FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

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FEDERAL TRADE COMMISSION

I N D E X

P R O C E E D I N G S

MR. SAYYED: Okay, I think we will get started. I am Bilal Sayyed. I am the Director of the Office of Policy Planning at the FTC. I am not going to take much time up here at all. We will get right into the program.

This is our second day at Georgetown, the eighth day of our hearing sessions on "Competition and Consumer Protection in the 21st Century." I just want to make a few points. This whole event is being webcast, recorded and transcribed, so your participation here or presence here may be reflected or may be captured on the FTC's website for forever, I hope.

There is a correction to the -- I think the network to access online. It is Guestnet, G-U-E-S-T-N-E-T. It should pop up. And there is no password.

The upcoming slides are dense, so if you are sitting in the back and you do not access the slide either in hard copy or on your device, you will not see them. My eyes worked about as far back as five rows. Yours may be better or worse.

WELCOME AND INTRODUCTORY REMARKS

COMMISSIONER PHILLIPS: So let's get started. So Commissioner Phillips is going to start us off with opening remarks. I am not going to say much about him except that he is a Commissioner, and prior to being confirmed, he was chief counsel for Senator Cornyn.

COMMISSIONER PHILLIPS: Thanks, Bilal. And thanks, everybody, for being here today.

It is really an honor to be here in front of you and, in particular, to have the chance to kick off a day with so much to discuss. We have two big topics that we are going to talk about today.

As some of you know, this hearing was originally scheduled to happen earlier, but had to be rescheduled because of the hurricane. And so in the meantime, we have already had a chance to explore some issues that actually can inform some of what we are going to talk about today.

So, today, we take on the very modest task of looking both at vertical mergers and the consumer welfare standard. Both have made headlines of late, which is not always true in the antitrust world. The Department of Justice's ongoing litigation regarding the mergers of AT&T and Time Warner has drawn a great bit of attention, in particular, to vertical merger law and the economic theories surrounding it.

And we have heard a great deal, almost every week, on op-ed pages, on television and so forth, regarding the consumer welfare standard. So this is an important time, it is an appropriate time for the FTC to be convening a hearing on these two topics.

My remarks today will be brief. I just sort of want to set the table and talk a little bit about what I hope to hear from some of the discussion. So again, our first topic is vertical mergers. For those who are not aware, which probably are not the people here today, but because these are supposed to be an edifying experience for the nation at large, vertical mergers combine two firms at different points in the supply chain. And they are frequently juxtaposed with another kind of merger, horizontal mergers, which combine direct competitors.

In 1978, in the antitrust paradox, building on work of his that went back decades, Robert Bork expressed skepticism of the likelihood of harm from foreclosure, which we will talk about in a moment, and competence in efficiencies like eliminating double marginalization that would flow from vertical mergers.

Vertical mergers also can mitigate free-riding and they can align incentives between the two firms and reduce the friction that they have in negotiating contracts with each other to achieve those efficiencies. And consistent with these theories, a lot of studies about which we will hear today have shown that vertical mergers are generally procompetitive, or at the very least, competitively neutral.

Accordingly, the Commission has, as a general matter, typically taken a more skeptical view of horizontal mergers than they have of vertical mergers. But that is not to say the vertical mergers never raise competitive concerns. We will hear today from, among others, Steve Salop, whose work in the 1980s concerning a theory of harm from raising rivals' costs finds its expression in enforcement that we and the Department of Justice do every day.

In the vertical merger context, this theory posits that an integrated firm with sufficient market power may be able to exploit its preferred or exclusive access to critical inputs or customers and, thereby, raise its rivals' costs of competing for those inputs or customers and could potentially harm the competitive process.

Vertical mergers also raise the prospect of other anticompetitive harm, such as increasing the likelihood of collusion. While U.S. antitrust authorities routinely review vertical mergers and sometimes bring enforcement, neither the Commission nor the Department of Justice Antitrust Division have updated formal guidance since 1984, which is a long time ago. The Antitrust Modernization Commission and the ABA repeatedly have called for updating vertical merger guidelines.

Critics note that the agencies have updated horizontal merger guidelines as recently as 2010 and that those guidelines have gained wide purchase in the bar and even by courts. And so today, for lawyers in particular and firms considering transactions, they offer meaningful guidance, as well as a tool for developing clear and consistent case law.

These same critics note that the 1984 nonhorizontal guidelines, which by the way are a DOJ product, not an FTC product, are outdated and do not reflect current agency practice. Earlier this week, Assistant Attorney General Makan Delrahim stated the guidelines are not used and do not reflect new evidence or case law.

So, today, part of what I hope to hear is what we have learned about vertical mergers since the early 1980s. How have the theory and the practice changed? What are the areas of vertical merger law that are unclear to businesses or courts from which the public, including those businesses and courts, would benefit from guidance from us at the agencies? Critically, do we have empirical support for the competitive benefits or the costs that are alleged to flow from vertical mergers? And would that empirical support support its health, presumptions in the law, either for or against? How reliable are the analytical tools that we use to evaluate vertical mergers, like vGUPPIs? And finally, in particular, with respect to the question of guidelines, what would new guidelines include?

So there is a lot to talk about and I look forward -- we have some of the real great minds on this issue here today, and I look forward either today or later hearing from them.

Our second topic today is the consumer welfare standard. And I think most folks even out in the public know, this is the standard that we use across the board, mergers and conduct in courts and at agencies, to judge anticompetitive conduct. It is not only a standard that we in the U.S. apply, it is a standard that is used by competition agencies around the world. It is an economically-grounded standard, and it requires that there be harm to consumers for conduct to be condemned. Mere harm to competitors is considered insufficient.

So let me repeat that again. There has to be harm to consumers, not just competitors. The reason that is so, the reason harm to competitors is considered insufficient is because sometimes a less-efficient firm losing sales or market share to a cheaper, more innovative or efficient rival, can be and often is consistent with vibrant competition and with outcomes that benefit consumers. Courts and agencies have embraced this standard for decades.

Today, there are two very important discussions going on about the consumer welfare standard, and they are happening simultaneously. And I think it is important that we understand that there are two conversations going on.

One is a continuing discussion about how we apply the standard, regarding whether enforcement is at the appropriate level, whether it is properly targeted. This is an introspective question on some level, in which scholars, economists, practitioners, and enforcers all ask ourselves, are we bringing the right kinds of cases? Are we using the right kinds of evidence? Should we be doing more or less in certain places? The antitrust bar, the business community, and others benefit from this ongoing and active analysis.

The second discussion happening now, and the one on which today's consumer welfare standard panels will focus, is whether the standard is itself the right metric we ought to use in antitrust enforcement and in antitrust law; some argue that enforcement under the consumer welfare standard has failed because of the law, and accordingly, that we should reform the law.

The FTC's hearings have addressed, as I said earlier, and they will continue to address certain assumptions that underlie these claims. For instance, last month, we heard about concentration and competition. Today, our panelists will explore how the consumer welfare standard as we know it came to be and propose and consider alternatives. I am interested to hear how the proper goals of antitrust are articulated and on what basis they are justified. Does the consumer welfare standard fail to achieve these goals and how?

I want to understand the proposed alternatives and how they would apply in practice day in and day out in antitrust enforcement from the Government’s perspective and also in antitrust litigation in the courts.

I am particularly curious about whether there is conduct that is illegal today that might be legal under a particular standard. I will cite as an example the concept of small labor sellers, workers, colluding against a monopsonist. So that is just one example.

We talk a lot about things that are legal today that might be illegal, but it is also interesting to consider things that are illegal today that might be illegal.

And among the many considerations, I alluded earlier to the fact that globally, we have seen adoption of the consumer welfare standard. I am interested to hear today how we think that, globally, a different standard would be applied and what would that mean really for the national interest generally.

As I mentioned at the beginning, today is a heck of a day. We are discussing two fascinating and very important topics, and I am really interested to hear what everyone has to say about them. So thank you very much.

(Applause.)

PRESENTATION: VERTICAL MERGERS

MR. KOBAYASHI: All right. Thank you, Commissioner Phillips.

So I am here to introduce our opening speaker for our first panel. This is the economics panel. We will have a second panel on vertical mergers and vertical guidelines that features lawyers. So this is the important one. We have a great panel, but I am going to -- because of the lights and the unpleasantness of those things, I am going to have Steve Salop come up here and give his opening remarks.

Steve is the Professor of Economics and Law here at the Georgetown University Law Center. As Commissioner Phillips said, his work with Scheffman and others on raising rivals' cost, as well as his work with vGuppi with Serge Moresi, are really influential in terms of how people think about vertical mergers, foreclosure. And, certainly, we use these tools in the Bureau of Economics, and one of the things that I think we want to explore is to what extent, you know, should things like this be put in guidelines.

So without further delay, Steve Salop.

MR. SALOP: Thank you. Thank you very much.

Thanks, Bruce.

Thank you, Commissioner, for setting the stage.

I have a heck of a lot of slides and this is going to save me several. So I really appreciate it.

As I said, I have a lot of slides and I am not going to have time to go over all of them. So what I would like you to do is kind of read along, sort of like a class, read along, and then I will highlight the issues that I think are most important on each slide.

But to start, by way of introduction, the key points I want to make are listed on the slide. That vertical mergers should be focused on oligopoly markets. A lot the criticisms one hears about vertical merger enforcement, why vertical mergers are competitive relate to vertical mergers in either perfect monopoly or perfectly competitive markets.

Second point, that I do not think that the analysis of vertical and horizontal mergers should be treated as inherently different in oligopoly markets. Vertical mergers, as I will discuss, can lead to unilateral harms, can lead to coordinated harms just like horizontal mergers can. In some sense, the vertically-merging firms should be thought about as indirect competitors in the premerger world, and that indirect competition is eliminated.

As I point out on this slide, vertical mergers, the forum is vertical, but the harm is horizontal. We are not talking about something that is fundamentally different.

Another key issue is whether -- and Commissioner Phillips pointed it out -- whether there should be a procompetitive presumption, in particular, a procompetitive presumption following from elimination of double marginalization. This is a key issue and there is a lot of disagreement on the panel about this issue.

In my view, that the efficiencies from vertical mergers, including EDM, are neither inevitable nor necessarily merger-specific. As I will discuss, the Coasian door swings both ways. Very often efficiencies can be achieved by conduct short of merger. And my view, and I think certainly in horizontal mergers and I think as were generally accepted, that in merger analysis, only cognizable efficiencies get to count, and efficiencies are only considered cognizable if there are verifiable, merger-specific, and procompetitive.

And the burden in merger law and across all of antitrust is that the parties have the burden on efficiencies, not the Government. And so my hope is that the vertical merger guidelines finally are revised after all these years, and that when they are, they should reflect this set of points.

So the question, you know, should the vertical mergers be revised, well, Commissioner Phillips laid out why they should be. The ‘84 guidelines are woefully out-of-date. I think we saw in AT&T-Time Warner that courts are not very good at analyzing vertical mergers. In my view, the staff and the Commissioners could get better at analyzing vertical mergers as well. And, of course, it would be useful for outside parties, both the merging firms and their counselors.

So what are the arguments against revising the merger guidelines? I have set out the standard arguments here. I am sure we will discuss them both in the economics panel and in the legal panel, as well. One is that you do not need to revise the guidelines because, hey, we already know how to analyze vertical mergers. Then there is another counter-argument that we should not revise the guidelines because the issues are so complicated, we could not possibly write down guidelines that are sensible.

And, you know, the benefit -- people argue the benefits are low because there have only been 50-some-odd consent decrees -- actually, it is 58 through June of this year -- in the last 25 years. And the benefits are low because there should not be any vertical merger enforcement. That is what someone like Professor Bork would argue.

And that leads to counter-argument number two, which is the one I really like, and I think it is the one that lies below a lot of the points that people make under counter-argument number one. The idea is that if you revise the vertical merger guidelines that education is going to lead to more enforcement.

And, you know, it is an ignorance is bliss argument. Better we should not know what the possibilities are because the other way people put the argument is the staff will have a new toy and, therefore, they will want to bring cases, and I think that is silly. I think that if we revise the merger guidelines, it will not increase false positives; instead, it will reduce false negatives.

So vertical mergers -- moving on, vertical mergers, they include both purely vertical deals, but also complementary product deals. So a case like Ticketmaster-LiveNation, they were not vertically related, they were both selling complements. Sometimes mergers are both horizontal and vertical, so for example, the St. Luke’s case that the FTC brought, the Idaho hospital case, the FTC focused on the horizontal aspects. At the same time, there was a private case that focused on the vertical aspects, that St. Luke’s was taking over a large physician practice as well.

Sometimes it is automatically vertical plus horizontal because one of the horizontal merging firms is already vertically integrated. So there was a deal five, six years ago where in the door skins market -- well, the door market -- where JELD-WEN bought a small competitor, but JELD-WEN both made the door skins and they also made the molded door. And that is a case where a private case in Richmond, just recently, undid that merger. Professor Shapiro was the expert for the plaintiff. Maybe he will talk about that. Maybe he will talk about that later. So there is a wide range of deals that are vertical mergers.

The basic economic benefits and harms, Commissioner Phillips laid them out, so I am just repeating them here. I would say in the foreclosure area, what I told my students when I actually -- I have coincidentally taught this on Tuesday -- that input foreclosure is the stronger foreclosure story than customer foreclosure.

I do not think there is a lot of disagreement about what is in blue and black font on this slide. I think that the economic arguments for both harms and benefits are pretty well known. I think where there may be controversy is what is in the green font, which are my views, that enforcement should be focused on oligopoly markets, that only cognizable efficiencies should be credited, and that what you need to do is analyze the overall effect on consumers, using a fact-based analysis of both harms and efficiencies.

Okay. Key policy issues, I think I have -- I have laid them out. The points on this slide are really key, but quite repetitive. The issue is -- the key policy issue is are vertical mergers so much less concerning than horizontal mergers that the legal and policy analysis should differ substantially. In particular, should vertical mergers be treated systematically more permissive than horizontal mergers? And if so, how? I do not think so, would be my simple answer.

Okay. So why? Commissioner Phillips said, hopefully, we will figure out how we should analyze the economics. And I would say this slide, this summary slide, is really pretty important from my view of everything. So in my view, the foreclosure harms, if we start with foreclosure, the foreclosure harms from vertical mergers are similar and not less inherent than the harms from horizontal mergers. The vertically-merging firms are indirect competitors, can be thought about as indirect competitors in the premerger world, and that indirect competition is eliminated.

The vGUPPI -- vertical GUPPI was mentioned earlier. The vertical GUPPI looks a heck of a lot like a horizontal GUPPI and that is because -- at least the upstream vertical GUPPI. That is because the analysis is very similar.

Vertical mergers are common, vertical integration is very common, but so is horizontal integration. Most firms produce multiple products that are substitutes for one another. So that is not -- you know, that is not an inherent difference. Partnerships among competitors are common; horizontal mergers are common. The idea that -- are vertical mergers inherently procompetitive? Well, so are horizontal mergers. The guidelines say so, we know very few horizontal mergers are disturbed every year.

Also, vertical merger efficiencies are not inevitable. I mean, vertical integration is common, but so is vertical non-integration. There is an awful lot of companies that are not vertically integrated. And we have lots of examples in which vertical integration has failed. Pepsi’s acquisition of KFC and Pizza Hut; you know, of course Coca-Cola has not merged with McDonald’s; Sony Betamax, which was vertically integrated, was beat out by JVC; in cable, we have seen integration and disintegration occurring over time. I note that even Alcoa, the fundamentally bad, vertically-integrated monopolist, has broken itself up into Alcoa and Arconic, upstream and downstream. So I think that is a similarity with horizontal, as well.

And, finally, the key policy issue is the issue is not about whether or not there are efficiencies; the issue is whether the efficiencies are merger-specific. As I pointed out before, Coase stressed that you can get vertical integration by contract. Very often, you can achieve the vertical efficiencies if they occur, but with contracts rather than having to merge.

So let me talk a little bit about this unilateral. I do not want to talk about the GUPPI -- we will leave that as a homework assignment for you -- but rather this idea that the firms are indirect competitors.

So here is our basic story, and I have an upstream merging firm, a downstream merging firm, I have them in green font. There is a downstream rival. And the way I have set this up -- because I like to keep the harms and the benefits separate. You know, you can have harms without benefits, you can have benefits without harms, or they can go together.

So, here, the upstream merging firm is supplying, in the premerger world, the downstream rival. So since it supports the downstream rival, helps the downstream rival keep its costs low, when the downstream rival competes with a to-be downstream merging firm, you have -- this competition implies that there is indirect competition at that level.

And if there is a merger and the upstream merging firm raises the price to the downstream merging firm or cuts them off, that indirect competition is reduced or eliminated. And that is the sense in which a vertical merger purely unilaterally can reduce so-called horizontal competition.

I sometimes focus on the fact that we cut the rival off. John Baker focuses on the idea that it would raise the price of the downstream rival and that would lead the downstream rival to involuntarily collude. In effect, it would be forced to coordinate with the downstream merging firms. So at the unilateral level, the issues are really not fundamentally different than in horizontal mergers. That is why the GUPPIs look similar.

You can read this. This just says what I said in words rather than with a picture.

At the level of coordination, vertical mergers can lead to coordination. One way it can lead to coordination is by disrupting or eliminating mavericks or disruptive buyers. So if the upstream merging firm is a maverick, after the merger, it may not want to behave as a maverick because its downstream partner benefitted from -- I’m sorry -- it may not want to eliminate coordination at the upstream level because if there gets to be coordination at the upstream level, it will be the unintegrated rivals that get harmed. Meanwhile, its downstream merger partner will then have a cost advantage. So if the upstream merging firm is a maverick, it may no longer want to act like a maverick after the merger.

Similarly, if the downstream merging firm is a disruptive buyer that prevents coordination at the upstream level, it will not want to do that after the merger. It would say, gee, why should I prevent coordination at the upstream level? I will be protected because I will get my inputs from my partner, and it can raise the price to my downstream rivals.

Then, third, if there is a downstream maverick, not a merging firm, well, that gives the upstream merging firm an even greater incentive to raise rivals' costs. So in those three ways, you know, within the context of horizontal merger guidelines analysis, a vertical merger can lead to the same type of harms.

There can be other coordinated harms, as well. There can be the classic information exchange harm. Within the context of unilateral, it can encourage reciprocal pricing or reciprocal coordination, which is -- I will point you to my Yale article rather than talk about it here.

It is important -- this issue of the reciprocal licensing, I think is important, as a practical matter, because with CNBC -- I'm sorry, NBCU merged with Comcast, and if Time Warner-AT&T goes through, then you are going to have these two vertically integrated firms that will have an incentive to engage in reciprocal licensing.

There will be another merger, right, when Charter buys Disney, you will have three, or if Verizon buys Disney, and then you will have an incentive for them to use cross-licensing of their content in order to raise their own costs and, thereby, push up subscription prices. So, you know, I think that is a retrospective we might want to do going forward to see what happens to the cable industry.

In terms of efficiencies, this is where the controversy is. Both horizontal and vertical mergers can lead to merger-specific efficiencies. I agree with that. And as a result, many firms produce substitute products, whether it is from economies of scope, sharing information about customers, reputational goodwill, and the externalities that creates and so on. And that is true for vertical mergers as well.

Now, I do not think that the efficiencies are enough to call for a different approach for enforcement for vertical mergers in oligopoly markets. So I lay out, you know, these four bullets here. I do not think Bork carried the day; I do not think the econometrics carries the day; I do not think the fact that competitors complain carries the day; and I certainly do not think that Sylvania and Leegin lead to that.

So I think once you accept the fact that these justifications are weak, it can refine the analysis and also avoid confirmation bias both by merger analysts and by district courts. I am not going to name names here, but you can name your own names about who suffers from confirmation bias.

So let me go through this. First, you know, Bork, Bork said foreclosure is just illusory. He had this great line that the FTC should have held an industry social mixer rather than bringing a vertical merger case. Well, I think we know at this point that foreclosure is real. There can be input foreclosure; there can be customer foreclosure.

Markets do not inevitably self-correct, contrary to what Frank Easterbrook would like us to believe, especially if the conduct raises the costs of rivals or erects barriers to entry. We have examples of cartels with large numbers of members going on for a decade, vitamins, for example. So the self-correction idea is limited. And in exclusion, the reason why there is self-correction is argued is because there will be entry. But if the exclusion leads to barriers to entry, that does not work. So that fails.

Single monopoly profit theory, no longer valid. It is valid in very, very limited circumstances, where you have two monopolists, upstream monopolists, downstream monopolists, protected by durable barriers to entry. They have to be real monopolists, because each one could be a potential entrant into the other’s market. The fact that there is only one, we know 100 percent market share does not necessarily imply that you have monopoly power.

As I keep saying, maybe if I say it often enough you all will believe it, elimination of double marginalization, EDM, is not inevitable and may not be merger-specific. You know, it is hard to integrate. There are principal agent problems within the firm, incompatible technologies. But we will talk about that a little more.

Okay. So EMD, I think, you know, pretty much this -- I have already probably laid out all these points. We can often achieve vertical merger efficiencies by contract without the potential anticompetitive harms. And that should be an issue in every vertical merger case.

EDM is a wonderful story, it is just not inevitable and it is not always merger-specific. EDM can sometimes be eliminated with non-linear prices or quantity-forcing contracts. There are also EDM -- the incentives to eliminate double marginalization as limited by opportunity costs, as we talk about in the Morise-Salop paper.

The key point, in my view, the failure to eliminate double marginalization in the premerger world does not prove merger specificity. The failure to achieve it could follow into the post-merger world, as well. So what firms should need to justify why they could not eliminate vertical -- elimination of double marginalization in the premerger world.

