses the shortest path to understanding competitive dynamics. At the same time, it forces courts to engage with complex, contested models whose assumptions may be detached from the commercial reality they purport to describe.

The claim also overlooks another basic limitation: models are only as reliable as their assumptions, and whether those assumptions reflect market reality often cannot be assessed without understanding how firms actually perceived and responded to competitive conditions in real time.[28] Internal documents and contemporaneous communications are therefore indispensable. They are less susceptible to post hoc revisionism and can reveal whether a model's assumptions correspond to market realities.

The FTC's challenge to Lundbeck's acquisition of Ovation illustrates the concern. The transaction combined the only two FDA-approved drugs used to treat patent ductus arteriosus in premature infants.[29] Post-acquisition, Lundbeck pulled its own product and raised the acquired product's price from roughly $78 to more than $1,600 per treatment.[30] The district court nevertheless found the FTC had failed to prove the products competed in the same relevant market, crediting expert analysis of price-based substitution while discounting ordinary-course evidence that Lundbeck viewed the products as competitively related and that the deal rationale

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[25] Francis, *supra* note 10, at 822 ("Fetishizing quantification, in particular, is affirmatively harmful. It risks giving judges and juries a 'CSI-effect' impression that numbers are especially reliable and distracting from equally (or more) important ordinary-course evidence, while enormously inflating the expense of antitrust litigation for businesses, consumers, and agencies.").

[26] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989).

[27] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 4.1 (2023) ("Evidence that the merging parties intend or expect the merger to lessen competition, such as plans to coordinate with other firms, raise prices, reduce output or capacity, reduce product quality or variety, lower wages, cut benefits, exit a market, cancel plans to enter a market without a merger, withdraw products or delay their introduction, or curtail research and development efforts after the merger, can be highly informative in evaluating the effects of a merger on competition."); MAYA- SALOMÉ GARNIER, INTENT IN COMPETITION LAW (Concurrences 2025) (explaining that "motive" describes the cause of an action, while "intent" describes its goal).

[28] Milton Friedman, *The Methodology of Positive Economics*, *in* ESSAYS IN POSITIVE ECONOMICS 3, 8–9 (Univ. of Chicago Press 1966) ("[T]he only relevant test of the *validity* of a hypothesis is comparison of its predictions with experience.")

[29] FTC v. Lundbeck, Inc., No. 08-6379, 2010 U.S. Dist. LEXIS 95365, at *1 (D. Minn. Aug. 31, 2010).

[30] *Id.* at *22.

lay in repositioning them to reduce cannibalization and prevent generic entry.[31] In the words of one commentator, "Why, God, why? What really has the world come to when a merger to monopoly followed by a 1300% price increase survives Section 7 challenge?"[32]

A third issue arises when courts fixate on particular metrics, like price and output, without first analyzing the conduct's exclusionary potential and its capacity to distort the terms on which parties trade. For example, some courts assume that conduct targeting a single competitor cannot cause market-wide harm, or that harm cannot arise absent reduced output and higher prices.[33] But depending on market structure, excluding even a single rival may substantially impair the competitive process, especially where that rival is the only entrant or the only firm meaningfully constraining an incumbent.[34] That same narrow focus leads courts to discount non-price competition and the use of coercion. For example, systematic deception[35] or threats of retaliation coupled with conditional dealing[36] may not immediately reduce output or raise prices, but still harm long-term entry, quality, and innovation.[37] Treating short-term effects as dispositive can thus allow facially coercive conduct to escape scrutiny despite the obvious absence of any valid business justification.

Another issue is when courts become preoccupied with utilizing particular economic tools to resolve cases. Market definition is a common example. It is an important method for identifying competitive constraints, but not the only one. Where direct evidence reveals rivalry, substitution, or adverse economic effects, excessive attachment to formal market definition can obscure the analysis.[38]

United States v. Sabre Corp. is illustrative. The court acknowledged extensive ordinary-course evidence that Sabre and Farelogix viewed each other as head-to-head competitors, finding they competed "as a matter of real-world economic reality."[39] It nonetheless held they did "not compete in a relevant market" as a matter of law because Sabre ran a two-sided platform and Farelogix did not.[40] Rather than ask whether the transaction would reduce competition in light of actual practice, the court let the formalities of an economic method dictate the legal analysis.