Econometric evidence, we will talk about in more detail later. Some studies are not capable of distinguishing -- you know, a lot of studies show harm from vertical mergers. Gilbert and Hastings, Luco and Marshall, we will talk about them later.

Some of the theories test -- some of the papers test the wrong theory. And, of course, they are limited by the data that is available. So a lot of the evidence on vertical mergers is beer and cable because they have good data, but the world is bigger than beer and cable.

Complaints by downstream competitors, common story. If the merger reduces costs, competitors will complain, but the merger is good. If the merger will facilitate coordination, then competitors will not complain because they will benefit. That means the merger is bad. Well -- and sort of the -- you know, my poster child for this is Posner’s opinion in Hospital Corporation of America. Posner said, the most telling argument for the merging firms is that the competitors complained. And we know competitor complaints are going the other direction.

But what is interesting about that opinion is four pages earlier in the opinion, Posner said, the way anticompetitive harm will occur in this industry is that the leading firms will prevent entry by new competitors or expansion by fringe by using certificate of need regulations to block their entry. So he laid out the very reason why the complaints by competitors actually were consistent with consumer welfare. Yet, he never linked it. He is a great man, but this may have been confirmation bias. How do we explain that he missed that point?

Lastly, Sylvania and Leegin, people argue, well, there are all these efficiencies from vertical restraints and they should also lead to -- what we know from them should lead to more permissive rules on vertical mergers. Well, I just point out that Sylvania was a manufacturer of 3 percent of the market in a competitive industry. Leegin was in a competitive market, as well. There were also intrabrand restraints, not interbrand restraints like vertical mergers, and we know that interbrand restraints are more problematic from a competitive point of view.

And, finally, despite the literature, what the Supreme Court said -- and that is one of my sacred books as well, by the way, is the law. The Supreme Court did not mandate a permissive presumption for intrabrand vertical restraints. They said, rule of reason, straight old rule of reason, which, of course, essentially, in decision theoretic terms, reflects a very neutral, competitively neutral presumption, not a pro-defendant presumption.

So I think that is the basics on why we should not be more permissive with respect to vertical mergers. The legal context -- I do not have a lot of time left -- you know, I think that -- let me just go here. I think we should basically be following the three-step rule of reason that is established in Baker-Hughes and Heinz for horizontal mergers, we should port that over to vertical mergers, as well.

That is the way Judge Leon wrote it in AT&T-Time Warner; that is the way DOJ argued it in AT&T-Time Warner. And I think an important point here is that the standard of proof builds in a greater concern with false negatives than with false positives. That is what the Clayton Act is all about, incipiency in the Clayton Act. So that is another reason why -- you know, I think the vertical merger law should follow horizontal merger law, and I personally hope or expect that the D.C. Circuit is going to come out that way in AT&T-Time Warner.

I note here and sort of the really crucial point in terms of the policy discussion that we have been having of where do you put the efficiencies in horizontal mergers, and the standard rule of reason across all of antitrust, efficiencies are step two, they are part of the rebuttal case. The plaintiff needs to show harm. If the plaintiff can show harm, then the burden shifts to the defendant to show some merger-specific, or in the case of restraints, restraint-specific efficiencies. If the defendant successfully shows that, then the burden shifts back to the plaintiff to carry the burden of persuasion that there is net anticompetitive effect.

So step one harm analysis is ignoring efficiencies, is there likely harm. Then step two says, well, there are efficiencies. Then step three says, okay, how do you balance the effect on consumers from step one and step two? And people argue that you should not follow this because vertical mergers are inherently highly efficient and procompetitive. Well, I have answered why I do not think that is right.

Another argument is you cannot have a Philadelphia National Bank presumption because the HHI does not rise in horizontal mergers, but, you know, this three-step rule of reason, you can do without -- without a presumption. It is done in the rule of reason without a presumption. And you can do it here without a presumption or you can create a presumption using different elements. Presumptions do not have to be increase in the HHI. And I have a slide that talks about possible presumptions in vertical mergers.

I would note that DOJ no longer thinks what they thought in 1984. These are the DOJ's proposed conclusions of law in the AT&T case, and I've underlined the ones that I think are notable. So they buy into the idea of incipiency. They say the relevant standard should be reasonable probability. They say you should use the same Section 7 standard for vertical and horizontal. They say you should not have to quantify up to the fourth decimal point. They say you should follow burden shifting, use the burden-shifting rule, and the burden is on the defendant to show efficiencies. And the efficiencies only count if there are -- if they are merger-specific.

So how would we do that? In this limited amount of time, I just want to point you to the bottom set of bullets, which are possible presumptions that you might use in vertical mergers. For example, one merging firm is dominant and the other is a critical entry, supplies a critical entry, or the upstream firm is a maverick, the downstream merging firm is the disruptive buyer.

I want to emphasize these presumptions are -- the way the law works is they are presumptions, and then there is case-specific evidence. So these are presumptions that would affect the Step 1 analysis. So they are presumptions about harm, not presumptions about net competitive benefit after you take potential efficiencies into account. So I think the arguments against these presumptions are all, well, there are efficiencies, well, there are efficiencies. Okay?

But Step 1 is ignoring efficiencies, what is the likely effect.

So I think there can be safe harbors as well. In my paper with Dan Culley, we suggest a safe harbor if the HHIs in both markets fall into the safe harbor. If both markets are unconcentrated and we have an adjustment there that not just the plain old HHI, but also an HHI adjusted for -- if you take out the merging firms, is the HHI also unconcentrated since foreclosure sometimes eliminates competition by the merging firms.

There will be two kinds of rebuttals. These are structural rebuttal, no barriers to entry, et cetera, or there are the efficiency rebuttals. And I have already talked about the fact that I think merger-specific, verifiable.

Okay. Two interesting issues, I think -- maybe I will take one minute over just to introduce them. What if there is only harm to some competitors -- I’m sorry -- to some consumers but not others? So for example, the FTC did a consent decree on these two soft drink bottler mergers, a study by Luco and Marshall said, as a result of this, the price of Coke and Pepsi went down, but because their bottlers bottle for Snapple and -- or Dr. Pepper and 7-Up, the prices of Dr. Pepper and 7-Up went up. So is that merger okay or not okay if you knew that?

Well, some people would say you should just look at some kind of representative consumer that drinks both, but under merger law usually you can define a market for -- a targeted customer market, a price discrimination market. In that case, the harm to the 7-Up and Dr. Pepper consumers would define a relative market and that is cognizable harm, and if there is harm in any relevant market, then the merger violates Section 7. So you would have to -- no cross-marketing balancing says Philadelphia National Bank and it's progeny. So that raises an issue whether we should follow that.

And then lastly, what if there is harm to the downstream competitors -- and yes, that is harm to competitors, but they are also customers. So should -- is that enough or do we need to show harm to the ultimate consumers? And that is a policy question. Interestingly, DOJ said it is enough to show harm to the other cable companies, to the mid-level people, to the competitors that you did not need to show harm to consumers, though, in fact, in their argument, their factual analysis, they claim there was harm to consumers.

So I just sort of leave that out and maybe we will talk about it more, just sort of to let you think this is not totally stupid. Suppose the merger facilitates collusion among the upstream firms? Well, then should you have to prove harm all the way downstream or should it be enough to show harm to their customers? Good question.

So remedied -- no need to talk about remedy.

So in my view, new guidelines are needed. And they should follow Baker Hughes and they should follow the policies that I have suggested.

Thank you.

(Applause.)

MR. KOBAYASHI: Thanks, Steve.

VERTICAL MERGERS (SESSION 1)

MR. KOBAYASHI: So I guess I'll invite the panel to come up. We have a great panel, and we are going to give each of our panelists 12 minutes. And after that, we will have a panel discussion and audience Q&A that lasts a little under a half an hour.

You will see Derek Moore. He will have note cards. And if you have a question, get his attention and he will give you a note card or somebody from the staff will give you a note card and write down your questions. They will get passed up to me.

All right. So I was looking forward to doing this panel in September because it was such a great panel. And then the hurricane did not come and it was a nice sunny day. You know, weather forecasting is an inherently difficult and error-prone activity just like economics. So we are happy that everybody was able to come.

We have on the panel, who will be up first, Dan O'Brien. He is the Executive Vice President of Compass Lexecon. And we were talking before, he has had more positions at the DOJ and FTC than anybody else I can think of.

We also have next Margaret Slade from the

University of British Columbia, Vancouver School of Economics.

We have Carl Shapiro, who is the Transamerica Professor of Business Strategy at the Haas School of Business at CAL. That is what we call Berkeley at UCLA. He is also Professor Emeritus and also has position at Department of Economics.

Finally, there are some good things that come from weather delays and that is we are able to have Francine Lafontaine on the panel. She originally had a conflict, but because we moved the date, or the hurricane moved the date, Francine is the Senior Associate Dean for Faculty Research and she had my job as the Bureau Director just a short time ago.

So I am looking forward to a great discussion with the panel and I will just turn it over to Dan.

MR. O'BRIEN: Thank you, Bruce. Thanks, Bilal. Thanks, Commissioner Phillips. And thanks, Steve, for putting together a great talk on a really interesting topic. It is an honor to be here on such a distinguished panel to talk about this important topic of vertical merger guidelines.

So guidelines have two primary benefits, I think. One is to provide information to companies so they can avoid going down unproductive paths. A second benefit is to help prevent untethered arguments. I think both benefits are quite important, and on that basis, I generally support guidelines whenever useful guidelines are feasible.

An issue to keep in mind with any set of guidelines is that anything that guidelines say is likely to become an important focus of the analysis. For this reason, it is important to state only robust principles when constructing guidelines. So guidelines should lay down general principles that the agencies will use to evaluate conduct.

What principles might vertical merger guidelines articulate? Let’s consider some candidate principles for vertical merger guidelines. Consider candidate principle one, harm from input foreclosure is more likely the more market power a supplier has. By input foreclosure, I mean actions by the merged firms upstream division to raise costs of unintegrated downstream competitors. For example, input foreclosure would occur if Time Warner raised the price of content to Comcast, say, after merging with AT&T.

So it might seem uncontroversial that the risk of input foreclosure would increase with upstream market power, but there is a problem. Vertical and complementary product mergers between firms with market power create downward pressure on price that grows with the extent of market power. In fact, in textbook models, the downward pressure often dominates the foreclosure effects. It often rises faster with market power than the foreclosure effect.

So this does not mean that the foreclosure effect never dominates. But there is a very important point here that no one should miss, and that is that just as a merger between two substitutes in a concentrated market puts upward pressure on price, a merger between two complements in concentrated markets puts downward pressure on certain prices. The math is actually identical except for the sine of the diversion ratio, which is positive in the case of substitutes and negative in the case of complements.

So the logic that leads to, for example, a rebuttable presumption of harm for horizontal mergers in concentrated markets seems to suggest a rebuttable presumption of benefit for complements mergers in concentrated markets. I would add that the benefit is not limited to the elimination of double marginalization. Combining complements promotes complementary investment incentives, too. I have always thought of the elimination of double marginalization as kind of a metaphor of internalizing the externalities from combining complements in ways that cause the firms to jointly do more of good things than they would have done if they were independent.

Of course, complements mergers can have other elements that are important. They can create foreclosure incentives, which need to be balanced against the joint pricing and investment benefits. And complements producers can try to contract around pricing and investment externalities without merging, in which case, the merger might not create these benefits. Empirical evidence, I think, indicates that firms do not contract around the benefit externalities completely, and we will hear a little bit more about that later.

Next, consider candidate principle two, harm from customer foreclosure is more likely the greater the market power of the downstream firm. By customer foreclosure here, I mean actions by the merged firm to exclude unintegrated upstream suppliers from the market. For example, AT&T might stop carrying Fox programming after merging with Time Warner.

So this principle sounds reasonable, too, right? But, once again, there is a problem. Suppose the downstream market is monopolized, which is the most market power you could have in the downstream market. Downstream monopoly makes it quite likely that firms will write efficient input contracts. In this case, the merged firm's static incentive to foreclose rivals selling into the monopolized market is no different than the incentive of the downstream firm prior to the merger. The merger might still raise dynamic foreclosure issues, and the old guidelines allude to this possibility. But it does not enhance incentives to foreclose merely to shift business.

So far, our search for a robust principle shows that market power has quite different effects, different implications for vertical and complementary product mergers than for horizontal mergers. While market power is surely necessary for harm, it does not appear to distinguish net harm from net benefit for vertical and complementary effect mergers.

So let's drill down a little bit. Candidate principle three digs a little deeper. That principle is harm from input foreclosure is more likely the greater the downstream value of diverted sales and the smaller the upstream margin. So small upstream margins mean a small EDM effect and large downstream margins mean a large foreclosure effect. So this principle is in the spirit of price pressure analysis, which looks at how a merger changes the markup equations that come from firms optimizing conditions.

Of course, price pressure analysis is a shortcut because changes in markup conditions do not capture full-blown equilibrium effects. But the hope is that this can provide some guidance similar to the guidance provided by price pressure analysis that is now widely used in horizontal mergers.

Unfortunately, the interaction between complementary benefits and foreclosure incentives is more complex, far more complex than can be represented by simple arithmetic. For example, the effects can interact in ways that make the equilibrium foreclosure effect actually negative, the opposite of foreclosure. This is one problem, and it is a significant problem.

A second problem is what I will call the internal consistency problem, and the problem here is that the inputs into a simple arithmetic analysis of effects that are as complex as this might not be consistent with the modeling approach that has been adopted, that generated the framework.

So this has been a problem in other areas of antitrust, for example, the misuse of critical loss analysis where we frequently have seen analysis presented where the margins and the actual losses that are assumed are inconsistent with any kind of rational behavior. We do not want to replicate those kinds of problems in the analysis of vertical mergers. And the codification of simple arithmetic factors could lead us down this path if we are not careful.

So when upstream and downstream products vary in fixed proportions as they often do and as we often think about in significant vertical mergers, small relative margins are likely to make sense -- small upstream relative to downstream margins -- only when one of three conditions holds. Upstream competition might be substantially constraining; prices might be determined through nonlinear contracting; or prices might be determined through bargaining.

The first of these factors makes foreclosure unlikely. So let's consider the second two factors. So, principle four, candidate principle four, harm from input foreclosure is more likely when input contracts are nonlinear. The simplest version of this idea is that bilaterally efficient contracts would transfer the input at marginal cost. So if firms sign such contracts, a vertical merger would not eliminate double marginalization, but it may still foreclose rivals. If that is the case, net harm would be more likely because the input foreclosure effect would be more likely to dominate.

But this logic also has some problems. In a multilateral setting, that is in any setting where foreclosure is a possibility, an upstream firm with market power prefers to use input contracts to soften downstream competition. This is better for the firm than engaging in bilateral contracting that inflicts externalities that prevent the firm from capturing the value of its product.

The question is whether it is possible for the firm to make commitments that allow it to avoid competing against itself. If so, nonlinear contracting does not increase the likelihood of harm from foreclosure. And having contributed to the theoretical literature on this, I am sorry to report that economic theory has yet to answer this question. Whether nonlinear contracting makes foreclosure more likely is an empirical question.

Finally, let’s talk about bargaining, which has recently become a central focus in important vertical merger cases. The first rigorous analysis that I am aware of showing that vertical mergers can harm competition under bargaining appeared in an unpublished doctoral dissertation in 1989. In a model with an upstream monopolist and downstream Cournot competitors, I found that under simultaneous Nash bargaining over input prices, what researchers now refer to as Nash and Nash bargaining, leads to a downstream price that is below the fully integrated monopoly level, as long as there is enough competition in the downstream market.

So what does that gibberish mean? It means that bargaining gets rid of effectively double marginalization. Okay? In which case, a vertical merger raises price. So this shows that it is possible for foreclosure effects to dominate double marginalization benefits under bargaining. But the result is not automatic. It requires enough downstream competition, but, more importantly, it assumes that the seller has no way out of this bilateral bargaining trap that effectively causes the seller to compete against itself.

The seller has incentives to find ways out of that trap, and I think that should be a focus of some research. And empirical results that suggest that margins are positive at the upstream level suggest that sellers do not find their way completely out of that trap, in which case, vertical mergers do eliminate some double marginalization and have benefits. There are trade-offs to evaluate.

So let me wrap up with just a few observations on what new guidelines might say were we to write them. The theoretical literature in the area shows that the effects of vertical mergers and other combinations of complements depend on many, many details, and that makes it hard to identify robust principles as we have kind of seen.

The most well established principle is that combining complements internalizes externalities in ways that go in the opposite direction of combining substitutes. So if I were to write guidelines -- time is up -- I would rely on foundational principles. And the most important point to emphasize is that our usual notion that market power makes things worse does not apply in the case of vertical analysis. It is really a case-by-case analysis.

And I think we do know some things that would allow articulating, at a very high level, possibilities from vertical restraints -- or vertical mergers, and you know, the agencies could write such guidelines and use them to try to construct models to bring cases. And, of course, consistency of the models internally and logically and consistent with the empirics would be critical to going forward.

Thanks.

MR. KOBAYASHI: All right. Thank you, Dan.

(Applause.)

MR. KOBAYASHI: Margaret?

MS. SLADE: So I am going to change gears a bit and talk about some of the measurement problems, whereas Dan went through some of the pitfalls of the theories, I want to talk about some of the pitfalls in the empirics and how I do not really think we can fine-tune. So first, I will start with what do we know about integration versus separation empirically? And then I want to talk about quantitative techniques for vertical merger assessment.

Vertical mergers are not a random sample. They tend to be highly-concentrated industries, economies of scopes, networks, and so forth. And the challenges tend to be based on a few factors. Foreclosure, facilitating coordination in exchange of sensitive information, and elimination of potential entrance.

But let’s step back and say, well, what do vertically integrated firms do? And there is an interesting paper by Atalay, Hortacsu, and Syverson.

They study vertical integration in manufacturing. Now, of course, not all vertical mergers occur in manufacturing, but it still tells us something. And they do not look at integration, per se, but again just what happens.

What they find is that one-half of upstream establishments do not ship to their integrated downstream firms. And, in particular, the median internal shipment share is .4 percent if you equally weigh or .1 if it is value weighted. So when you do not have shipments, it lessens a lot of the strengths of motive, some of the motives, like foreclosure or elimination of double marginalization.

So then why do firms integrate? Well, we have four Nobel Prize winners that have studied this question. On the other hand, they have not looked at oligopolies, which is the interest here. Mostly, it has either been perfect competition or monopoly. Nevertheless, they focus on efficiencies like mitigating contract costs, facilitating specific investments, providing efficient incentives for effort or investment, and risk sharing.

Now, these, of course, are not related to product flows and pricing, but they are related to the transfer of intangibles, which unfortunately are very hard to estimate. So I think it is very important that we have safety zones and they could be based on concentration indices. Concentration indices have many known problems, but I do not see a lot of alternatives. They require market definition, but once you have a market, they are fairly easy to calculate.

An alternative might be vertical GUPPIs, but I do not know that anybody thinks that this really should be used in screening. There are so many ways to calculate them. The information -- I mean, it is simple to calculate once you have the information. But the information that you need is not the sort of thing that you ordinarily have, cross price elasticities, marginal costs, and so forth. So usually we have approximation based on prices, shipment, observables, average variable costs, and they can be poor. So for example, often elasticities are based on market share. That brings us back to defining a market. We cannot say what the market share is without it.

Both firms can produce many, many products, in which case you have many, many GUPPIs. Some of them may go up and some of them may go down. And they can have many rivals.

So now, I will turn to what the effects of vertical integration are. Again, most studies study vertical integration versus vertical separation, not vertical mergers. Many of them look only at one side, either the costs or the benefits. So foreclosure is perhaps the most studied of the costs. And many of these people define foreclosure as favoring integrated products, which seems like a very bad definition, because if you are going to eliminate double marginalization, for example, you have to favor integrated products.

On the other hand, the industries are things like cable TV, cement, iron ore, energy, transportation, which are the types of energies where concerns have arisen. Even within that set of industries, the results are fixed. We have about half conclude that foreclosure occurred.

Efficiencies, on the other hand, there is a huge literature, but most of the markets that are considered are not oligopolies. They might be fast food, hotels, retail, trucking. The results are overwhelming support for the theories of organizational economics, except for risk sharing.

Now, for predicting what techniques, we need some techniques that are going to be -- that use only premerger data. And I want to talk a little bit about horizontal mergers because a vertical merger simulation is just two horizontal mergers models pasted together with a bargaining model.

So there are three blocks, building blocks that you have to construct. The first is demand. We have to have demand for brands. Then we have to specify an equilibrium, which is usually Bertrand. And then we have to get marginal costs and it is quite difficult to estimate marginal costs. So what people often do is they say, okay -- they retrieve the cost from a first order condition.

So what does that mean? So you ask yourself, what would costs have to have been to rationalize the estimated demand and the presumed equilibrium? Well, that means if you get one of those wrong, your costs are wrong. The other thing is that the costs are usually constant; that is, constant marginal cost.

So the conclusions, unfortunately, are quite sensitive to these choices. And I have looked at this in a paper, and it is not just that you get -- if you change, say, from one demand specification to another, it is not just that you get different point estimates, which you would always get. It is the fact that one point estimate may be outside the confidence regions of the other and vice versa. So it is one of the things that is hard to justify if somebody else could come back and overturn your collusions.

Let me go on to vertical merger simulations. One of them is downstream demand to obtain -- you need to do the same sort of thing. Only one demand, downstream demand to obtain a matrix of own and cross price elasticities. Then you have to specify up and downstream gains and the bargaining process. So we have a lot more assumptions and modeling choices, which means that vertical merger simulations are going to be even more sensitive to assumptions.

To predict efficiencies, you also have to have another assumption; that is, how are products transferred within the vertically integrated firm? And usually it is assumed at marginal cost. But this may not be necessarily true. Even with horizontal mergers, full efficiency is not necessarily achieved.

So there is a paper by Crawford, Lee, Whinston and Yurukoglu, and it is a very nice paper. They look at both harms and efficiencies. It is very specific to a market, cable TV and satellites, which I think is good. If you are going to learn something, you have to look at the specific market. And they assume Nash-in-Nash, which is what Dan was mentioning. They conclude that vertical integration can either be beneficial or harmful depending on your set of circumstances. So the results are quite mixed.

What I would like to do is talk about what are sort of my final conclusions, and I think that it is very important to have, you know, rules that will tell you which mergers are not going to be challenged. There are about 10,000 mergers a year in the U.S. Most of those, almost all, do not raise competitive concerns. So you need to have some rules that say which ones are not going to be challenged.

I also think that quantitative techniques in vertical situations, they are not that reliable in horizontal situations. They are much more difficult to perform and to get it right in vertical situations, and that efficiencies are much harder to estimate because unlike the things that we know and are used to estimating like economies of scope and scale, transfer of intangible assets is not something that we are -- and in fact, one of the papers that I have looked at -- I mean, in my own work with coauthors, one of the disappointing conclusions in the horizontal case is that, from a competition point of view, one of the big factors that we find is whether the merger is beneficial or not depends a lot on technology transfer, whether productivity from the highly productive firm can be transferred to the other firm or whether they are going to have a merged firm as just the average of the two.

Again, this is something that is very hard to predict. We can predict economies of scale, but we cannot predict technology transfer. So we need some easily calculated rules of thumb. We should not rely on them too heavily, but we would like to have them. And I am skeptical about trying to fine-tune. So to summarize, I think that there should be merger guidelines. They should be short and simple. They should do three things. They should provide, first of all, clear guidance about the sort of mergers that are unlikely to be challenged and that may be based on concentration ratios.

When the mergers are singled out for evaluation, there should be a discussion of the factors that are most likely to lead to competitive harm, and there should also be a discussion in the guidelines of the factors that should lead to efficiencies. And when I say efficiencies, these should be not just pricing externalities like elimination of double marginalization, but production and organizational efficiencies.

I do not think the guidelines should contain rigid rules, such as price increase thresholds, not one-size-fits-all tests or boxes to check, that straight jacket the guidelines.

MR. KOBAYASHI: Thank you, Margaret.

(Applause.)

MR. KOBAYASHI: Carl?

MR. SHAPIRO: Good morning. I want to focus on what vertical merger guidelines would say. It seems to me at the end of this process that is what the Federal Trade Commission, hopefully working with the DOJ, will be -- how they will mostly be using this. So that is what I want to do.

So, first -- and picking up on I think the very helpful framework that Steve Salop has provided us -- first, I want to say I think we really very badly need new vertical merger guidelines. I do not know how many of you have actually looked at the lovely 1984 nonhorizontal merger guidelines. Let's just say they are badly out of date.

As somebody who has worked on the horizontal merger guidelines, one of the things that we paid a lot of attention to when Christine Varney was Assistant Attorney General and I was the Economics

Deputy, was that the guidelines reflect how the agency actually operated. So it is accurate for the business community. I just think these fail kind of miserably on that score, and it sounds like Makan Delrahim agrees. So it seems to me, you know, very much needed.

One thing, the ‘84 ones, that is before there was even unilateral effects in the horizontal merger guidelines. Essentially everything that has been talked about here is not even mentioned in these guidelines because it is about coordinated effects and it is about two-level entry, which are perfectly good topics. But there has been a lot of learning and a complete shift in agency enforcement related to unilateral.

And as Commissioner Phillips said earlier, the agencies routinely review vertical mergers. So ths is not like it is an irrelevancy. So it seems to me that it has gotten to the point where it is really just way overdue and very important.

Now, of course, what sort of threshold we have if we want these to be perfect -- now, you could put up -- if you want to put as a standard the 2010 Horizontal Merger Guidelines, if you want the guidelines to be that good, of course, you will never write guidelines again.

(Laughter.)

MR. SHAPIRO: So I do not think that should be the hurdle that has to be met.

The other thing is, look, I will be happy to say vertical mergers are generally much less of a problem as a category than horizontal mergers. Okay? But that does not mean we should ignore vertical, much less have inaccurate guidelines about them. If I have a heart problem, that is very serious and we want to pay attention to it. My dental problems are probably not as life threatening, but we should still pay attention to those, too. So that is why we are here. So I think it is very important that we really urge the agencies to pick up on this and revise these guidelines, update.

Now, why is it harder? So I also agree with Dan O'Brien, and I think what you are going to hear from the other panelists, that it is harder to articulate in terms of the economics just what would be the analytical framework, what would be the steps that then would be in the guidelines and used for counseling. So it is harder than horizontal.

And, look, it is for a couple reasons. First, horizontal, you have direct loss of competitors, and we understand that inherently leads to less competition. Then there may be some offsetting efficiencies. And you can study ostensibly the mark or the level at which the merging firms operate.

Vertical, it is not inherently -- it is not a direct loss of competition. Steve can talk about indirect, but indirect is more complicated than direct in my experience in most things in life. And you need to deal with two levels at once. So it is just inherently more complicated. But there still are -- and I think this is essential to what Steve Salop said -- there still is a fundamental tradeoff. In horizontal, what is a fundamental tradeoff? The merging firms stop competing, but maybe they get more efficient. Okay, you got some balancing and we have a way of dealing with that with burden shifting.

In vertical, there is also a similar fundamental tradeoff, which is -- at least in terms of this unilateral analysis is that -- I will talk about input foreclosure and my example will be I make microprocessors and Steve makes computers and I sell them to him. So if we merge, fundamental tradeoff is going to be, the merged firm is going to be less interested in selling the microprocessors to Margaret who makes competing computers. That is inherent because the merged firm now has the Steve computer operation and that competes against the Margaret computer operation. Okay?

So call that raising rivals' costs. That is inherent. And then also, there are some inherent efficiencies -- at least possible efficiencies including elimination of double marginalization. So again, we get a fundamental tradeoff. Okay? And so the horizontal and vertical are similar in that respect.

But what is different is that, in horizontal, what we say is, look, these efficiencies, they do not automatically spring from the merger. So you have -- there is going to be a burden and the parties are going to have to jump through these hoops to prove them, either to the agencies or in court. So we have some pretty strict standards there in terms of verifiability and merger specificity.

So I think what is fundamentally different is that how do we handle the efficiencies in the vertical deals than horizontal, and we are hearing from panels about these inherent efficiencies, which economists would agree with, including me.

So I want to distinguish then between

elimination of double marginalization, which is hard to say so I will say EDM, versus other types of efficiencies. And there is an important economic sense in which the EDM efficiencies are kind of automatic or inherent in a vertical merger as opposed to other types of efficiencies, which may or may not be achieved.

Now, what do I mean by that? Let's go back to horizontal. If two merging firms compete, then we say, all right, when you compete, you are going to act as one and you are going to stop the competition between the two merging brands. If the merging parties said, oh, no, do not worry, because we are going to operate the two brands separately and they are going to continue to compete even though they are the same company, the agencies and the courts would say, no. The agencies would say, that is silly, and the courts would mention Copperweld.

What about vertical? So when Carl's microprocessors merge with Steve's computers, we would say, look, you are going to operate the company as a single entity to maximize overall profits, and that inherently means that we get this elimination of double marginalization. Okay? That is automatic. Okay? So that is an efficiency which is different than other types of efficiencies that might be claimed.

So that is, I think, different in that once we acknowledge that, then we have to ask, well, how do we weigh that against the anticompetitive harms, let's say the raising rivals' costs of charging Margaret more for the microprocessors?

And a good way to think about this elimination of double marginalization, there is a number of ways to think about it in terms of the merged firm, but a good way to think about it is that when Steve and I merge, what the -- the uber boss of the merged company says, Carl, sell your microprocessors to Steve at marginal cost, transfer them really within the company, and then Steve can set the price of the computers to maximize profits for his division, and that will be great for the overall company. That is one way it could be managed. There are other ways, and that's what economics tells us.

So if originally, you know, I was charging -- the microprocessor was charging Steve, let's say, $200 for microprocessor, but the production cost was only $100, there is a margin there. And what the -- the instruction is reduce -- the internal transfer price should go down to the true economic cost, which I will explain in a moment. So it is the elimination of that one margin -- that is the elimination of one of the two margins. That is why it is the elimination of double marginalization. He is going to still earn a nice margin on his computers. That is how we are going to make money here. But we are not going to pick it up at both levels.

So that is going to be achieved. I just think we have to assume that the merged entity operates as a single entity to maximize overall profits and that means elimination of double marginalization. I do not think we have any alternative, as antitrust economists, to continue to assume that in all merger analysis that the merged entity operates as a unified entity that maximizes overall profits. Okay? So that gives this elimination and that does create this efficiency.

So, the key question then is, is it merger-specific? It is not about verifiability. Okay? Because it is inherent in having a merged entity. Is it merger-specific? Okay. So that is where I think guidelines and practice can evolve, guidelines could -- for example, we could say, wait a moment. Other people in this industry solve this through contract, two-part tariffs or other type of nonlinear pricing. They find a way to solve this inefficiency through contract, so you do not need a merger so it is not going to count. In other words, you are going to achieve it from the merger, sure. That is a gimme. But you could have achieved it without the merger.

So the fact that EDM will be achieved does not mean it is merger-specific. And that is something -- an enforcement issue is whether the agencies will say, what is needed to prove this that it is merger-specific? Okay?

And the approach that I -- one approach that I have tended to take in these cases is to say -- to ask, have other people in the industry solved the problem through contract? If they have, then why can’t do you that, too? Is there indication that you are working on the problem or have a way of solving it so that you are about to solve it? If so, get on with that, and maybe you would do that without the merger.

But if nobody in the industry has solved the problem and you have tried to do it and there is no reason why the environment has changed dramatically in the recent past to create a solution, then it seems not that likely that you will solve it through contract, in which case it would become merger-specific.

So that is just one way to go. I am not

saying that is the only one. That is what I have done in practice. But that is something the guidelines could talk about and certainly has to be handled in practice when the agencies figure out how to treat this efficiency. Okay?

One other more technical point on this that is not, I think, widely understood is how large are these efficiencies that we are going to be balancing against raising rivals' cost, for example. So in my example with Steve where the production cost is $100 for the microprocessor and premerger I am charging him $200 -- and everybody else for that matter I am charging $200 -- and after the merger, it is not true that then the merged entity will instruct my upstream division to transfer the price at $100, the production cost, because that is not the true economic cost.

So if I am charging Margaret $200 for the microprocessors, if I transferred a microprocessor to Steve, it does cost me the $100 production cost. That is a component of the economic cost. But it also means if Steve sells another computer and displaces sales through Margaret, a critical diversion that comes into the raising rivals' cost, then the upstream division is not going to sell the $200 microprocessor to Margaret. So that margin has been lost.

So if, say, 80 percent of Steve's sales come at the expense of Margaret's computers, then there would be an opportunity cost of transferring the microprocessor to Steve, which would be the $100 margin on Margaret's computers -- on the microprocessors sold to Margaret times 80 percent or $80. So the proper instruction for the merged entity would be to transfer the microprocessors from Carl's upstream division to Steve's downstream division at production cost $100, plus opportunity cost $80, $180. So the elimination of double marginalization would reduce the price from $200 to $180, not from $200 to $100. So when you are measuring these things, you need to account for this diversion.

Let me boil this down and address quickly with Dan O'Brien's principles. I think there is a principle here that can point to both -- in the direction of safe harbors and presumptions if you wanted to go that way, which is -- but it is not based on Herfindahls and market shares. I think people get into the horizontal merger mentality, so they want to think about Herfindahls and market shares, and it is not really the right frame for vertical merger analysis.

The key thing is, if you have -- just input analysis, if you sell the input, take the input, the concern after the merger with Carl and Steve is that Margaret will be denied microprocessors and the price will go up to her for input foreclosure in the normal language. So the key things to look at are not about market shares, but is if Margaret does not have the microprocessors from -- this brand of microprocessors, is she going to be significantly weakened as a competitor to Steve? It is not about just defining markets. That is an economic question related to the business operation.

If she can easily replace these microprocessors, no problem. Then, well, who cares? Okay? Then that would be, I guess, just find another supplier. No big deal. If she cannot and she cannot make her products without it or they are much inferior or the alternatives are much more costly, then we have something to talk about. Okay? That would be the main screen. Okay?

If she really will be significantly weakened without these microprocessors, then we really want to look -- so if it does not matter very much, then we could be in sort of a safe harbor. If it does matter, then I do think we need to get into this balancing, and this is why I think it is so important to have the guidelines, because if you are going to go to court and do this sort of balancing, I think Margaret just said a few moments ago, gee, of course, all economists know, you know, basically you do a bargaining model and you put it together with a downstream simulation, which makes it -- that seems like a good approach to me, but I am not highly confident every court will agree with that.

So I think the guidelines can play a big role in both explaining to the business community and the courts just how this analysis should go.

Thank you very much.

MR. KOBAYASHI: Thank you, Carl.

(Applause.)

MR. KOBAYASHI: Francine?

MS. LAFONTAINE: Good morning, everyone. Thank you for being here. And also thank you to the FTC and everyone who was involved in organizing this hearing for inviting me to participate in this debate.

I want to start by saying that I agree with several of the panel members who have said that there are vertical mergers that present challenges that we should be seriously thinking about, and, in particular, as you saw from Carl's discussion, foreclosure or raising rivals' costs is something that we worry about in these particular mergers.

What I am a lot less clear about, even though I also agree -- so the horizontal merger guidelines have been a tremendously useful tool for people to understand where we need to go and how we understand the analysis and what kind of mergers are likely to be challenged. They have been, I agree, extremely important, and they should not be the right benchmark -- Carl is correct about that -- given that they have had such distinguished authors, as well as they have a long history.

I also think that the nonhorizontal merger guidelines are not useful really. So I put that aside. But having said all that, I am not convinced that we are in a position to develop sufficient guidance in order to really write this down in a way that is going to help us in going forward on this. So the main concern that I have about that is the possibility that we would end up examining a lot of mergers, many more mergers, and there is an agency capability or the capacity of the agencies to handle some of that volume.

So let me say it this way. But there is also just simply the possibility that we would hinder a lot of fairly efficient mergers. So it is trading off these things that is making me more nervous about trying to write that down.

I also agree that it is very central in terms of the whole discussion that we think about the efficiencies and how to handle them. And the suggestion that Carl made, which is that we would handle double marginalization type of efficiencies in a different way than others, at least gets us a little bit further. I think ignoring them entirely in the first step of the process would be a problem.

So let me, with that kind of summary, try to see if I can make these -- okay. So, this is just reminding everyone about what vertical mergers are, which is just two different levels of production that decide to get together or a firm merges with another entity that is in a different stage of production. And most of the time, the way that we think about those, is that it is merging the production of complementary products. So each firm is going to be providing an essential part of this and then will be putting them together.

So one thing I wanted to highlight is that, in the horizontal merger guidelines, there is a statement that says that the interests of firms selling products that are complementary to those offered by the merging firms often are well aligned with those of customers making their informed views valuable. And the reason I point this out is, again, vertical mergers often involve the combination of complementary products.

So that is the fundamental reason, the fact that the interests of sellers of complementary products are aligned with those of customers which are what the antitrust laws are meant to focus on, suggests that we should have a more positive view of vertical mergers as a starting point.

So why that more positive view? Well, there is a number of different things. There are these economies due to removing double marginalization, but in a much broader sense, there are also a number of issues of aligning incentives, reducing transaction costs, as well as coordination in design and understanding quality improvements and other sources of benefits to consumers. So information sharing and gathering and all of that about consumers can be enhanced through a vertical merger.

So I want to talk a little bit about some of the arguments that Professor Salop brought up when he talked about efficiencies, and, in particular, the fact that he argued that the merger efficiencies are not specific to the merger. And Carl said a few things about that as well. My concern about -- I have spent quite a bit of time studying contracts, and my concern about that is the idea that you can fully generate the same kind of efficiencies through contracts is actually a relatively complicated and -- you know, it is not so clear.

So, yes, in theory, we can have models that show that, you know, a contract could take care of double margins. It could take care of various incentive things. We do have that in the theory. But when it comes to practice, the world is more complicated than what the models start from, and in these more realistic contexts, very often, contracts do not do the full job of what is needed for that -- what mergers can achieve.

So for example, in some of my work, which is in what people sometimes describe as competitive industries and then sometimes not, franchisees -- there are lots of controls that franchisors apply to their franchisees and yet there have been many disputes about where the price should be and, in particular, franchisees wanting to have a higher price than what the franchisor would want. So the franchisor had difficulty getting the price to be as low as what they thought was beneficial to them.

So Margaret Slade and I have summarized some of the empirical literature related to vertical restraints in particular, and we have -- what we find is that most of the -- a lot of the context where these vertical restraints are used and a lot of the context where we see the empirical literature on the make or buy decision support the idea that there are efficiencies and resolution of incentive problems that come from these.

So let me summarize what I am trying to say about this. So for example, quantity forcing and two-part tariffs do not easily generate the same outcome as what a vertical merger could do because of demand uncertainty, risk aversion, information asymmetries, all sort of incentive problems.

So continuing on this notion that efficiencies are not merger-specific, I want to reemphasize that there are also rules against vertical restraints in antitrust laws, and so to say that the firms could achieve the mergers outcome by using vertical restraints is kind of putting them in a circular motion where we are telling them you cannot merge because you could do it by contract, and then we say, but these contract terms are not acceptable. So

I think that we need to think a little bit more about the mechanisms by which they can be achieved with contracts. All right. So that is the contract as an alternative to vertical merger argument I wanted to spend a bit of time on.

I also want to briefly mention that, you know, I think Carl is completely right. We need to get way from thinking about HHI and horizontal merger kind of qualifiers. We need to think in terms of something different if we are going to think about vertical mergers. So the vGUPPIs, as a screen, I think would be not the right way to go at this point given what we know and what we do not know about how they behave in different contexts.

And then Professor Salop talked about how vertical and horizontal mergers are not inherently different, and I would beg to differ exactly for the reasons that Professor Shapiro pointed out, which is that we need to think differently about those kinds of markets.

So I will say just a few more words about organizing kind of the empirical evidence. Margaret Slade is quite right that much of the empirical evidence on vertical things does not involve vertical merger analysis. It is really about firms that are vertically integrated, do we see them being more efficient or not? So there is a problem with matching the information that we get from this empirical literature with some of the analysis that we would need to do when it comes to vertical merger.

So I am going to just leave it at that in terms of that literature and say that back to horizontal merger guidelines, what we want in the guidelines is something that helps us describe how and why we challenge various types of mergers. And per the horizontal merger guidelines, again, this should be done while avoiding unnecessary interference with mergers that are either competitively beneficial or neutral.

So again, we can give some guidance potentially, but in a vertical context, we have a lot more difficulty defining exactly how and what kind of guidance would be useful. And so the concern is that we would end up blocking a number of potentially beneficial mergers.

I want to add a few more things to that. Professor Salop talked about presumption. I am actually just going to just skip that. I think I have already said that we need to think, at least in terms of the double margin type of efficiencies, differently from the way that he is approaching this.

But what I am going to do now is to just say that, in terms of thinking about vertical mergers, because I have just a few more seconds left, I want to make this one last point, which is that in a theoretical model, it is very straightforward to say what is upstream, what is downstream, what is a vertical merger? Everything is clean-cut. But, empirically, we have firms that are involved in lots of different markets at a time. And so with these very diversified types of firms, the mergers are not purely vertical. They can be also horizontal partially.

And so are these guidelines going to be useful only when we do not have horizontal concerns? And are we going to be asking the agencies to spend a lot more time on the kinds of mergers that we are not sure are raising as much as a set of issues as others.

So my last slide here said that vertical mergers and vertical restraints can be problematic, that we should be reviewing those. But given the current state of theory and empirical evidence, I think that the guidelines are not quite what I would propose at this point. I think that what we need is much more academic work that helps us understand specific industries and specific contexts and the kind of cases that Professor Shapiro was involved with, the AT&T-Time Warner case to help us develop a better understanding of what is important in these and the kinds of tests and analyses that we could propose, and we just need to make more progress on that.

We are not there yet. And I think it is dangerous a little bit to try and go ahead of further analysis in developing guidelines. Thank you.

MR. KOBAYASHI: Thanks, Francine.

(Applause.)

MR. KOBAYASHI: Okay. We have 17 minutes, and if I let Steve respond, he will take all 17 minutes.

(Laughter.)

MR. KOBAYASHI: So --

MR. SALOP: Just the sort of response one would expect from the Federal Trade Commission.

(Laughter.).

MR. KOBAYASHI: So we will contract. I will give you a couple minutes and then --

MR. SALOP: How about two minutes per person?

MR. KOBAYASHI: Two minutes per person would be great.

MR. SALOP: Okay. How about three?

MR. KOBAYASHI: No.

(Laughter.)

MR. SALOP: Let me try to be fast then.

MR. KOBAYASHI: You will have to figure out which is the most pressing.

MR. SALOP: Okay. Well, on Dan, I agree that -- maybe he agrees at the end that nothing is automatic, but it certainly did not sound that way.

I did not say that EDM is never merger-specific. I said it may not be merger-specific. You know, it may be that there is no double marginalization to eliminate. In all of Dan's canonical models, of which it turned out there were many canonical models, it was all merger-specific. But there are other models that I would think were canonical that that does not happen. For example, Hart and Tirole, two Nobel Prize winners. OSS, no Nobel Prize winners, but still a model in which there was no double marginalization to eliminate. Those were the first two modern approaches to vertical mergers both found vertical mergers to be anticompetitive and no efficiencies.