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[31] *Id.* at *55–57.
[32] Christopher Sagers, FTC v. Lundbeck*: Why, God, Why?*, ANTITRUST CONNECT BLOG (Aug. 23, 2011), https://legalblogs.wolterskluwer.com/antitrust-connect/ftc-v-lundbeck-why-god-why/.
[33] *See, e.g.*, Daniel Graulich, *Antitrust Analysis in Iowa Pathologist Case Misses the Mark*, Law360 (Mar. 10, 2025), https://www.law360.com/articles/2307797/antitrust-analysis-in-iowa-pathologist-case-misses-the-mark (arguing that the district court in Iowa improperly considered harm to the only rival entrant as insufficient for antitrust injury).
[34] *Id.*
[35] *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 ANTITRUST L.J. 823 (2009).
[36] *See* Daniel Francis, *Monopolizing by Conditioning*, 124 COLUM. L. REV. 1917, 1920–21, 1999 n.514 (2024).
[37] *See* Graulich, *supra* note 32 (where the dominant firm allegedly pressured competitor pathologists into non-compete agreements, locked them out of their offices, withheld essential biopsy slides, and posted false negative reviews online).
[38] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MERGER GUIDELINES § 4.3 (2023).
[39] United States v. Sabre Corp., 452 F. Supp. 3d 97, 139 n.16 (D. Del. 2020).
[40] *Id.* at 136.

Opportunities for International Cooperation and Convergence

In citing examples from U.S. courts, I do not want to suggest the challenge is uniquely American. If there is one proposition on which competition lawyers can agree, it is that judges across jurisdictions misapply economics all the time. Any legal regime that asks generalist judges to resolve disputes about market power confronts the same difficulty: economics is technical, judges are not economists, parties have incentives to weaponize complexity, and the costs often fall on enforcement, private litigants, and businesses trying to plan around the law.

A natural instinct is to ask how judges can be better educated about economics. But the more productive question is procedural—specifically, how courts can manage the adjudication process to better incorporate economics. How courts receive expert testimony raises practical questions of case management, not just institutional knowledge.

Several reforms merit attention.[41] Court-appointed experts can prevent basic analytical errors and offer a credible independent check on competing submissions.[42] Written direct testimony allows fuller presentation than compressing voluminous reports into brief oral examinations.[43] Courts might also make greater use of special masters with demonstrated antitrust and economic expertise, particularly in complex cases where the judge would benefit from help narrowing disputes and identifying the assumptions that drive the analysis.[44] Finally, concurrent expert evidence and placing opposing experts in structured dialogue before the bench, a practice often called "hot tubbing," has been used in Australia for decades and adopted in the United Kingdom and some U.S. courts.[45]

These problems are tractable, and that is cause for optimism. No jurisdiction has fully solved the role economics should play in antitrust adjudication, which creates opportunities for the kind of dialogue this panel represents. If we agree that the goal is to use economics to facilitate what is ultimately a legal question about how best to protect competition, we can work toward deploying it in ways that are more predictable, more administrable, and more faithful to the consumer and trading-partner focus animating the antitrust laws.

Thank you.

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[41] Michael L. Katz, *How to Fix the Courts' Misuse of Economics*, PROMARKET (Dec. 7, 2021), https://www.promarket.org/2021/12/07/courts-economics-antitrust-consumer-welfare/ (discussing the misapplication of economics by courts and procedural reforms that could be considered to address the issue).

[42] Gregory J. Sidak, *Court-Appointed Neutral Economic Experts*, 9 J. COMPETITION L. & ECON., 359, 373 (2013); Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSP., 91, 96 (1999) ("You don't have to understand a proposition to be justified in believing it; you need only be able to repose a justified trust in the truthfulness and expertise of the person who assures you that the proposition is true.").

[43] Katz, *supra* note 40 ("Written direct testimony, which is used by some judges, allows for a much more complete and careful presentation of the economic evidence.").

[44] FED. R. CIV. P. 53(a)(1)(B) (In their adjudicative role, a special master may "make or recommend findings of fact" on non-jury issues, supplementing the judge's decisions with specific expertise).

[45] J.L.B. Allsop, *Expert Evidence Practice Note (GPN-EXPT)*, FED. CT. OF AUSTL. (Oct. 25, 2016), https://www.fedcourt.gov.au/law-and-practice/practice-documents/practice-notes/gpn-expt; Katz, *supra* note 40.