I agree there are multiple GUPPIs and, you know, what is going on in this Sibley paper and

Dasgupta paper -- Das Pharma (phonetic) paper that Professor Lafontaine talked about, it is a an old model. It is Joseph Spengler’s old model. The vGUPPIu is positive, but the vGUPPId is negative. So of course, there is a tension between the two that has to be resolved by an equilibrium or simulation model. And in that model both prices go down.

But, you know, that is certainly not inevitable. On Professor Shapiro, his approach, you know, I think all I am asking is that you require the merging firms to explain why they did not eliminate double marginalization. And it is not sufficient for them to say, because we did not and nobody else did either. Oh, there were bargaining frictions. AT&T said, oh, there were bargaining frictions. Well, that is like nothing. That is a conclusion. It is not evidence. I think even Dan O’Brien would say that is not evidence. So I would like to ask them why didn’t you do it?

Now, in AT&T-Time Warner, for example, I thought about why they may not have been able to do it. It did not come up in the case except with this term “bargaining frictions.” And I think the answer there, I think if they were really put to the test, they would say it was because of most favored nations provisions. We could not eliminate double marginalizations because these MFNs are rampant all over the cable TV industry.

But there are two problems with that theory. One is, have they said that? Well, usually MFNs do not affect the largest firm. And both Comcast, when it merged, and then AT&T when it merged, they were the largest MVPD. So therefore, the MFN probably did not constrain their ability to engage in EDM. And you can see this in a paper by Erik Hovenkamp and my colleague, Neel Sukhatme, that goes into this.

Secondly, had it been an MFN that bit on the largest firm as well, what you are saying is these MFNs prevent upstream firms from giving lower prices to downstream firms, i.e., they prevent competition among the content providers. Well, if that is the case, they were saying, well, we could not do EDM because there was an anticompetitive MFN. Well, that is not a very good answer.

In fact, the DOJ -- you know, one of the Obama Administration is they started an investigation of MFNs in cable and it died. I mean, there you have a restraint that appears anticompetitive, but yet it has been allowed.

And that is another part about -- Professor

Lafontaine said, well, you are going to say they should vertically integrate by contract, but that could be illegal as well. Well, the answer if they are both -- the fact that the contract would be illegal does not make the vertical mergers legal; it makes it illegal, too. You know, if you say, well, we could do exclusive dealing, you know, if that would be anticompetitive, well then the merger is anticompetitive as well.

Lastly, okay, one more -- I am not at my six minutes yet.

(Laughter.)

MR. SALOP: So, you know, the empirical studies of foreclosure, they are really -- I mean, you know, you need to look at my Yale Law Journal article, look at the articles written by my fellow panel members. The articles on foreclosure are really pretty bad. I mean, event studies, descriptions, the cable TV studies in your JEL article all test customer foreclosure not input foreclosure. They do not do a very good job on customer foreclosure because they cannot distinguish efficiency from foreclosure. But the issue in cable is not customer foreclosure; it is input foreclosure. And none of them try to do that.

So the fact that Atalay found no shipments, that prove no foreclosure -- it proves no EDM, but it does not prove no foreclosure, because the best example of foreclosure is when you -- the simplest models say -- AT&T-McCaw did a vertical merger years ago. They claimed efficiencies. But it turned out that AT&T's network equipment was incompatible with McCaw's network. So there was no elimination of double marginalization or efficiency in terms of network formation. The only effect of the equipment part, in principle, would have been foreclosure in terms of the immediate effects.

MR. KOBAYASHI: All right.

MR. SALOP: And --

MR. KOBAYASHI: Steve, you have to stop.

MR. SALOP: Thank you.

(Laughter.)

MR. KOBAYASHI: All right. Dan, you wanted to say something about merger specificity?

MR. O'BRIEN: Yes. Merger specificity of the EDM effect, I think this is important. This is obviously a focus that people are thinking is important for thinking about vertical mergers and what we can say about them.

One point that is being missed is that absent a merger, an upstream firm with market power that is selling through multiple downstream firms, a multilateral setting does not want to write a contract with any one of those downstream firms to transfer the product at marginal cost. Okay? Because that dissipates rents in the entire vertical structure and there is an incentive to try to construct contracts that do not do that.

Now, I am not saying -- now, it could be that in sort of secret bilateral contracting, firms are going to sign contracts that eliminate this EDM effect. But it is also true that a firm that has market power wants to try to soften that. And so, I mean, that is where all of the literature on vertical restraints was prior to 1990. Okay? And so are we just going to ignore that?

MR. KOBAYASHI: Does anybody else want to take a minute? Carl?

MR. SHAPIRO: Yeah. I think on the efficiencies that are not elimination of double marginalization, it seems right to treat them the same as we do in horizontal mergers. So let's take example. When Carl's microprocessors merges with Steve's computers, we claim, oh, this is going to be great because we are going to have a better way to do the product roadmap and that tells Steve's computers how to design the rest of the machine to use Carl’s microprocessors and we are going to have a faster product cycle than we could without the merger, okay? It will be an efficiency.

But I think we really want to say, you have to prove that, that you could not do that by having your engineers meet together through a joint venture, through a contract, through sharing confidential information. So I do think the EDM is different, because it is inherent, than the other types of efficiencies.

Two other points quickly. The second one, I think -- let me just put out there again, I think there is a good screen, at least for the unilateral raising rivals’ cost effect here, which is when Carl’s microprocessors merges with Steve’s computers and we are worried about Margaret’s computers, if she cannot get the microprocessors from the now upstream division, is that a problem, a significant problem? And if she does lose business, will a significant portion of that go to Steve’s computers? So we have two elements there, the importance of the input and the diversion.

And if those do not come home, then this theory does not get off the ground. So there are a lot of deals you can say, I am not worried about, at least, this theory. So you can do a lot of the screening, call it safe harbor if you want, at least for that theory.

The last thing, Francine, you said, it is dangerous to move forward. But compared with what? The ‘84 nonhorizontal guidelines do not look so good. Okay?

So I confess when I was at DOJ, I was twice there, ‘95, ‘96, I would say, all right, it was only ten years, we did not have to do these yet. 2009-‘11, I did the horizontal mergers guidelines. That seemed like a good project. But I just think the time has come. I think it is dangerous not to move forward.

MR. KOBAYASHI: All right. So I am going to ask one thing, which I am actually really interested in, and it applies to a lot of the things that were said today. But one of the things that -- and for example, Steve talked about whether or not there should be a presumption. I always think of presumptions as, to the extent they are useful, empirical-based. And so, you know, if we have done -- sort of each agency has done an average of one a year for 25 years, there should be -- each agency. So there are two agencies. So 25 years, 50 challenges, or consents mostly.

There should be a lot of stuff we missed. Right? And so I would like to sort of collect -- I would like to collect sort of a list of things that we can go back and look at empirically. The Chairman and myself are both very interested in doing as many retrospectives as we can. I mean, they are hard to do. You need to have data. You need to have a credible control group. But to the extent there has been sort of almost -- some, but almost nonenforcement, there should be a lot of type two errors. And so we are really interested in sort of getting a list of things that you think that it would be useful to study. And if anybody has ideas, you can say it now or send me an email.

MR. SALOP: Well, Bruce, you know all the ones you have cleared. Why don't you look at all the ones --

MR. KOBAYASHI: It was not me. I have not cleared any.

(Laughter.)

MR. SALOP: Your institution. I mean, how are we supposed to know which nonvisible deals --

MR. KOBAYASHI: Well, I would actually say that is fine. Let's just randomly pick a bunch of them and then you will not have selection issues. But I tell you, I have looked at our resources at BE and they are not big enough to do that. And so, you know, I think what the other approach is is we look at the margin. Right?

And I know it is hard to think about what the margin is, so I would actually like people who have -- I mean, a lot of people on this panel to sort of say, you know, this one and -- just to give us some guidance of, you know, which ones you think are --

MR. SALOP: Okay. Well, I knew you were going to ask this question. So I made a list.

(Laughter.)

MR. SALOP: Time Warner-Live Nation, you ought to go back and look at. Google-DoubleClick. Amazon-Diapers.com. Look at -- you know, when Joe Simons was Bureau Director, you cleared Avant-Synopsis. You challenged Cytyc-Digene. Look at those two. Look at NBCU-Comcast. You know, I did not see that they lowered price since they merged.

MR. KOBAYASHI: Okay. No, I --

MR. SALOP: So that is my initial list.

MR. KOBAYASHI: We are truly collecting a list. And part of the problem is is that people ask us to do them and we would like to do them, but we do not have the data or a credible control group.

MR. SALOP: Well, you have CID authority.

MR. KOBAYASHI: Yeah, 6(b). So that would be great. But -- and I encourage anybody else who might have candidates to send them to us.

Any of the other panelists?

MS. LAFONTAINE: So there has not been that many that people have been able to look at --

MR. KOBAYASHI: Yeah.

MS. LAFONTAINE: Again, data is a big issue. You know, I can think of the soft drink one. That was the Pepsi --

MR. KOBAYASHI: Yeah. We had --

MS. LAFONTAINE: -- merging with the Butlers.

MR. KOBAYASHI: Right. Actually, somebody did a study. They actually --

MS. LAFONTAINE: Right. A couple of them.

MR. KOBAYASHI: Yeah, yeah, yeah.

MS. LAFONTAINE: And what they found was that the price of Coke and Pepsi in each of these went down, again, as you pointed out, and then the cost to some of the rivals went up, but, in total, consumers were better off given who was consuming how much of what?

MR. SALOP: Which consumers were better off? I'm sorry.

MS. LAFONTAINE: Those of Coke and Pepsi.

MR. SALOP: Ah, those consumers. And the others were worse off.

MS. LAFONTAINE: As we sometimes have in horizontal mergers.

MR. SALOP: Yeah, but that makes the merger illegal. Not to quibble, but --

MR. KOBAYASHI: Steve, that is the next -- you are on the next panel, too, so...

(Laughter.)

MR. KOBAYASHI: How did that happen? We are at Georgetown. You are on this panel. But I mean -- so, yeah, I mean, from a welfare standard -- and then Carl is on that panel -- they are difficult because there are mixed effects, and there are winners and losers.

I want to get to some of the -- there are actually some good questions on the cards. So somebody asked is there a presumptive illegal vertical merger? My guess is no.

MR. SHAPIRO: Well, if Steve cannot think of one, I guess none of us can.

(Laughter.)

MR. SALOP: I presented a list of -- on what you could base presumptions on.

MR. O'BRIEN: The horizontal merger that Steve had on his slide that was not a vertical merger that he called a vertical merger was presumptively illegal.

MR. KOBAYASHI: Oh, the one -- the Canadian -- yeah.

MR. SHAPIRO: But, look, I would say if you have a merger, the input is important, the rivals really need it, all of them, and there is no elimination of double marginalization that is merger-specific, you know, that is going to be looking pretty bad. Okay?

Now, do I want to say there is illegal presumption? No, I am just going to tell you the economics. But those are the sort of fact patterns that you could find pretty quickly and that would raise a flag.

MR. KOBAYASHI: There is a question for Carl about his recent work, but -- I will not do that part, but the back half is about remedies. If, in fact, there are useful, I guess, behavioral remedies that would allow us to obtain the benefits of sort of the allocative efficiencies of EDM without sort of worrying about the foreclosure. Any thoughts about that?

MR. SHAPIRO: Well, a question for vertical merger guidelines is whether the agencies would want to say something about the type of remedies they would or would not accept. That has not been in the horizontal merger guidelines traditionally, but it could be added conceivably. I mean, it is not out of the question. That has been handled separately.

Let's just say one advantage of putting that in these guidelines that I am imagining, that a number of us are imagining, is it would at least indicate where the areas of commonality are between the two agencies. Because if there is a breach there, that seems like it is not good public policy.

MS. LAFONTAINE: So I would add, I think, I mean, on horizontal mergers, there is a very -- and at the agencies generally, I would say, there is a strong preference for structural remedies. Right? I mean, in part because they focus on the kinds of things that lend themselves to that. I do think in vertical mergers we would have to be a little bit more open to alternatives because it is -- again, we want to get some of the benefits that are embedded in these mergers.

MS. SLADE: Well, also, in horizontal mergers, often, the remedy is divestiture. And if there are certain -- these are not just single-product firms. So if there are certain markets or products that cause harm, that could be a remedy.

MR. KOBAYASHI: All right. We have a minute left. All right. So I want to just go back to the merger-specific efficiencies. I think maybe it would be useful just to call EDM an allocational effect. It is just DPP. And Francine’s slides sort of got at this, but, I mean, you could -- and Steve said Coase’s door swings both ways. I assume you are talking about Coase 37 not Coase 60?

MR. SALOP: Thirty-seven.

MR. KOBAYASHI: Because Coase 37 really focuses on the costs of using the market as the explanation for why we have firms at all.

MR. SHAPIRO: That is 1937, by the way. His first article.

MR. KOBAYASHI: Yes, ‘37. But, you know, it always seemed to me that these are efficiency-specific -- and especially in this discussion, specific to the merger -- seems to stand Coase 37 on its head. I mean, it really is -- he used the cost of using contract and the cost of using the market to explain why we have firms at all. And you are asking, well, why don't we just use contracts instead of actually doing it within a firm? And so, I mean, it puzzles me, and maybe it is just where I was trained and the people who trained me as an economist.

MR. SALOP: But, Bruce, that is not even right in terms of where you were trained. You were trained to learn, oh, there is vertical integration by contract. That is what we learned from Ronald Coase, 1937. If there is vertical integration by contract -- and what that meant, especially where you were trained, is it meant you could get all the efficiencies from vertical integration with a contract. You did not actually need the vertical integration.

Well, therefore, that is all I was repeating. I was not turning it on his head. I was just stating --

MR. KOBAYASHI: No, that is Williamson and Klein.

MR. SALOP: -- the way we ought to teach it in antitrust.

MR. KOBAYASHI: Yeah, okay.

MR. SHAPIRO: Bruce, I just want to note when you guys at George Mason, say, you have a football team, is the count for the hike, it is like Coase 37, Stigler 64.

(Laughter.)

MR. SHAPIRO: Bork 78, hike.

(Laughter.)

MR. KOBAYASHI: Well, we do not have a football team.

(Laughter.)

MR. KOBAYASHI: In fact, one of the presidents suggested we get a football team and it almost caused a riot. We have a basketball team.

(Laughter.)

MR. KOBAYASHI: But, yeah, no we -- we say Coase 37 and Klein, Crawford, Alchian.

All right. I want to thank everybody. I am sorry I did not get to all your questions. I will type them up and pose them to our panel and I think there is probably some process through which, you know, if they choose to answer them or I will answer them. But I would like for everybody to thank our great panel. Thank you.

(Applause.)

VERTICAL MERGERS (SESSION 2)

MR. HOFFMAN: So let me get started. I am Bruce Hoffman, the Director of the Bureau of Competition at the FTC, part of our unique FTC dual Bruce structure for the bureau heads. We did not find a Bruce for the Bureau of Consumer Protection, but I understand Bilal is working on that for the future.

And thanks, everybody, for coming. We have a great panel. I am going to introduce the panel in a moment. I do not plan to say anything substantive, and I am standing here only because this is the only stuff I plan to say other than asking questions. I will soon sit down and ask questions.

But, nevertheless, I will give the disclaimer that anything I say does not necessarily represent the views of the Federal Trade Commission. And, in fact, the purpose of this is to help us form views. So we really do not have views; we are trying to form them.

Bruce Kobayashi introduced us or suggested that this, being a panel of lawyers, would be the unimportant panel or the less important panel, and I agree. I mean, the economists, who came first as you saw, spend their time creating elegant, sophisticated, and complex conceptual models with Greek letters and we enforce laws and block mergers. So you can decide which is more important to you specifically and pay the amount of attention to the panels that you choose based on that decision.

But with that brief introduction, let me just say a little bit about what we are going to do that is different than the last panel. First of all, we have no slides. So we are not going to be flipping through slides. Secondly, being largely, with the possible, although debatable, exception of Steve, a panel of lawyers and noneconomists. We are going to do more of a Q&A format, I think, based to a certain extent on the issues that came up in the last panel.

So that is going to consist largely of questions going to the various panelists and getting their thoughts and somewhat free-wheeling discussion about some of the issues raised by the concept of vertical merger guidelines and also the issues that arise in vertical mergers and some of the thinking that has been going on about that.

So with all that, let me just quickly introduce the panel. You have already heard about Steve. So I will skip right past Steve and go to Gene Kimmelman, who is the President and CEO of Public Knowledge. Gene served as the Director of the

Internet Freedom and Human Rights Project at the New America Foundation. He served as Chief Counsel for the DOJ's Antitrust Division, and he has held a number of other prominent positions in a number of categories and is somebody that brings a great perspective to this.

Sharis Pozen is the Vice President of Global Competition and Antitrust at General Electric. She spent over three years at the Antitrust Division at DOJ as Chief of Staff and Counsel and as Acting Assistant Attorney General. She has worked in private practice in antitrust and she has been at the Federal Trade Commission. So she is a dual agency recidivist, actually, in some respects.

MS. POZEN: That sounds dirty.

(Laughter.)

MR. HOFFMAN: I make no moral judgments. Again, we are here to learn. Right?

Jon Sallet is next. Jon is a partner at Steptoe. Previously, he was General Counsel of the Federal Communications Commission and Deputy Assistant Attorney General at the Antitrust Division. So this is a somewhat unusual collection of skills and background. Jon has also worked in the Department of Commerce. And he is a Senior Fellow at the Benton

Foundation, and he also has spoken and given a very important speech on vertical mergers while he was at the Department of Justice, which I recommend to anybody who is thinking further about the subject.

Laura Wilkinson is next. Laura is an antitrust partner at Weil, Gotshal. Her practice focuses on mergers and acquisitions. She began her career at the Federal Trade Commission and served as Deputy Assistant Director for the Bureau of Competition's Litigation Division. And she is one of the most prominent antitrust merger practitioners out there and no doubt will have a lot to say about how all these issues affect the day-to day life of firms complying with antitrust laws.

Then, finally, we have Paul Yde, who is a partner at Freshfields and the head of the U.S. antitrust practice at that firm. Paul has also worked at the Federal Trade Commission as counsel to two Federal Trade Commissioners, as well as being an attorney in the Bureau of Competition and is a longtime member and participant of the antitrust bar as well as a prolific contributor to the intellectual debates that pervade the antitrust community.

So it is a great panel. Hopefully, we will keep you entertained and say something that is at least marginally almost as important as some of the things said in the prior panel. So thank you. And with that, I am going to start asking questions but from a seated position.

So we just listened to the prior panel about the economic framework in which you might assess the harmful or beneficial effects of vertical mergers and how that is and the fairly sophisticated ways that economists do it.

Laura, let me go to you first and ask, if you are looking outside of economic models, first of all, do you have a general sense or is it your experience that vertical mergers are harmful or not? And what evidence should we use or could be used from the more practical standpoint, on a day-to-day basis, to try to determine whether vertical mergers are harmful or beneficial?

MS. WILKINSON: Okay. Well, I want to start out by saying thank you for inviting me to be a part of this panel. I appreciate the opportunity to add my voice to this conversation about vertical mergers. And at the outset, I also want to say that the views that I express today are my own and not those of my law firm or our clients.

And so in answer to your question, I would first say that, look, most mergers are not harmful. Of the roughly 2,000 mergers that are filed under HSR every year, maybe 30 or 40 are challenged as harmful typically in a year. And of those, one or two are vertical mergers. And so we see so few vertical mergers are challenged, and even fewer are litigated, because they are less likely to result in anticompetitive harm and they are more likely to result in cost-reducing efficiencies.

So, in my view, the standard sources of evidence used to evaluate horizontal mergers are useful also for analyzing vertical mergers. These sources include documents of the merging companies, whether they are documents relating to analyzing the merger or they are ordinary-course documents.

We also would be able to look at the company’s executives in terms of what they say, not only in their documents, but in testimony before the agency. And, of course, we look to the views of industry participants, whether they are customers or competitors or industry experts. And, of course, in the vertical context, some of these industry participants may be both customers and competitors of the merging parties.

We also, obviously, look to data. Market shares are, of course, one of the important aspects, but there is lots of other data that is important in understanding the industry and the likelihood of harm.

As we heard today, vertical mergers in oligopolistic markets have more of a potential perhaps to raise anticompetitive issues. And so there it would be important to look at concentration levels at both levels of the upstream and downstream markets.

Other evidence, of course, that we need to look at are whether there is entry and expansion possibilities by other firms in the market, whether there may be power buyers or other countervailing forces in the industry. And, of course, we also need to understand the efficiencies. Vertical mergers are prone to have more efficiencies, as we have heard this morning. And cost savings are very likely in the elimination of double marginalization.

However, we look at those in the horizontal context, as well. But in the context of vertical mergers, they probably would be afforded a bit more weight. But I am not sure that a presumption is necessary in terms of the analysis.

The main difference in analyzing the vertical mergers is really the same as in horizontal mergers. It is a fact-specific analysis. And we just have to look separately at what the theories are in vertical mergers most typically raising rivals' cost, change competitive incentives or information exchange. So what we are looking for is to determine whether there will be those types of harms versus the harm that you would see in horizontal mergers, but the evidence sources are really very much the same.

MR. HOFFMAN: Great. Thanks. So let me go to Jon and Sharis collectively and ask you a question that builds off that a little bit. It is kind of a two-part question. One is, when you were at the Division and you were looking at potential vertical mergers, part A is, did you have the sense that there were a lot of vertical mergers that you were concerned about that you thought might be harmful, but there were inadequate tools with which you could bring a challenge to those mergers, whether the tools were the lack of coherent economic theory or whether they were legal decisions?

In other words, was there a high risk of what Bruce described as type two error where you thought there were a lot of potentially bad deals that you could not do anything about or was it the case that you just did not see a lot of potentially problematic vertical mergers and what were the facts, what were the kinds of evidence that were most important to your assessment of them?

MR. SALLET: You want to go in order of service? You want to go first?

MS. POZEN: Either way. I share Laura’s thanks and I really want to commend the Federal Trade Commission for these hearings. I think it is important to have a discussion on all the topics you are covering. These topics, in particular, today I think are important and I am privileged to be a part of it. So thank you.

And in terms of what we saw when we were there, I will say it seems like every vertical mergers that came in, I was recused.

(Laughter.)

MR. HOFFMAN: Well, that is convenient.

MS. POZEN: Yeah, that was convenient, except for maybe Ticketmaster-LiveNation, when we first walked in the door, you know, that was a horizontal merger in ticket sales with verticality in terms of venues. Google-ITA is one where there was a consent agreement, and in NBCU-Comcast. You know, so I cannot talk about specifics. Gene was there with me and so he can talk about the specifics.

But in terms of the tools in the toolkit, you know, how you can address the issues, I think we all agree, I think that the vast majority of vertical mergers have tremendous efficiencies and synergies and make sense from a pragmatic standpoint of why these two companies want to join together, what the efficiency gains will be, what the innovation is going to be, you know, using Carl’s example of the microprocessor and the computer together and how that interface can be worked.

In terms of the tools of the time, you know, remember, when we were there, we revised the merger remedies guides. And we did that in large part wanting to convey not only that there is a presumption that you do want structural remedies in all cases when you can get them, but there were times when you should consider whether there were other alternatives available that might solve the problems.

And there is a part of me that thinks because of some of the actions we took in those cases is why we are here today discussing it, because I think, you know, folks look at those and there are those on certain sides of the spectrum who say, oh, my God, they were so behavioral. And, yet, you know, I would question in the recent litigation in AT&T-Time

Warner, I do not think there was any evidence that there was any issue in administrability with respect to the consent agreement in NBCU-Comcast.

So how bad was it? Is it just a philosophical issue that people were concerned about? So I think there are tools in the toolkit. I think when we were there, we used them and used them where we thought it was appropriate. There might have been a level of -- experimentation sounds, you know, maybe a bit extreme, but there were times when we tried to get it right, where we wanted to allow the merger to go forward to allow those synergy gains and efficiency gains, but where we thought we could control for what we thought were going to be the anticompetitive effects and tried to do it very carefully.

MR. HOFFMAN: Jon, did you want to add to that?

MR. SALLET: Yes, if I could just briefly. So I think -- I was there at the end of the Obama Administration. I think we were coming to the view -- and, Bruce, you were kind enough to refer to the speech I gave. I gave the speech actually because we thought -- this was Renata Hesse's decision -- that we ought to sum up what we thought we had learned over the previous years, for whatever future use there might be.

I think we thought a few things. One is, one ought to note that when dissent decrees are entered into, it is because the Division believes there is a valid theory of harm, that it is willing to say is a value theory of harm leading to potential harm on the record in court, albeit nonlitigated, but a very definitive position that there was harm that would come, would have come, absent the consent decrees at least, from a series of vertical mergers. Sharis mentioned them. LiveNation-Ticketmaster, there was a UTC merger, Comcast-NBCU.

So we felt as though we actually were building a body of precedent about what kind of harm might exist. Input foreclose, customer foreclosure, use of sensitive information flowing around -- from a vertical partner to rivals, potential competition, one into the other's market on which we could rely. We thought we knew that. I think we did think that it would always have been useful if economics had given us something like the model we have in horizontal mergers of HHI as a starting point. Not an endpoint, but is there something akin to the structural presumption, and we heard a lot about that on the panel earlier.

In terms of litigation, I think we thought that -- let’s take upstream, input foreclosure. If one had an input and it would be advantageous to the new company to deprive it of the rival and the rival needed it a great deal and the deprivation would cause competitive harm, then one could prospectively litigate, although we did not, one could prospectively litigate that on the facts even without all of the economic modeling that might sometimes be preferred. And we had circumstances where we thought hard about such challenges. In a couple of cases, as people recall, mergers were abandoned before processes were finished. So I think we felt that we were making a good start.

The last point I think we thought about, and Bruce, you mentioned this in your speech on vertical, is are there circumstances in which behavioral remedies might not be workable. And so I felt like we thought we had a good handle on how to proceed, but there was a lot more work to be done, which I think brings us to the question of new guidelines.

MR. HOFFMAN: Thanks. Let me go quickly to Paul.

Paul, to follow up on that, did you have a sense or do you have a sense that there is a large set of vertical mergers that the agencies would like to challenge but are not?

MR. YDE: I do not. But at the same time, I think actually the vertical merger guidelines could facilitate maybe challenging a few more.

I just want to say a few things, I guess, maybe just on the point of guidelines. You know, and by the way, I think a lot of what I would say and I have said and I said in an article about 10 years ago really has not changed and it was largely restated in Professor Lafontaine's slides and in some of what she said, that vertical mergers actually might be anticompetitive.

The issue today is whether we can actually create useful guidelines. Can we state guidance that allows us to distinguish procompetitive from anticompetitive mergers based on generalized and observable criteria? And more about that in just a minute. But I wanted to knock down one of the straw men that keeps getting set up, which is the 1984 guidelines. I think I have said in the past that, you know, we did not really need to revise the '84 guidelines. Mostly, I was saying I just did not think we needed to do anything about it.

But I am happy to just knock down the straw man and say that nobody pays any attention to the '84 guidelines anymore, just as Carl said, I think. I have not looked at -- even though I have done a number of vertical -- and by the way, vertical and complementary, we will treat as essentially the same, vertical and complementary transactions over the last many years, I do not think I looked at the vertical merger guidelines, the 1984 guidelines in at least 10 years, and probably I did it then only because somebody asked me to.

I did not even look at them for purposes of preparing for this panel and I am not sure how many did. Okay, one. All right. So just -- let's just ignore that. And so whenever we get into the debate about whether we should revise the vertical merger guidelines, let's actually just pose it the way we should pose it, which is, should we create vertical merger guidelines and just assume that right now there really are not any because nobody is looking at 1984?

So back to the point about guidance and theory, there is a fundamental difference -- as Francine said, there is a fundamental difference between substitutes and complements, I think we all learned that in our first micro class or maybe in high school. And I really enjoyed, by the way, Dan

O'Brien's wry comment that a lot of the analysis is the same, but the coefficients have different sines. I mean, that is a really kind of simple way of putting that there really is a fundamental difference between substitutes and complements. So thanks for that. I will remember that in the future.

But, you know, there is -- we have a basic difference in theory. There is a basic difference for all the reasons that have been described previously and I will not try to restate those. But there is a basic difference in theory that suggests that we should be treating horizontal and vertical mergers differently.

Just by the way, Steve said -- and I do not want to provoke Steve because then he will take up all the response time, but Steve said, in commenting on my article in his article in the Yale Law Journal article, that I only focused on the two polar cases and he described that as essentially what the primary critique is, is based on the two polar cases, the perfect competition -- both levels of perfect competition, both levels at monopoly, that was essentially two paragraphs in the entire article and the rest of the article, I spent on the post-Chicago theoretical literature.

Basically, it is that literature that we have been saying -- and I think that we heard from Dan O'Brien and from Francine and from others, including to some extent from Carl, that suggests uncertainty and ambiguity with respect to the possibility of anticompetitive effects in vertical mergers, but also suggests the high probability of efficiency and procompetitive effects from vertical mergers. So again, I do not want to revisit all that, but it has been discussed at length already.

And by the way, just back to the original point, you know, about whether lawyers, you know, have all that much to say about this, with all due respect to the panel and to my own role as a lawyer, I am not sure that we actually do with respect to whether there should be guidance, guidelines or not.

But back to the theory, there is a lot of ambiguity, there is basic theoretical ambiguity in the economic theory of anticompetitive effects for vertical mergers. I told you I was just going to say what I was going to say regardless of your question.

MR. HOFFMAN: Yeah, I know. I was forewarned.

MR. YDE: So that, you know, we think that there should be empirical evidence, you know, and this has been said, again, many, many times, not just by Slade and Lafontaine and others, but for years, that where we had this ambiguity, Salinger said it in his original paper, when Jeffrey Church did that massive analysis of nonhorizontal merger theories for the purposes of justifying the European Commission guidelines, he said the same thing, that there basically is not a sufficient basis in the theory for vertical merger guidelines for any nonhorizontal merger guidelines, and so we really should try to see if we can get some more empirical evidence.

And I think this was touched on just briefly, but I think not long enough, in the previous panel about why we have not done and developed more empirical evidence of anticompetitive vertical mergers when I think everybody would agree that there has been this long period of time where we had essentially a laissez-faire approach to vertical merger enforcement. And I think that is fundamentally the basis for your reinvigorating vertical merger enforcement paper, Steve, and I think to the statements that have been made previously about the lack of vertical merger enforcement.

We must have a vast number of deals out there that during that period, you would consider to be anticompetitive. I know you mentioned some of them. But we should be studying those, doing a retrospective to see if, in fact, we can develop a more robust support for some kind of a vertical merger theory that then would support or at least answer the questions of ambiguity that were raised by Dan O'Brien and have been raised by economists forever about vertical merger policy.

MR. SALOP: Are you using up all the response time?

MR. YDE: Yeah, I am.

MR. HOFFMAN: So we are debating whether to give you a specific rebuttal piece at the end, to fit it in.

MR. YDE: Yeah, the only other thing I would say just because there is so little time is to just suggest that I think, you know, there are a number of comments, a number of papers that people should read on this because we are not going to be able to cover them all and even the economists could not cover them all in their session. But, certainly, with respect to the empirical literature, Lafontaine and Slade and the other articles that have been written. Dan O'Brien has contributed to a number of these. But, more recently, just the GMU paper that attempted to kind of summarize the more recent empirical literature in the area, I think is helpful and important.

MR. HOFFMAN: Yeah, and a lot of those papers are collected, including some of the responses to those papers, are collected in various places, where if you look up vertical mergers, you can find cross-references to all those papers.

Let me go to Gene quickly on this. So, Gene, from the standpoint of both having been an enforcer, but also from now working at an entity which has a public standpoint on this, which is more of an advocacy and knowledge group, what is your perspective on the state of vertical merger enforcement? Are the agencies missing a lot? Is there something that we are just blind to or that we have been unable to do anything about in terms of the significant number of vertical mergers that you think are problematic that ought to at least be getting remedies, if not outright prohibitions?

So I think that I need to step back even before that because starting 30 years ago, I was probably audacious enough to challenge the conventional wisdom of everything Paul just said, and I was banging my head, challenging mergers and asking enforcers to challenge mergers and challenge what I thought was anticompetitive behavior in vertically integrated companies. So -- back to Time-Warner-Turner, in that era.

I think what is being missed here is actually one of the things that is most important about what you have done with these hearings, which I applaud the FTC for doing, which is you have opened the kimono here on antitrust. It is not just about economics and it is not just about lawyers; it is about the society. And it is great what you have done, and I will urge you to continue it.

When we were at DOJ, we did field hearings on agriculture, and I urge you to go into the field as well because the public cares about this. And the things that I was fighting about starting 30 years ago is a public sense that there are greater harms in vertical integration. So has there been enough enforcement or not? You know, we can go back and look at specific cases. I do not think there is a magic number, but I do think it is a time here where we need some guidance.

Now, whether it is actual guidelines or it is something comparable, I do not know. But Judge Leon referenced the ‘84 guidelines in the AT&T case. So it is not insignificant, whether Paul wants to look at it or not. If jurists are using them, then we have a problem.

So we need to update -- I think Steve is right on target in focusing on oligopoly markets. And, again, I want to put it more broadly. We remedied the problems of vertical harm by passing laws. Congress, in 1992, passed the Cable Act because of the dangers of vertical integration blocking the development of competition. It did not wait for the antitrust laws to ponder and question and whatnot. It felt it was fairly obvious. So there are situations that clearly require intervention, and I think we need to be very mindful of it. So I appreciate the focus.

I want to say that I think that it is very important to look beyond the simple economics. Jon Sallet referenced this. These are key fact patterns. Can you say something generalizable? It may not be anything near the kind of prose in the horizontal merger guidelines, but it would be extremely helpful to open it to the public to have a discussion of what are the efficiencies, how do they arise, what can be handled through contract.

I think Carl framed it extremely well, and I came away from that thinking that where you have key questions, probably the biggest issue for the enforcers to focus on is who bears the burden. Because I think the problem in enforcement has been too big a burden on the Government and too little on the defendant explaining how contracts would not suffice or their alternative ways to get efficiencies.

So I think enforcement has been tempered substantially because of the concern of the burden on the Government, number one, and number two, I think a concern about litigating the fix. So I think that the problem is not just going into a court with a judge who may not be expert in antitrust, but a judge who sees some kind of a behavioral remedy put forward and has a much greater difficulty discerning whether there really -- it remains substantial harm that needs addressing as opposed to what a defendant has offered up.

So I think that is actually the biggest problem that remains for enforcement. So I would urge you to go forward with some kind of guidance, and really opening it up to the public so there is at least a broader understanding of what antitrust enforcers are grappling with.

MR. HOFFMAN: Thanks. I am going to come back to remedies because I think there is a lot of stuff to talk about there, but I wanted just one last point on this to follow up with a question to Paul, which actually builds on something you said, Gene.

Obviously, Judge Leon cited the ‘84 guidelines. I know that a lot of us inside the community have said nobody pays any attention to that, but, Paul, isn’t that very much an inside-the-beltway kind of situation? I mean -- and not even just inside the beltway. I mean, if you are on Capitol Hill, in you are in the Antitrust subcommittees or even on the Hill more generally and you are looking at what is the state of the law in vertical mergers, isn’t it the first thing you are going to look at?

And then even beyond that, what about foreign enforcers, people developing vertical concepts for enforcement overseas, you know, if they are looking at the historical development of analysis here, aren’t the ‘84 guidelines -- it was Halloween yesterday, so aren’t they sort of still rattling the chains like the Ghost of Marley out there?

MR. YDE: So I think that is a good point, and I agree. So I think we should withdraw the 1984 guidelines so that they are not confusing. No, I’m quite serious.

MR. HOFFMAN: Leave nothing in the place.

MR. YDE: I am quite serious about this. Because then the question is, what do you do next? And what do we have -- on what basis would we actually draft guidelines for nonhorizontal mergers generally? You can look at the European Commission's nonhorizontal merger guidelines and maybe that is the direction we go. There are a lot of problems with the nonhorizontal merger guidelines at the European Commission.

But the question really is -- and I really do agree with the point that there are going to be people who, when they -- they want to know what the agency's policies are, they will look for those '84 guidelines. I get that. We do not, generally.

But in terms of what you do next, what do you do next? Do you do this kind of burden shifting? We have heard this from Steve. The burden shifting in a case in horizontal mergers, it makes sense, right, for the reasons that Carl explained, the difference between horizontal and vertical mergers. But in the vertical merger context, where, in fact, there is inherent efficiency, there is an inherent pricing efficiency, the question is how substantial is that pricing efficiency that is achieved and is it outweighed by the potential anticompetitive effects?

But in this context, we are talking about the possibility of shifting burdens on to parties to explain why the transaction is not -- or is efficient or how they have kind of -- the merger might be the least-restrictive means of achieving those efficiencies, which is kind of a pretty tough burden for them to establish.

I mean, I think it is an inside-the-beltway point about the ‘84 guidelines, but I think in terms of what we do next, we really have to think carefully about what the economics tells us about the right standard and about where we establish burdens on the parties.

MR. HOFFMAN: Thanks. So, Sharis, you wanted to add something to this, then I’m going to go to Steve because, otherwise, he is going to grab the microphone.

MS. POZEN: Well, listen, as I said, I think these hearings force us all to sit down, think carefully, think thoughtfully about the issues that have been raised and raised this morning on the economics and otherwise.

And I have to say, as folks know, Carl Shapiro is hard to disagree with, right? And so the point about the judge using those guidelines is hard to disagree with. So we have a set of guidelines that the whole world knows we have out there, that Europe has its own set of guidelines that are more recent. So to answer your question, Paul, what do you do?

And the thing I feel like just listening to the last panel and then listening to this panel is we are struggling with the model of a guidelines. A guidelines that I know from -- you know, the horizontal guidelines, as they have evolved, all talk about, you know, what are the effects, what are the markets, how do you define them, what is a SSNIP test. You know, they are robust and encompass all aspects of horizontal mergers, right?

So could you actually come up with a guideline that encompasses all aspects of vertical mergers in that similar fashion, and I think that is where the answer is coming as no, you cannot. Right? You could, but I think it would be very, very difficult to do. So is there something the agencies could do that is different from that? Is there a policy statement that the agencies could make about vertical mergers and how they are approaching them, about remedies and how they are approaching them, to go to Carl's point about answering the question about remedies?

That would not be a guidelines because that is just -- you know, Paul, on our previous call, said this is, you know, a solution in search of a problem, that is one point of view. I think this is putting a square peg in a round hole of guidelines.

MR. HOFFMAN: So, I know, Jon, you want to say something, and then I actually have a question for Steve and then for you, and then I have a followup question for Laura on this issue.

MR. SALLET: Okay.

MR. HOFFMAN: But turning to this question about construction of guidelines, Steve, I think you have articulated what could be a framework for a fairly complex and robust set of guidelines, ala the horizontal merger guidelines, or you talked during your presentation about something that would be more prose and less rigorous analytical content, like the -- and you have it open in your slide deck -- the proposed conclusions of law from AT&T.

And then, Jon, I know you have looked at the development of press and the development of the ‘84 guidelines, but also the development of the horizontal merger guidelines did not start out with anything like the thoroughly articulated framework we have today.

So I would like -- if both of you would not mind, I will start with you, Steve -- talking about what actually would be needed in guidelines and how robust and analytical and thorough do they need to be to be useful relative to the world in which we do not have them or we have the ‘84 guidelines?

MR. SALOP: Well, first of all, I do not think it is so hard. Dan Culley and I have a draft. You could start with the draft and see what -- you know, we set out what the analytics were, we set out what the evidence would be, and we set out the set of policy questions that the agencies would need to resolve. And we did it in a fairly balanced way, the best I can do in terms of balance.

So I do not think it would be that hard. But if you wanted to be lazy and do less, you need to take --

MR. HOFFMAN: That is in a nonpejorative, nonjudgmental sense.

(Laughter.)

MS. POZEN: Let’s talk about whether there is consensus on any of the issues that you raise.

MR. SALOP: We need the guidelines because the agencies need to state their enforcement intentions, okay? If what we have right now is AT&T-Time Warner’s proposed conclusions of law and we have your speech from last year, well, that’s the whole breadth.

MR. HOFFMAN: It was Jon’s speech, too.

MS. SALOP: And Jon’s speech. That is a pretty -- you know, what is a businessman going to read to figure out whether you can allow the merger? That is all over the place.

So we had this whole controversy this morning about who should bear the burden on EDM and other efficiencies. At the very least, the agencies need to take a position on that. Okay? Now, of course, Paul and I disagree. Now, maybe it is because he only had one course in economics, I do not know.

(Laughter.)

MR. SALOP: But across all of antitrust, everywhere, the defendants have the burden to prove restraint-specific efficiencies. That is true in Section 1, that is true in Section 2, and it is true in mergers. I do not see why vertical mergers should be different. And, you know, I guess that is the question I want to put to Paul.

MR. HOFFMAN: So, Jon, you wanted to add something?

MR. SALLET: Yes, I do. Just because I think -- look, there is a simple answer to all this, it is all Carl Shapiro's fault.

(Laughter.)

MR. SALLET: He did such a fabulous job writing the 2010 Horizontal Merger Guidelines that people are taking the view that if we cannot be that great right away, we should do nothing. And so what can I say, you know? I mean --

MR. HOFFMAN: This is the Carl Shapiro memorial panel, by the way.

MS. POZEN: I actually would not even go that far, Jon.

MR. SALLET: But I will say I reject the concept, right? I mean, I love the horizontal merger guidelines. But, of course, work precedes. Of course, we know better. The 1968 horizontal merger guidelines are not the same as the subsequent versions, including 2010.

So the question is, is there a purpose for vertical merger guidelines? Are there topics that we believe can be discussed? I think the answers to both are yes. First, it is very useful for the bar, for businesses, to understand how agencies will proceed in investigating vertical mergers, and, as somebody said on an earlier panel, whether the two agencies have the same view. That is fundamentally important.

So then what can we say? Look, I think there are a number of things that we know we can say, and that is even without having to steal everything from Steve's articles. We can identify theories of harm. What theories of harm will an agency investigate? Input foreclosure, customer foreclosure, potential competition, information flow. We know we can establish those, I believe.

Secondly, what kind of efficiencies will be looked at and how will they be examined? We know double marginalization exists, but as in Comcast-NBCU, it was found it was not merger-specific. That was an inquiry that the agency undertook and we can specify what we would likely want to look at.

We can talk about remedies, which in your vertical speech you talk specifically about, Bruce. It is a very important issue. The Justice Department may have a different view on this, also an important point for possible reconciliation.

And then, finally, I think -- well, no, two more. One is, one can ask the economists, are there any presumptions? Maybe there are no presumptions, but, of course, as Steve has said, the lack of a presumption does not mean the inherent failure to be able to make out a prima facie case. It is just we want to know, are there such things that can be implemented? If there are, great. If there are not yet, do not include them and continue the research.

And then, finally, I do think it seems very common sense that the Baker Hughes methodology used for horizontal mergers of a prima facie case, rebuttal, balancing, if you get to the third stage, makes sense in the vertical context, and I think it would be useful for the agencies to say that.

So, of course, I am not suggesting that horizontal merger guidelines should not try to go further than I have just outlined, but it does seem to me there is more than enough here and more than enough need to justify the two agencies working together to promulgate them.

MR. HOFFMAN: Thanks. So let me --

MR. YDE: So I will go ahead and answer that.

MR. HOFFMAN: Go ahead, Paul.

MR. YDE: Leave it to Steve to go ad hominem when he is losing an argument.

(Laughter.)

MR. HOFFMAN: We are going to try to refrain from that. I mean, that is good for academic debate, I understand that is how it works in the university.

But we will --

MR. YDE: But I think what Jon just said is consistent with what Sharis said, which is we are not talking about guidelines, we are talking about --

MR. SALOP: No, I am talking about guidelines.

MR. YDE: No, I know, but I was saying it is consistent with what Sharis said, which is that we actually -- you are describing stating a set of issues that need to be analyzed as opposed to actually describing essentially a set of observable conditions that imply that there is some underlying model that we are following for this.

I mean, I think if you want to just say, and the two agencies can say, we think about vertical mergers in the way that Bruce Hoffman described in his speech, I think that is great. I think if you want to say, as Makan Delrahim has said, you know, we think about behavioral remedies in the context of vertical mergers in the following way, I think that is fine, although I think he was wrong on that.

But I think that is different from actually stating guidelines of the type that were drafted in ‘92 and in 2010.

MR. HOFFMAN: So I want to go to -- let me go to Laura and then I have a question for Gene. But, actually, before that, I was reminded that I need to underscore to the audience that there are -- you have the opportunity to send us questions on note cards. I will ask them and, in fact, the question I have for Gene is a question I was sent to ask him, but I am going to go to Laura first. But please feel free to send up questions and they will get asked.

Laura, I know you wanted to say something, but I wanted to add a question to you, which is, you know, in light of all this discussion we have had, as a practical matter, one of the issues that has come up is, as a practical matter, what do business people do? How do they make decisions?

My question for you is, without waiving attorney-client privilege, what do you tell them? How do people actually navigate this land right now?

MS. WILKINSON: Well, that is a great question, and that is exactly why I think that whether you call it updating the guidelines, coming out with new guidelines, or calling it something short of guidelines, but to provide some guidance not only for the agency staff but for us as the antitrust bar, for the business community, for the courts, for the public, I think that while it is true that they will have to be somewhat complex, but I do not think that that is a sufficient rationale for not doing something.

I am reminded of the adage, “Don’t let perfect be the enemy of good.” Just because we cannot clearly articulate every single economic model, I think there are some basic things that we understand about the types of anticompetitive harm that we look at in the vertical merger context. Even in the old ‘84 guidelines that we are disparaging today, it does reflect several different theories of harm. And so we would do the same here, I would expect.

You would outline the several different theories of harm and you would obviously talk about the procompetitive efficiencies that vertical mergers may exhibit, but also talk about the instances where that may not necessarily be true.

And in terms of counseling, because there are no viable guidelines right now, we have to look to what the agencies have done in terms of prior enforcement. And to the extent that they have issued press releases or speeches that provide a little bit more background on why they made those decisions, that is really what we are left looking at, and speeches, as we have talked about today, including yours.

However, I think that we also look at -- in terms of counseling, we look at the economic literature because we know that those are the things that the agencies are looking at or we assume those are the things the agencies are looking at and we want to make sure we can run our facts by those theories and see what the agency might do as part of their review of the transaction so that we can be prepared to have arguments in response or also just to counsel clients whether to go ahead with the transaction or not.

I think that the guidelines will also help in terms of counseling because there has been uneven enforcement between the two agencies, among different groups within each of the agencies. Also, because of that, it is difficult to necessarily have one answer for clients, but to give them a range of this is what may or may not happen.

MR. HOFFMAN: Clients always love hearing that, too.

MS. WILKINSON: Exactly. So that is, again, coming back to why I think guidance would be very helpful in terms of being able to point to the current views of the agencies, and as someone pointed out on the panel earlier, to show whether there are differences between how the agencies are looking at vertical mergers today as well as the possible remedies, which I think is a point we are going to get to on this panel, but an important point in terms of counseling clients. This is not only how they will analyze it, but is it likely that remedies would be needed and, if so, what might they be.

MR. HOFFMAN: Great. So, Gene, you wanted to say something, but I also want to ask you the question that I got from the audience, which was that you had mentioned public concerns about vertical mergers that relate to economic issues. And the question is, what are those noneconomic issues? And I would add to that, what kind of suggestions would you have for how we would address noneconomic issues, either in enforcement or in guidelines in the vertical merger context?

MR. KIMMELMAN: So the point I was just going to make is that if we have all convinced you to rescind the ‘84 guidelines and replace them with something, we will have accomplished something here. And we can debate exactly what needs to be in that.

So what I was referring to was not purely noneconomic, but not using the precise econometric tools or the precise tools of antitrust economics as the sole basis on which to think about problems of verticality. I think a lot of what the public responds to -- and it is very frustrating in antitrust enforcement -- is that we often have markets that become more concentrated either because there was a lack of regulatory intervention in some sectors that maybe should have happened or previous mergers that have led to higher levels of concentration.

Then when you look at a specific merger, the public expectation is you are solving for everything, which is not what you are doing in antitrust enforcement. I think there is a huge disconnect between what the public expects in antitrust enforcement, just using that kind of an example, and what you can actually deliver.

So a lot of it is economic, a lot of it has to do with harm to innovation, harm to potential competition. It deals with maybe even past mistakes, but it comes out in an entire framing on if you do not block this merger, you have not done your job.

And I think it is a conflation of a broad set of factors that the public has these broader expectations that I think we need to be thinking about, but not necessarily by fundamentally changing antitrust enforcement approaches, but by thinking about what deserves sector-specific attention, what possibly deserves sector-specific regulation or oversight, as opposed to antitrust.

In the communication sector, there is a statute that promotes localism, promotes diversity of viewpoints, promotes diversity of sources of information in electronic media. Those are not things we commonly talk about as we are looking at a particular merger for antitrust review on its face. They may be side effects.

So there are a lot of other factors here that are -- they are economic, but they are not the same kind of quantitative measurements that we are doing in antitrust enforcement. I think it is really important not just to identify those, but for the agencies to think about taking a position -- they do competition advocacy; we all have been there -- about what else the Government should do that is not antitrust, but that is pertinent.

I go back to the Cable Act, I mean, that was a direct intervention that one arguably could have done through antitrust. I do not think it would have been successful at that time. Congress jumped in. And it went far further with banning exclusive arrangements, limiting vertical integration and horizontal concentration for a specific industry in a specific moment in time.

So I think those are some of the things we need to grapple with around antitrust as we discuss what we are doing, both with guidelines and enforcement, to help both the public and broader set of policymakers think about what other tools they need to bring to bear.

MR. HOFFMAN: So let me ask a quick followup on that. So is your point that antitrust ought to address these issues or that the agencies have maybe had a communications failure in inadequately explaining to the public at large that for those kinds of issues, we do not include them in antitrust and there are good reasons for that.

And I will tell you having recently had “an hour and a half and more glasses of wine than I care to admit” argument with my father over why we are not completely failing to do our jobs because we do not protect small business and watch out for fairness, I do understand the public messaging failure, at least with regard to him as the audience of one.

MR. KIMMELMAN: That audience of one is probably very reflective of the entire public. I do not want to force a broader set of issues into antitrust analysis. I want antitrust to push the envelope on what it is capable of doing, and I do not think we have done as good a job in vertical enforcement, in looking at potential competition and in fully assessing innovation and quality. I think we can, I think we can do more, but a lot of what the public is expecting is not antitrust.

I think we have done a terrible job communicating that to the public, and I think these hearings can be a piece of starting that process better. But it should not be, sorry, guys, there is no solution. If there is a real problem that people care about, if they are worried about too big to fail, if they are worried about problems in agriculture that are discrimination but not antitrust violations, we ought to be thinking about other tools to address those. And I think that is where the competition advocacy function of the enforcement agencies should come to bear.

MR. HOFFMAN: So let me -- I have two questions from the audience that I am going to ask and then I want to go to remedies to make sure we cover that before running out of time.

The first question for the audience is an interesting one and I think I will throw it, I guess, originally to Sharis, but really open it up to anybody who wants to answer, which is should incipiency be a ground for greater scrutiny of vertical mergers and, if so, when? So I guess the idea is that, fundamentally, if we are talking about Clayton 7, we are talking about incipiency statute and it is always predictive, except in a case of maybe consummated merger, obviously, and even then the analysis is predictive.

Since we are talking about prediction in vertical mergers, should we be more skeptical or more careful in prohibiting or seeking remedies in those contexts given the statute?

MS. POZEN: Yeah, I cannot see why. Honestly, I cannot see why. Maybe Steve will tell me why I am wrong, but I cannot see why you would have more. I think it is actually quite the opposite. I think we know that vertical mergers generate synergies and efficiencies.

Steve gave the example of McCaw-AT&T. That is probably the one merger that we could come up with. Maybe there are a couple more. But the vast majorities have tremendous synergies so I would say absolutely not.

And I think the reason why is, again, we know what can be produced through verticality. We know the abilities and innovation, as long as competition is continuing at both levels of the equation in a vertical merger, right? And so that is kind of the answer.

I want to go back, though -- I cannot help myself but go back. I just want to make clear, I am not advocating for guidelines. I am not advocating for guidelines. I do not think we have a consensus on everything that you have right there in the Government's position in AT&T-Time Warner at all. So I really do not think you could come up with guidelines where you could find a consensus. I am advocating for something less than that.

MR. SALOP. Yeah, but that is why you have to go through the process. If you fail, you fail.

MR. SALLET: Exactly, that is right.

MR. SALOP: That is what it is all -- you know, it is not -- there is a lot of controversy over the 2010 guidelines.

MS. POZEN: I know.

MR. SALOP: Including by the Chairman of the FTC.

MS. POZEN: Right.

MR. SALOP: So it is the process that you need to go through, and to say we do not want to go through -- we are not going to go through the process because we are not sure of the answer, the agencies need to tell merging firms how they are going to view -- whether efficiencies are merger-specific or not.

MS. POZEN: Right.

MR. SALOP: And you need to tell people how to analyze them. Because right now, we all know, Sharis, right now, the guidelines are my article, the analytic guidelines.

MR. SALLET: Well, I thought they were Bruce’s speech and --

MR. SALOP: Well, that is what happened when you hire me.

MS. POZEN: Yeah, yeah, I do not know that -- again, that is my point on consensus. I do not think we have reached a consensus on those issues at all. So your point is we are going to reach a consensus by going through this process, I think is false. I do not think that is possible.

MR. SALOP: There are two things that guidelines do.

MR. HOFFMAN: Let me -- let me --

MR. SALOP: There are two things that guidelines do.

MR. HOFFMAN: We are going to degenerate into a free-for-all, but I will let this go and then that will be it.

MR. SALOP: One is they lay out the analytic framework and the other is they make policy cuts. And what you need to do -- what the agencies need to do is make the policy cuts.

MR. SALLET: Can I just have 10 seconds? I just want to agree with Steve. It is very difficult to copy-edit a blank piece of paper. The first thing you do is you write the sentence, then you see does this sentence work and does the next sentence work? There is enough need for vertical merger guidelines that I think one ought to try to write the page. If it does not work, it does not work.

MR. HOFFMAN: Let me ask this question. So, Paul, you have been, I think, and have written on this subject, one of the more outspoken opponents of the idea of vertical merger guidelines. Do you object to a process of trying to write them to see if something comes of it?

MR. YDE: Yeah, sort of, because I am sort of contemplating who would be involved in that process. But I think --

(Laughter.)

MR. YDE: If you could actually come up with --

MR. HOFFMAN: Fortunately, I am used to being insulted literally every day.

MR. YDE: No, I think actually what -- Jon just mentioned a page. I am good with a page, right? A page that says we are only going to look at vertical transactions where we are confident that we are looking at an oligopoly at both stages. I think that is a good set of guidelines and that is a ramp basically off of doing anything more.

I think anything that you do more leads to, you know, the possibility of setting standards that -- as I have said before -- and I am not going to repeat all this now, people can go read my article and I will circulate it to everybody in the audience as well -- but that what are described as necessary conditions -- and that is the best you can do with respect to vertical merger guidelines, nonhorizontal merger guidelines -- become sufficient conditions.

That is just a natural consequence of the way these things work. It happened with respect to GUPPIs where the original authors basically described that as an on-ramp into the analysis that also was supposed to take into account efficiencies, some kind of standard efficiencies associated with GUPPI calculation, and, instead, it sort of became what was considered the sufficient condition in a number of cases at the FTC and the DOJ. And that is certainly the way that we saw it when we were on the other side of the table from the economists who were working with GUPPIs.

So you know, look -- and I think that has faded over time, that is good that it has actually become a more rational analysis and maybe that is what happens with vertical merger guidelines. But there is certainly a much more -- you know, a more sound theoretical basis for the horizontal GUPPIs than whatever we would try to do with respect to vertical merger guidelines.

MR. HOFFMAN: All right. So I have another question from the audience which I am going to ask before going to remedies. But I should preface this question by saying whoever wrote it apparently forgot that this was the lawyer panel and with the exception of Steve, not the economist panel. So the question is, Steve -- no.

(Laughter.)

MR. HOFFMAN: How can we treat EDM as a tack-on efficiency when the effect is isomorphic with the price increase from a horizontal merger? And to rephrase that slightly, I think the point -- to put it in lawyer English, I think the point is that EDM, unlike a lot of horizontal merger efficiencies, and Carl touched on this, is an inherent effect of internalizing externalities just as the price increase implied in a horizontal merger is an internal -- is an effect of internalizing externalities that competing firms impose on each other.

So it is really -- it may or may not actually exist in particular circumstances and the magnitude may vary, but it is inherent in the process of a merger of complements. So why should we treat it the same way that we treat efficiencies which are not structurally inherent or at least implied by the same mechanism that would give rise to the anticompetitive harm?

MR. SALOP: Let me just ask the same question I asked before. Why couldn't AT&T and Time Warner have solved the double marginalization problem without the merger? The DOJ failed to ask that question until they wrote their proposed conclusions of law.

So I mean, I think, in fact, the way the DOJ might see it is that Carl just put EDM into his model because -- he put it into his model in case it turned out to be merger-specific. Carl never took a position on whether it was merger-specific. AT&T never explained why it was merger-specific. Therefore, it follows that if the D.C. Circuit says the burden on merger specificity is on the firms, then AT&T fails and the merger is found to be anticompetitive. So --

MR. HOFFMAN: So -- go ahead.

MR. SALOP: So that is all I am saying is, why couldn’t they -- I just want to put to the merging firms, as I always put to my clients, why couldn’t you have solved this problem without the merger? And they have often come up with a good answer. But sometimes they do not.

MR. HOFFMAN: There is a subtext in there that I might come back to in terms of merger specificity versus the isomorphic question, but we will leave that for now because I do want to go to remedies. I think almost literally everybody on the panel wanted to talk about remedies. So, obviously, the predicate here is there has been a lot of talk about remedies and most prominently, as I am sure everybody here knows, Assistant Attorney General Delrahim has said on a number of occasions that the DOJ is extremely skeptical of behavioral remedies at vertical mergers.

And as Jon pointed out, the FTC has said, on a number of occasions, myself and others, that we are also skeptical of behavioral remedies, but we also have used them and they have worked, at least as far as we can tell. And so that in cases where the efficiency of a vertical merger is real and cannot be achieved without allowing the merger to go through and where we think a behavioral remedy actually could work, we have done that and we have not ruled them out.

So that is sort of, I think, the state of play on this. I could be wrong about that, but let me go -- I know Sharis and Laura wanted to talk about this specifically, Gene as well. Let me just go in no particular order to Sharis to comment on this issue.

MS. POZEN: Sure. Again, going back to Steve, I think that is where the uncertainty comes in, right? I will say, up until the challenge of AT&T-Time Warner, I think I felt fairly grounded in advising my businesses on vertical mergers. And then with that challenge and the DOJ’s positioning of that case, to be quite honest, and even in their findings of fact, I felt ill at ease.

I also felt ill at ease with the combination of the very strong statement at the fall forum that you mentioned, Bruce, that the AAG made about remedies in this circumstance. And there is -- you know, I want to give credit where credit is due. If you read the speech carefully that the AAG gave, he did preserve some instances where he thought that remedies would be acceptable, although we have not seen that defined by the DOJ.

I know the FTC has accepted and the Trump Administration has accepted a remedy in a vertical merger in a context very specified in which there was a statement around that specificity because it was the defense industry. So we are watching it. I sit there at General Electric Company, we are watching it and watching it carefully so that we can give good advice, you know, to Laura’s point about advising on that. Again, I felt comfortable up until that point. We will see what the Court does, to your point, Steve. We will see what the Court of Appeals does and maybe we will have maybe even more guidance.

But I want to take a step back and, you know, in this notion in terms of remedies and behavioral remedies, there is a spectrum of behavioral remedies, and we seem to lump everything in together into one category of behavioral. It is a very broad category. We see remedies that can include, you know, reinforcement of contracting provisions that exist, licensing remedies, all the way up to the arbitration baseball remedy that we saw in NBCU-Comcast. So that is a spectrum.

And I am concerned, you know, not that we would do anything that would require a remedy at General Electric Company, but if there were a circumstance where it could be easily resolved in a remedy quickly, without compliance with a second request, without going through all of the efforts because the staff has a binary choice right now of sue/no sue, right, so they have to do an extraordinary thing in terms of investigating, if there was a way to come forward with a remedy that was administrable, that was not overly burdensome, that was not overly regulatory, which I think one-half of the pool of behavioral remedies is, then why wouldn't we think that would be okay?

Why wouldn't we go forward and allow a merger to proceed that has efficiencies that are proven that does not have foreclosure where the parties do not have the incentive and ability to foreclose, but there is some concern out there by competitors or others? Why wouldn't we do that?

And I do not know that I have had that question answered at this point. I am hoping through further development as we watch the agencies that will see that. But, I think, to me, that is the uncertainty I feel. I do not feel uncertainty because I do not have vertical guidelines. I have uncertainty because I do not know what the state of play is right now, particularly at the Department of Justice on these issues.

MR. HOFFMAN: Okay. And, Laura, you had wanted to add something on remedies?

MS. WILKINSON: Yeah, I would like to say that I think -- I am agreeing with Sharis that the agency should be open to developing creative remedies that are tailored to the facts and the potential harm involved in the transaction.

I understand why there is a preference for structural remedies over a behavioral fix, but, as Sharis said, there are lots of areas where a behavioral fix may be an appropriate resolution, and that may be a better result than allowing either a flawed merger to proceed that may result in harm or blocking a merger that would have largely been positive.

So just as the agencies are flexible in

adjusting their analysis to the factual circumstances, I think they should be flexible with respect to mergers and remedies of mergers, as well, in the horizontal and in the vertical context. And, of course, there are some instances where a remedy may not be possible and the agencies will have to decide whether they want to challenge the transaction or not. But remaining creative in terms of finding options on remedies, I think, is an important flexibility that, as Sharis has pointed out, we are not seeing in the statements from DOJ at the moment.

MR. HOFFMAN: So let me go to Jon. Jon, you actually, in your speech on verticals, talked about this issue. And one of the things that I previously noted is what you said was not actually that different from a lot of what Makan has said. In part, the point that you made that divestiture is often the right remedy even in a vertical merger, do you want to elaborate on that?

MR. SALLET: If I could, just a couple of points. I think it is useful to note that across two administrations and in both agencies, including your speech on vertical, Bruce, we have had skepticism expressed about behavioral remedies. Now, different levels of skepticism, perhaps, but a skeptical view.

So what can one derive from that? I think there are a couple of things. One is, clearly -- I do not think anybody disagrees with this -- if it is possible to have divestitures, that is a better outcome because the economic incentives then begin to work by themselves. It does not require an agency oversight.

Secondly, behavioral conditions can be difficult to implement. One can read some consent decrees that are in effect now and they look very difficult to parse, very difficult, therefore, to enforce. So to have a behavioral condition, one really wants to make sure that it is monitorable with the resources available in an agency and that outcomes are measurable, and that someone would be able to prove pretty easily and quickly whether there is a violation. Right? If you do not get that, then you do not have confidence that a behavioral condition will work.

That said, of course, nobody has closed the door, including Makan, to any behavioral remedies. And I think there are three kinds that we ought to be thinking about more research on, right? One is information firewalls of the kind that the FTC has used in, for example, the Broadcom merger, important to understand are they monitorable, measurable and work, because they do have a great deal of an immediate appeal.

Secondly, as Sharis says, arbitration. How does arbitration work? And by the way, when we ask about arbitration, we ought to ask not just whether the merged firm gets prices that are too high, but whether it gets prices that are too low. We are trying to reproduce a competitive market. So we want to know how arbitration would work.

And, thirdly, if I could just say for a minute, I think nondiscrimination requirements require a lot of study, right? By my count, the two agencies together since 1994 have imposed nondiscrimination remedies in five telecommunications mergers, and that includes two from the ‘90s from the Federal Trade Commission. Nondiscrimination requirements have a lot of appeal. They look external; they are not about internal product development; they are asking for a certain kind of parity that one thinks one can establish by virtue of marketplace data.

On the other hand -- and, by the way, they find voice in congressional statutes of the kind Gene has talked about, and in FCC conditions, for example, in AT&T-DirecTV. On the other hand, what does it mean to be discrimination is something that the FCC has looked at since 1934. It is not always an incredibly simple question.

But I think to the points that have just been made by Laura and Sharis, if we drill down on this question of whether nondiscrimination can be effectively enforced, perhaps through arbitration, perhaps through otherwise, I think we would know a lot more about a critical ingredient that we have tended to use over and over again in behavioral remedies.

MR. HOFFMAN: Those are good points. I am going to go quickly to Paul and then Gene on this, and because we are under 10 minutes, I have a question to all the panelists that I am going to go to Steve first on and then see what everybody else's views on it are. And then we will see where we are in terms of how much more we can get in. But, Paul, you wanted to say something on remedies.

MR. YDE: Yeah, just very quickly. I think behavioral remedies, in the way that they have been used, in particular, with respect to nondiscrimination provisions and information firewalls, that they actually do reflect the -- I think an appropriate level of skepticism or uncertainty about the potential anticompetitive effects of the transactions in which those behavioral remedies have been used and they also reflect, I think, a recognition -- an appropriate recognition of the inherent efficiencies in those transactions or at least what people understand to be the efficiencies associated with those transactions.

So I think we should probably be, in the context of nonhorizontal mergers, a little bit less skeptical about whether behavioral remedies can be appropriate. I mean, I think -- and I have said this before -- it is a little ironic that the justification for challenging, for filing the first preliminary injunction action against a nonhorizontal merger in over 40 years was the regulatory humility. I mean, I think a little bit more humility might have led actually to using a behavioral remedy of the type that was used in Comcast-NBCU.

MR. HOFFMAN: So, Gene, you wanted to comment on this?

MR. KIMMELMAN: Yeah. I mean, I cannot disagree with much of the framing that Jon put out there, but the problem with it is it is a little too theoretical for what is happening in actual enforcement, and that is, the easy case to be worried about is where a behavioral remedy is offered and it is the easy way out for enforcers and we ought to avoid those in all circumstances. That just should not be on the table.

The harder case, which is what I think we need to be focusing on, is where you find there is a competitive harm, you could litigate, but your judgment of litigation risk is rather high. And I think that is often the case.

And so a 50 percent chance of remedying the full harm and you have an alternative, and then you do the assessment that I think Sharis was talking about, how much of the harm would it really take care of, is it as administrable as Jon talks about, and you might be getting at 60 or 70 percent of a problem, but you might have 100 percent likelihood of achieving it. That is an important balance to keep on the table, I think, and I would not underestimate it.

The downside is, in the kind of markets that Steve was most focused on, oligopolistic markets where we have substantial concerns, there is an equal problem to what Sharis said about business uncertainty and that is the uncertainty of the public that you are really getting at the core problem. The Comcast-NBCU decree just expired. I would assert that that market is every bit as concentrated as it was when we started that case now and the concerns are equally great. And so while there are aspects of the decree I think that worked well, there were a lot that did not do everything we would have liked them to do. We now have a problem of the expiration.

So it works on both sides here. There is uncertainty for businesses, but it is uncertainty for the public as to whether you are really getting at the core problem. Again, some of these may take what Jon was referring to, which is a sector-specific regulator that has the task of figuring out some of the longer-term structural issues in a sector, and it would be nice if you could have parallel action between antitrust enforcement and sector-specific regulation that actually protects competition and maybe even enhances competition.

I will just flag that our biggest issue right now is that for the tech sector, we do not have that kind of a regulator, and I think that is where we are going to struggle the most on vertical questions.

MR. HOFFMAN: All right. So Steve, I think, was collecting some thoughts on some really complex remedies, but in the interest of time, since we are under five minutes, I am going to go to this question from the audience and we may come back to that.

But, also, I wanted to say right now, this panel ends in five minutes. After that is the lunch break before we go to the consumer welfare panels. There is a cafeteria two floors up in this building which has coffee and protein bars and may have other things, but I would not know. And donuts. It also has donuts. It may have other things, but that is right behind the chapel. There is an adjoining cafeteria in the next building over and there are a lot of restaurants for whose quality I cannot vouch in the neighborhood. So after this, you are free for lunch.

So let me pose this question to all the panelists. And, parenthetically, if there is anybody here from Capitol Hill, I want to state that the predicate or the assumption in this question is something that could be thought about. So for those of you from Capitol Hill, with that in mind, I will now ask the question: Agency resources are both constrained and fixed.

MS. POZEN: That was the part of the question you wanted them to pay attention to?

MR. HOFFMAN: Yes, just saying, you know.

MS. POZEN: Okay, sure.

MR. HOFFMAN: Should the agencies devote

more resources to investigating or challenging vertical mergers, recognizing that those resources must come from somewhere? Again, leaving aside the assumption in that question, whether it is necessarily always valid --

MR. YDE: I will start. I will say no.

MR. HOFFMAN: Okay. Paul has got his point. Go ahead, Steve.

MR. SALOP: I am going to go with the predicate. I think Bruce should do fewer retrospectives publishable in Econometrica and do more investigation of vertical mergers. Bruce, I will be honest with you.

MR. HOFFMAN: Right. I figured that that was probably the Bruce you were talking about.

Anyone else have thoughts on resource allocation question? But, I mean, I pose the question in a semi-facetious way, but it is a very serious question because we have to figure out what are we going to do with the resources we have at any given moment.

MR. SALLET: All right. First of all, I completely endorse your view that agencies need more resources. But I would say it this way, one of the reasons that --

MR. HOFFMAN: For the record, I did not actually say that.

(Laughter.)

MR. SALLET: No, I am sorry. I apologize for mis-attributing that to you.

Look, this is why we need guidelines. What we really care about is harm to competition, harm to consumers. So what we really want to do is allocate resources, investigatory and litigation resources, to the places of the greater harm.

My only view here is that one cannot neatly dissect harm into whether it is horizontal or vertical because to the point Steve's made, all harm is horizontal. Vertical mergers, if they are harmful, yield horizontal harm. So I think we need guidelines to help at the beginning of investigations when memos are being written, theories of harm are being discussed, to try to identify those places where harm from a vertical merger could be sufficient, could be grave enough to justify the use of resources, as one does with horizontal mergers.

MS. POZEN: Can I add to that?

MR. HOFFMAN: Sharis?

MS. POZEN: So I want to pick up on something I just do not want us to overlook.

Litigation risk. I do think -- and, again, I can tell you there were meetings when I was at the Department of Justice where we thought about litigation risk and we thought about we do not care if we win or lose, this is worth going out and making a statement about. So that happens, too. But I think this calculus that Gene was talking about about losing and then what is the case law going to be that emerges, I have to say, a wise person told me when I got to the Department of Justice that you need to think about every action that you take, you know, and the benefit to consumers or not, and the advancement of antitrust law and thinking.

And so the risk that right now we face, you know, if you are an enforcer, the enforcement agencies face a risk that this Court of Appeals is going to come down with a paradigm on vertical mergers that is going to mean there is no more enforcement of vertical mergers. That was the risk the Department of Justice took. I am sure they took it knowingly because the kind of discussions that we had, you know, went on.

But I do think that you -- you know, we think about allocation of resources and the cases you bring and you do not bring, I do think that you actually -- the litigation component of it and the advancement of antitrust and where the courts are today in thinking about these issues -- we saw it in Judge Leon's opinion in AT&T-Time Warner -- that was a risk that the Justice Department decided was worth taking. We will see if it pays off or not. We will see what the Court of Appeals does.

MR. HOFFMAN: So we have 25 seconds.

MR. KIMMELMAN: If I could just jump on that, I think Sharis is absolutely right. But I will say that in terms of research allocation, if you have cases to bring that are vertical cases, this is the time to do them because having ripped the band-aid off with AT&T-Time Warner, I think we need to know better what the enforcement practice will be going forward and have that not be the sole action. If there are not cases, I think vertical guidelines are the next thing we should look at.

MS. WILKINSON: Well, I would just close out to say --

MR. HOFFMAN: Go ahead, Laura. Laura will get the last word.

MS. WILKINSON: In the context of this panel, whether we end up with new vertical merger guidelines or a good report that comes out from this session, we will have hopefully a bit more guidance for staff, the companies, the bar, and the courts.

MR. HOFFMAN: Well, please join me in thanking a really excellent panel.

(Applause.)

PRESENTATIONS: ALTERNATIVES TO THE CONSUMER WELFARE STANDARD

MR. SHELANSKI: Good afternoon, and thank you for coming back to this panel, our first of two panels this afternoon discussing the consumer welfare standard as it has come to be established in recent decades of agency practice and Federal Court jurisprudence. And we are going to hear four presentations on this panel on different alternatives or different ways of thinking about the consumer welfare standard going forward.

This is a huge panel because in addition to the four very distinguished panel presenters that we have, we have an equally distinguished group of commentators who will come up and join us after these four presenters have spoken.

My principal job, given that we have two hours and nine presentations, will be to keep and enforce time, which I will do ruthlessly.

So with no further ado, let me introduce our four speakers. We will go in the order that they are seated. We will start with Barry Lynn. Barry Lynn is president of the Open Markets Institute, which he initiated after 15 years of running similar policy programs with the New America Foundation.

After that will be Jonathan Sallet of the Benton Foundation, who will be followed by Maurice Stucke, Professor of Law at the University of Tennessee, and, finally, Tim Wu from Columbia University.

I do not think any of these panelists need much further introduction. So with that, I would like to turn it over to Barry.

MR. LYNN: Thank you, Howard.

One thing, I am actually not the president of Open Markets; I am just the director. As you guys who know us know we are a pretty flat organization.

Thank you all. It is a great honor to be here today. I want to thank Chairman Simons for organizing this exceptionally important discussion. The extreme and growing concentration of power in America poses many political and economic challenges and the FTC was created precisely to deal with such problems.

I believe my testimony from a hearing in the Senate Antitrust Subcommittee last December has been distributed to my fellow panelists. The following comments build on the historical analysis of the consumer welfare philosophy that I provided in that document.

Today, I want to emphasize six main points. First, the prime purpose of antimonopoly law is to protect the liberties of the individual citizen and our democracy. I will start with a quote from one of the founders of this institution, Woodrow Wilson. “America was created,” he said in 1912, “to break every kind of monopoly and to set men free upon a footing of equality, upon a footing of opportunity.”

Let me buttress that with a quote from a man who rejected Wilson as a leader due to Wilson’s racism; yet, fully embraced Wilson’s vision of America. This is W.E.B. Du Bois, who wrote in 1935, “America’s contribution to the modern age is a vision of democratic self-government, the domination of political life by the intelligent decision of free and self-sustaining men.”

Isn’t that a beautiful description of the American nation? “The domination of political life by the intelligent decision of free and self-sustaining men.”

The election in 1912 began the modern era in antitrust. Over the first 14 months in power, President Wilson, in tandem with Congress, passed the Clayton Antitrust Act, the Federal Reserve Act, an antimonopoly tariff reform, a progressive income tax, the FTC Act. And the key principles of this regime, because it was, in fact, a coherent intellectual and legal regime, the key principles were the main practical goal of antimonopoly is to extend checks and balances into the political economy. The foremost goal is not and must never be efficiency. Markets are made, they do not exist in any platonic ether. The making of markets is a political and moral act.

Corporations are tools of governance, so they must be regulated preferably through competition. Vital monopolies, such as communication and transportation networks, must treat every producer and buyer the same. They must never discriminate. The worker, farmer, independent entrepreneur and professional must be free to form unions, cooperatives, and associations.

The founders of modern antimonopolism did not see antimonopoly as one policy among many; they saw antimonopoly as the operating code that governs every commercial relationship between citizen and citizen everywhere. They saw it as the way to make and protect the political economy that not only allowed but encouraged, and I repeat, the domination of political life by the intelligent decision of free and self-sustaining men.

The vision worked. As other industrial nations fell to fascism and totalitarianism, in America, it resulted in the most powerful, richest, freest, most materially and socially innovative nation ever in the history of the world.

My second point today, the authors of the consumer welfare philosophy aimed to promote concentration of power and top-down systems of corporate control. As most of you know, Robert Bork in his book, The Antitrust Paradox, provided the key intellectual argument in favor of the consumer welfare philosophy. Bork aimed to simplify antimonopoly to one goal only, efficiency, exactly what traditional anti-American monopolism -- I mean, American antimonopolism said must never be the primary goal.

The effects of this change were understood at the time. In 1987, the former Chairman of this institution, Robert Pitofsky, in Congress, said of Mr. Bork and his work, underlying all of his thinking is a fundamental disdain for the competence of Congress and the Supreme Court to understand economics and apply its principles. His appointment would threaten the delicate balance among the legislative executive and judicial branches that is the heart of the American constitutional system. We would see a different sort of country of companies if every segment of this economy were permitted to merge down to two or three giants without fear of antitrust exposure.

My third point today, the effects were indeed radical and extremely dangerous. The political and economic effects with this change of thinking and policy are many and increasingly terrifying. Monopolists are key drivers of inequality, suppressing wages, ratcheting up prices. Monopolists use their wealth and power to disrupt and dominate our democracy. Monopolists sell out our national security, making us depend unnecessarily for vital supplies on autocratic regimes, such as China.

Monopolists make complex industrial and financial systems more subject to catastrophic cascading failure. Monopolists kill people by driving up the price of drugs and vaccines, of medical supplies and hospital beds. Monopolists impose increasingly autocratic systems of control over workers.

Platform monopolists exploit their choke-hold control over our communication systems to strip our free press of ad revenue and to make influential authors, reporters, editors, publishers afraid to speak their minds in public. The manipulation machines of these monopolists serve also as the main conduit for the subversive propaganda and misinformation, both foreign and domestic, now tearing our nation apart.

Fourth, we must return to basics. The consumer welfare test must go. I know this discussion is deeply frustrating to many of you. You have devoted entire careers to this philosophy. I greatly appreciate how much creativity so many of you are devoting to stretching the consumer welfare philosophy to fit all sorts of new purposes.

But the word "consumer" itself, the concept itself must go. There are many problems with the concept. I will give you two. It inverts the main original purpose of antimonopoly law, which was to protect us as producers, creators of goods, crops, services, ideas, art. It leads us naturally to focus on material measurements of well-being rather than the political goals that prevent and keep citizens alert to concentrations of power, the maintenance of liberty, the protection of democracy.

My fifth point today, the traditional philosophy of antimonopoly was simpler, more predictable, and easier to enforce. Many people criticized us for not detailing how to make our vision of antimonopoly work. They say we aim to use antimonopoly to specifically address all sorts of social and political ills.

Frankly, at Open Markets, we do not see any need to come up with anything truly new at all. We believe the antimonopoly regime, as originally designed, fully promotes these values of liberty and democracy. Hence, we do not believe that any specific legal decision should ever require CEOs or judges to assess those values.

As a stop-gap measure, we would simply return, it could be tomorrow, to the basic principles stated in previous guidelines for antimerger and antimonopoly enforcement. Those guidelines are simple. They are easy to understand and use.

Consider complex industrial activities. Thanks to rules limiting one corporation to no more than 25 percent of any market, every CEO and every enforcer needs to be able to count only as high as four.

Add to those 1968 year antitrust guidelines, the guidelines then, of course, at the FCC, USDA, Federal Reserve, DoD, STB and CAB, and all the rest of the U.S. Government, and we would have today's monopoly crisis licked faster than you can say the word “Google.”

Sixth, and last, the founders of the modern antimonopoly regime understood consumerism as a pretext for and a pathway to autocracy. I began with Wilson, I will end with the other great founder of this institution, Louis Brandeis. Some of you have heard me read this quote before. This is for the record, so I will repeat myself.

“Americans should be under no illusions as to the value or effect of price-cutting. It has been the most potent weapon of monopoly, a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Far-seeing organized capital secures by this means the cooperation of the short-sighted, unorganized consumer to his own undoing. Thoughtless or weak, the consumer yields to the temptation of trifling immediate gain, and, selling his birthright for a mess of pottage, becomes himself an instrument of monopoly.”

Today’s monopoly crises is, in many respects, more grave than any we have faced in our long history together. We will overcome it, as we have all the crises before now, together. I look forward to working with all of you to reestablish

America on a firm footing of liberty and democracy, one that this time, perhaps, will be forever unshakeable. Thank you.

(Applause.)

MR. SHELANSKI: Thank you very much, Barry.

I will turn it over now to Jon Sallet.

MR. SALLET: So Barry and I did not coordinate. There was no joint conduct here. But I am going to pick up where he left off talking about Louis Brandeis. I am going to do this because I think there are two really important questions that we are going to discuss in the course of the afternoon.

One is, what is the role, if any, of larger social democratic, even political, concerns in antitrust? Second, is the enforcement of antitrust best pursued through the use of the consumer welfare standard?

Now, I want to look at the questions through the prism of Brandeis, who, as everybody knows, Barry just illustrated, was a leading advocate for stronger antitrust laws in the early part of the 20th Century. He wrote a book called, The Curse of Bigness. It gives you an idea of his views, right? He viewed monopolies and trusts inimical to democracy, to individual opportunity, to economic opportunity, and by the way, he viewed opportunity and democracy and opportunity and the economy as closely linked.

What I want to take a few minutes to talk about today is what I think are two fundamental teachings from Brandeis that I think have borne the test of time. One, as to the question about politics, the democratic and social goals, I think he teaches us how Congress, the legislative branch, or state legislators can consider larger social and democratic goals in the formation of antitrust while keeping antitrust enforcement and litigation free from day-to-day political concerns, so an institutional distinction.

Secondly, I think he teaches us how we can look to the idea of a competitive process as a measure of what antitrust laws protect.

So I want to do this by going through five principles that demonstrate what I believe was Brandeis’ view of progressive governance of antitrust in competition, but tells us when the right question is directed to the right institution.

First, he thought monopolies and trusts were very dangerous. He thought legislators, Congress, should consider those democratic goals. The questions of political power he thought should be considered by

Congress. Why? Because he thought Congress can consider whatever it wants, and that was his first principle. Congress should look broadly.

But, secondly -- and this is just as important -- he thought the job of Congress was to translate those concerns into enforceable legal standards that identify harmful industrial -- that was his word; we would say economic -- industrial conduct in a manner that vindicates the values. So we know a lot about what Brandeis thought about how legislation should be written from what happened in May of 1911.

On a Monday, the Supreme Court decided Standard Oil. For Progressives, that was a defeat. Brandeis thought that was harmful to the Sherman Act, that it gave judges too much discretion in deciding what was or was not violative of the Sherman Act. He got a telegram from Senator La Follette saying, can you come to D.C.? He telegrammed back, I am going to take the night train to Boston. He did Wednesday night. By Thursday of that week, he was here working on legislation to reform the Sherman Act.

So we know what he thought about how to proceed. We know he did not put into the proposed legislation anything like let’s look at the political power of an institution, what are its lobbying resources. What he did put into it were some very important measures that he thought focused on economic outcomes of monopoly. He locked at -- well, here is some language he wrote into the legislation. "To prohibit unfair or oppressive methods of competition." Not that far from the current standard of Section 5.

He looked at issues like exclusive dealing, or tying or market allocation. He proposed presumptions, rebuttable presumptions for market share and horizontal and even proposed a presumption to deal with input foreclosure in vertical measures. He talked about when the burden of proof should be on the defendant. In other words, he thought this kind of legal standard could vindicate larger goals without having to litigate them. And that meant he looked next at what antitrust enforcers and courts should do. He thought they should follow Congress' instruction.

And it is very important here to understand the history. The history is, his views were affected mightily by Lochner vs. New York. Different case, labor laws, Constitution. But he thought that case -- remember what Justice Holmes said in his dissent about the Constitution not embodying Herbert Spencer's social status, right? He thought that decision demonstrated a court that was willing to use its theory in place of litigated facts. He thought that was backwards.

He wanted antitrust to focus on what was really going on. So whereas he told Congress to look big; he told antitrust enforcers to look very granularly at the facts in front of them. He wanted to know were markets working or not working. When he criticized Dr. Miles, the decision that was overturned by Leegin, he criticized the Supreme Court for lack of familiarity with the facts of business life, which he said results in erroneous decisions. In other words, he preferred the hard work of detailed inquiry to the easier path of theory that he thought the Lochner court exemplified.

He thought the right laws would lead to the right investigations, which would lead to the right results because he wanted antitrust to work. So he thought facts matter. He did not want to get caught up in abstractions and formalisms. He wanted to understand the practical lessons of economics.

Now, he also understood that everything about competition law does not come from antitrust. For example, he did not want antitrust to set prices. He did not think that was the job of antitrust. But he recognized that there could be sectoral regulation

-- in his day, railroad regulation may have been the leading example -- where that kind of more intense look was appropriate. So he favored the sectoral regulation where he thought it was justified. Narrower in scope, but more detailed and expansive in its reach than antitrust laws. And here he distinguished, therefore, between the tools that Government has in enforcing and promoting competition.

Fifth, he really emphasized the importance of innovation. He emphasized that in industrial circumstances, but he also emphasized it with specific regard to the creation of the Federal Trade Commission. He wrote an opinion -- a dissenting opinion in 1925 in a case called FTC vs. Gratz, where he talked about the FTC Section 5 as being important -- well, why would one have a phrase as general as unfair methods as competition? Two reasons, he said.

One, we will look at incipiency, actions that have not had the kind of competitive effect that he thought the Sherman Act examined. Secondly, because, he said, there will be new kinds of harm that we cannot anticipate. If we write a detailed list, we are going to miss some. So he wanted a standard that would evolve as economic issues as the facts evolved.

He believed the FTC was important because he thought data was important. Like these hearings demonstrate, the importance of a expert agency gathering information. He thought the FTC was important because its expertise was important because it could pick up the work of what had earlier been the Bureau of Corporations and bring to bear real learning and experiment in how to proceed as, for example, with potential rule-making, which Commissioner Chopra talked about.

Let me just go to the second question briefly because it is an irony that a hundred years ago Brandeis handed down his most famous antitrust opinion, Chicago Board of Trade, which ruled against the government enforcement action. With this language that everybody has -- well, I think Tim quoted earlier in the day perhaps. But what I want to talk about is the facts. The facts of the case is there was public trading between grain buyers in Chicago and farmers located in the rural Midwest. And what he worried about was asymmetry of information, lack of transparent markets, the inability of farmers to bargain effectively when they would not have actual knowledge of market conditions.

Now, this decision has been much criticized, I think sometimes with hindsight. But what I think is critical here was he was defending a rule, a limitation of trading hours that went to the idea of establishing what he thought would be a competitive process. He did not mandate any outcome, but it did permit bargaining to take place among people who all had information.

My last point, there is going to be more talk about the competitive process as we go on this afternoon. I want to just emphasize, as this quote from the United States Government's brief in the Amex case emphasizes, is that it is an approach that is already recognized. After talking about the consumer welfare standard, the United States Government said, "Consistent with the Sherman Act's fundamental policy of market competition, courts protect consumers by protecting the competitive process."

And that is important because, as a litigator, I can tell you that it can be confusing when one is litigating a case that is not about sellers dealing with consumers, and those cases exist. They exist in monopsony when there is huge buyer power affecting upstream sellers. And, by the way, there might be no reduction in output to consumers. They come about in intermediate purchaser cases like the

Sysco-U.S. Foods case where a restaurant was harmed standing between a supplier and a consumer.

In late 2006, the Justice Department brought a case that had to do with cable TV in Los Angeles that Makan Delrahim recently described and quoted as alleging that the joint conduct “deprived L.A. area Dodgers fans of a competitive process.” Now, just one aside, Howard, if I could, I am a Red Sox fan, okay. The World Series is competition on the merits. I just want everybody to be clear on that.

But the point is we have a way of thinking without getting confused about the role of the consumer in circumstances where harm is focused on other players in the marketplace. And I think, as a litigator, that is an effective, useful way of focusing courts on what they should focus upon.

Thank you.

(Applause.)

MR. SHELANSKI: Thank you very much.

Now, actually, against this backdrop to give us one vision of what an alternative to the consumer welfare standard might look like, Maurice will talk about the effective competition standard.

MR. STUCKE: And that is what we are going to do. We are going to go forward today.

So, first, I want to talk to you a little bit about why do we need a new standard. So one thing that we -- and thank you for this opportunity.

So one thing that we have seen is the decline in enforcement outside of cartels. First, we see the decline in monopolization cases. DOJ brought its last predation case in 1999. Between 2000 and today, the DOJ has brought only one Section 2 case. In contrast, the DOJ, between 1970 and '72, brought 39 civil cases and three criminal cases against monopolies and oligopolies.

John Kwoka has pointed out the significant decline in merger enforcement and concentrated industries with an HHI below 3,000. There is a significant decline by the agencies in prosecuting vertical restraints. And we can say that it is not that we have reached the point of optimal deterrence; the DOJ is still prosecuting a lot of per se cases. And we look to see what is going on in Europe and there may be multiple contributing factors, and I want to point out two. One is them is the consumer welfare standard and then the next is the rule of reason.

So what are some of the problems? And Marshall Steinbaum and I have outlined this in our latest report. First, there is no well-accepted definition of consumer welfare. It means different things to different people. You look at the ICN surveys, that bears it out. It also raises significant rule of law concerns.

So, one, the U.S. courts say that the reduction of competition does not invoke the Sherman Act until it harms consumer welfare. So how much competition can be reduced before it starts affecting welfare? One of the problems with this is that there is no uniform definition of who the consumer is. Some people say, no, no, no, you got it all wrong. The consumer welfare standard includes workers, it includes sellers, it includes everyone within the distribution chain.

But the reality is, as we all know, is that the competition officials generally look down, they do not look up. They do not look up to see what the effect of a merger is on workers. They do not generally look up to see issues of buyer power and the like. Even if we can agree on “consumer,” there is no uniform accepted definition of “welfare.” And here what we find is that welfare is not synonymous with surplus.

In fact, looking at prices can lead you to the wrong result with those dataopolies. So Facebook acquires WhatsApp; they reduce price. Is that necessarily a good thing? Not necessarily if they are going to significantly reduce privacy protection. And even if we can identify who the consumers are and what welfare we are concerned with, trying to then measure the impact that a restraint has on that welfare can be very, very difficult, particularly with these dataopolies that ostensibly charge a zero price and reap their monopoly power through data that they collect through us.

So, one thing we hear is, well, the consumer welfare standard provides predictability and objectivity. That is really questionable. It is particularly questionable when you look at, for example, group boycotts, elimination of nascent competitive threats, and the like. So the ICN says, you know, trying to determine the impact on consumer welfare engenders a relatively high degree of uncertainty and estimation or assumption used for quantification of detriment to consumer welfare.

The other problem is we have had a natural experiment now for 35 years, and it does not appear that the consumer welfare standard is much about consumers nor necessarily has helped improve their welfare. Instead, what we are hearing increasingly is that the United States has a market power problem. And Marshall has done some excellent work on this involving labor. We also cite some recent studies that show this market power problem.

So where does that lead us? We have an unwieldy rule of reason type of analysis and we have a consumer welfare standard that is largely vacuous. So what we propose here is the effective competition standard. And what we propose is actually not very radical. So, first, preservation of competitive market structures. We already heard from Jonathan that that is in the law. And, in fact, as Jonathan pointed out, that is where the Obama Administration was starting to go towards the end of its administration. And you can see this in the case law, as well.

The protection of individuals, purchasers, consumers and producers, that is also not controversial. I really doubt that anyone in the room today would say that anticompetitive restraints only matter if they affect us as a consumer and not as a worker or as a seller in today’s market.

Preserve opportunities for competitors. That is a fundamental value of competition law. That is especially important in today’s economy where we are dealing with powerful platforms. And this is uncontroverted. If you look at the Supreme Court, time over time, they talk about protecting firms' right of freedom to trade.

Promoting individual autonomy and well-being. Here, one of the fundamental beliefs for competition and competition policy is that it can promote an inclusive economy that promotes overall important values such as autonomy and overall well-being. I mean, you just think about Topco and comparing competition law to the Magna Carta in terms of promoting economic freedom. This is, again, very, very important with respect to labor markets.

Next, disperse private power. What we have learned is that economic power can often translate into political power. The goal here is to ensure an inclusive economy that promotes a healthy democracy. That is what you heard from Barry in his comments.

So how would it change then the status quo? Here, one of the key things is all you would need to show is a substantial lessening of competition. You would not then have to show, well, how does that substantial lessening of competition affect consumers welfare, per se.

One of the key take-aways that I hope you get from my talk today is that today we have the worst of all possible worlds. I think it is beyond dispute that competition encompasses multiple economic, social, moral, and political goals. Some of you might say, no, it just encompasses one economic goal. But even among you, you cannot agree among yourselves that economic goal as narrowly to prevent tradeoffs and the like.

If you have multiple economic goals, you cannot also have an open-ended rule of reason type of inquiry. What you require then are those multiple goals to be synthesized into legal presumptions that are administrable for the agencies and are simple enough for the lawyers to explain to their client.

And, here, what we propose are seven areas of legislative change. And they are all in greater detail in our paper. I will just run through some of them. For mergers, we already have now a bill to switch the presumption. We just add a couple fine-tuning to that. And I think this will give them greater accountability, particularly when the agencies allow these mergers to occur in highly-concentrated industries or mergers where the acquiring firm is a monopoly.

Market power, one of the things that you might hear from the rest of today -- and I think when we talked during lunch -- which is one of the worst Supreme Court decisions, Amex came up. Because there are multiple ways you can prove market power and what we identify is both direct evidence, as well as circumstantial evidence. And one of the key points here is the pressing quality, including privacy protection, below competitive levels can be indicia of significant market power.

That turns next to looking beyond price effects. Everyone agrees on this. I mean, there is no real dispute that antitrust looks beyond price. The problem, though, is is that price is what we invariably gravitate back to. That is why unilateral effects theory is so popular today, because it is quantifiable. Coordinated effects much less so. And this is not going to really help us. The pricecentric tools that the agencies have are not going to help us in the data-driven economy where things are often for free.

And the Europeans now are starting to move forward on this. And I think there is a greater gap between what the Europeans are doing and what we are doing with respect to this.

Behavioral discrimination. Basically,

getting us to buy things that we do not really want at the highest price that we are willing to pay. That and Section 1, Section 2, and duty to deal are all suggestions. And I would love to pursue this during the Q&A.

Thank you very much.

(Applause.)

MR. SHELANSKI: Thanks very much, Maurice.

Tim, to you.

MR. WU: Thank you very much. Hi, everybody. Thanks for inviting me. I am pleased to be not quite at the FTC, but in the orbit of the FTC again. It is wonderful.

I want to say that I have a transcript available of this -- not quite a transcript, but a written version of my testimony that I will make available on the web.

So here is what I want to talk about. My talk is structured really in two parts. First, I want to describe what I see as the major problems with a consumer welfare standard. And then, second, I want to talk about how, in practice, the protection of competitive process standard works. It is leading alternative.

So here is what I think. You know, I think the good faith version, the honest, earnest effort to use a consumer welfare standard has been, at times, worthy. It is an incredibly ambitious idea to bring a certain scientific certainty to the law of antitrust. But I think that some 40 years into the experiment or so, we have to admit it has not succeeded; that it has indeed failed; and that it has run into repeatedly the limits of the legal system. So I am not saying it is bad in theory; I am saying it is bad in practice. The legal system has great difficulty assessing the full range of cost benefits that would be necessary, I think, for the enterprise to succeed by its own terms.

Instead, I think that what we have seen over the last two decades is a consistent neglect of a huge number of costs, things like quality effects, dynamic benefits, and so forth; other things we mentioned, labor market, political considerations, all of which might be considered important, all of which are exceptionally difficult to measure, and all of which have made, in some ways, made the soul of the antitrust law resemble the joke about the economist and the street light, which would be very funny if it was not actually so tragic.

So looking back, I think that if you think about consumer welfare standard, it was, I think, very effective as a standard for measuring the harms of price collusion. But I think it was allowed to migrate too far from the natural home. I do not think it performs well in measuring the harms when it comes to collusive exclusion or parallel exclusion. I do not think it does well with unilateral exclusion and I think it probably is worse suited to merger review. So, you know, those are important areas of antitrust practice and I do not think the standard does well in those areas.

Let me just give you one example from the exclusion area. So I think most of us can agree that the most important Section 2 case over the last several decades was the Microsoft case. When you look carefully at the Microsoft case, obviously, it involved Microsoft’s exclusion of Netscape, its competitor. On an earlier panel which I was on, Doug Melamed mentioned that when they began the case, they did not have particular evidence of price effects, particular evidence of innovation harms. And in some ways, the Government caught a break because when you look carefully at the case, it accepted that “harmed the competitive process” was sufficient, so it implied that that would be harm to consumers.

I think today there is a real danger if you brought the Microsoft case today, that you would end up in a situation which is too often, I think, the consequence of the consumer welfare standard, is it all becomes about whether you can prove a concrete price effect to consumers, whether there is evidence of harm, measured by prices to consumers. So I think today it is very possible the Microsoft case would be thrown out on the theory that the Government had failed to demonstrate that Microsoft had concretely demonstrated consumer harm.

Now, some people might say, oh, this shows how flexible it is and consumer welfare works because we did do the Microsoft case. But I think it was saved by the D.C. Circuit's willingness to basically equate a competitive process standard and a consumer harm standard.

So this is what I think is -- and I have mentioned this, but this is what I think, at its best, the consumer welfare standard becomes the process of competition standard. The two become one through the implication I just described. At its worst, it puts a burden on the plaintiff or on the Government in every single case to prove some kind of price effect on consumers. And without that, we will dismiss the case and, also, without that, we will make an agency unwilling to go forward with a case it thinks it might lose. So this is what I think is how it has damaged the antitrust law.

I also think that that focus, as I will discuss later, has tended to hurt the development of the rules and standards that should be the byproduct of antitrust jurisprudence and has weakened the jurisprudence, making every single case kind of a quixotic one-by-one search for can we prove that this cost the consumers a couple of bucks or not. And I think that is a damaging tendency for the antitrust laws.

So why do I think a competitive process standard or how do I think the competitive process standard would work? So let me say that as others have said that a competitive process standard is already in the law. It is frankly a return to what is sometimes already used by courts and has been used by courts, not here for decades, but, you know, for in this century. And I think it posits a basic question which, in practice, enforcers face.

So you are, you are sitting in the agency and someone comes and complains about conduct. You know, it could be multiple parties, it could be a single party, whatever it is, there is a complaint about conduct. And the question that the enforcer, I think, needs to be asking and, frankly, is often asking is whether these complaints of conduct, whether these disruptions are part of the competitive process or a disruption of the competitive process. That is essentially what Brandeis is saying in the Chicago Board of Trade opinion. And I could quote it, whether it promotes competition or whether as such it may suppress or even destroy competition.

I do not think you can get far away from that question and I think the consumer welfare standard has taken us away from that basic question as to whether you are promoting or destroying the competitive process towards this, as I say, quixotic search for even more esoteric theories of harm.

In some ways, at the risk of abusing metaphor, I think that the enforcers are and should be in the position not unlike a sports referee in a football game or soccer game, to be a little more European about it. And, you know, you have, in the course of these games, obviously a series of maneuvers, tackles, purported fouls. And in every -- you know, what the referee needs to figure out is whether that was actually part of the competition, a legal tackle like in football, or whether it was something that interferes or tends to destroy competition, you know, holding penalties, pass interference, and so forth, so that the competition itself gets destroyed. And I do not know if you can get much better than having the enforcer in the position.

The idea of trying to maximize consumer welfare is, frankly, a much more ambitious idea. You know, you are sort of asking the enforcer to kind of imagine and think about welfare, a very broad idea, almost a central planning kind of model, and imagine all the things that might come into this and say, well, this is not good or is not bad for consumer welfare.

To return to the sports referee, so the referee is just calling is that a foul that is hurting competition or is that part of competition. If the referee was then asked whether the foul in question was injurious to the fans, i.e., the consumers of the game, in each and every instance, you would have a completely different, almost an absurd standard. But somehow that is where we have ended up, in sort of a case-by-case review of each individual foul as to whether it has harmed consumers, when really I think what we should be concerned about is the competitive process.

So I think that is the direction we should move. I think it is much more realistic. I think it is in line with what people in enforcement agencies are already doing anyways. I want to close by saying that the competitive process approach, I think, ultimately will -- you know, in previous times, did and ultimately will continue to create a healthy common law jurisprudence of what is fair and foul in the conduct of competition.

What we are aiming for ultimately is competition on the merits. You want to stream off the things that are abuse of competition and leave companies in a position where they are actually competing on the merits.

So thank you very much.

(Applause.)

MR. SHELANSKI: Thanks very much, Tim. And thanks very much to our presenters.

THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW

(SESSION 1)

I would like to invite our commentators and panelists to come up and join us right now. As they come up, I will briefly introduce them again. A group of people who probably need rather little introduction to this group, but we have Tim Brennan who has served in numerous positions in government and is a Professor of Public Policy at University of Maryland at Baltimore County.

To his left, at least in the seating arrangement, is Deb Garza, a partner at Covington & Burling, former Acting Assistant Attorney General and Deputy Assistant Attorney General at the Department of Justice.

After that is Gene Kimmelman, and if Barry doesn’t want to be a director, Gene seems to want to be a president and CEO. He is president and CEO of Public Knowledge.

To his left, we have Sharis Pozen. Sharis, who was also a Deputy Assistant Attorney General at the Antitrust Division, is currently Vice President for Antitrust and Global Competition at General Electric.

And, finally, Fiona Scott Morton, former

Economics Deputy at the Antitrust Division at the Department of Justice and Professor of Economics at the Yale School of Management.

And I would like to start our commentators off just in the order in which they are seated and invite Tim to come up and present his slides.

MR. BRENNAN: Thanks for inviting me. And the reason I am up here is because I actually had like three slides to try to move myself along. So let me see if this works.

Okay. I wrote a paper in the Antitrust Bulletin a while back on this subject -- not that long ago -- on this subject, and one of the things I said is if you sort of pull your thumb out of the consumer -- out of the dike here, that there is a lot of things that can be introduced. And I have listed these because I actually had like cites for all of them. This is not just something I sort of made up. You know, someone once came to my office and asked where is this in my resources for the future and asked what happened to sustainable antitrust. So these things are also out there.

I will just mention because of Sharis on the panel, that on the media voracity thing, that is not just a 2016 campaign issue. I had some people come up to me back when GE bought NBC saying that merger should be blocked because now NBC is not going to cover defense contracting anymore. So there is a lot that is around on this.

Next, my views on this are more pragmatic than they are really philosophical. On CSAR (phonetic) concerns -- first, this is the great Fred Gwynne from the even greater “My Cousin Vinny.” And this is up here to kind of symbolize the question, you know,

how are judges supposed to do all of this balancing of all the things we have heard about today, and for that matter, enforcers, businesspeople, and others on this.

That is Erol Pekoz, who is sort of the founder or a big leader in developing the econometrics behind merger simulations. And that is there to symbolize the -- or indicate the question of isn’t antitrust already complicated enough. You know, I actually have some sympathy with what Maurice has said in other contexts about whether we should have more presumptions and lessons even, you know, with consumer welfare. But if you are going to grow this thing, it is going to be even more complicated.

Now, a slide that got lost in translation or transmission somehow was the next picture was going to be one of the earned income tax credit. That is there because almost all of the other issues -- so I will come back to the competitive process in a moment -- that have been identified as things that antitrust should worry about are economy-wide, and for almost all of those, there are better solutions than antitrust enforcement to try to deal with them.

And the last is just a picture of Thurman Arnold, and that is here to symbolize the idea that static efficiency, consumer welfare, that may be kind of boring, but if you have the Antitrust Division and the FTC worry about other things, who is going to worry about that stuff? Where are you going to handle it? Okay, so that is that.

Last slide, just four things just to leave in mind. The first is, would adding social policies put antitrust on the radar screen in a helpful way? One of the things that I have liked hanging around antitrust for all this time is it is kind of under the radar, and when it is under the radar, it gets to be kind of intellectual, kind of apolitical, all those sorts of things. And I am not sure if antitrust is viewed as sort of this great social improver that is going to stay that way.

The second is -- and this is kind of borrowed from some things I have been reading from Greg Werden lately -- which is whether the competitive process is an additional principle or constraining principle on consumer welfare, which is that we always care about consumer welfare. Antitrust cares about it only in the competitive process context. We will leave other consumer welfare contexts to other agencies and other laws.

The last is whether -- or the next to last is whether this is really about alternatives to consumer welfare or about whether kind of expanding the reach of antitrust, I think, is a fair question, things like no-fault monopolization, for example. And one could talk about that. Again, my concerns about that are more actually pragmatic than, in some sense, matters of deep principle.

And the last of these is -- I will call this a plea -- which is if you care about these other social goals, please do not waste your time on antitrust. If you care about income inequality, if you care about jobs, if you care about environmental protection, if you care about all those other things, do not waste your time doing this.

Thank you.

(Applause.)

MR. SHELANSKI: All right. Thanks very much, Tim, for those very thoughtful and provocative remarks.

Deb, I would like to turn it to you.

MS. GARZA: Okay, thank you. Can we reset the time so I can keep track of myself here.

Okay. So, look, I do not have slides. So I am going to remain comfortably seated. I think it is important for antitrust enforcement to be guided by predictable, administrable, principled standards that do not vary from administration to administration or with every political wind. That has been the key strength, I think, of our antitrust policy. And the body of case law that has developed around and given content to the consumer welfare standard I think has done a good job of meeting those objectives of predictability, administrability, and principled standards.

Now, I do think it is important that we continually assess the performance of antitrust enforcement and whether we are achieving the right results. I was part of such an effort as chair of the Antitrust Modernization Commission that looked at these issues, including the consumer welfare standard from 2004 to 2007, and I am a fan of these hearings. But I think that our assessments have to have a strong empirical foundation and I do not believe that the case has been made for repudiating the consumer welfare standard or for any better replacement standard.

More pointedly, I think it would be a very large mistake to repudiate the consumer welfare standard or to try to transform the antitrust laws into a cure-all for every perceived social ill. With due respect, I do not think the presenters today have identified a single case wrongly decided because of the consumer welfare standard.

MR. WU: Do you want us to get on that?

(Laughter.)

MS. GARZA: Yeah, well, and, actually, Tim, I want to thank you because you helped me make that point because you talk about the Microsoft case and I think it actually disproves the thesis. You acknowledged that some might argue -- that Doug Melamed argued that the D.C. Circuit’s opinion proved that the consumer welfare standard is sufficiently flexible to protect competition, including where the focus is now price effects. And I would say the same. I would say that it does because it does. It is strange to me to use a case that came out right as proof that there is a risk of it coming out wrong.

And I think it is important to remember, because you might get the idea, I think, listening to the first four presenters that antitrust decisions are politically driven, that it is an R or a D thing. But, in fact, the Microsoft case continued on under two administrations, one Democrat, one Republican. And then look at the court, on the court, four of the seven judges were appointed by Ronald Reagan and George W. Bush, Doug Ginsburg, Steve Williams, Dave Sentelle, Raymond Randolph, all Republican appointees, all frankly people who, if you look back, and particularly at Ginsburg, all believed in the consumer welfare standard.

But as you say, you feel comfortable with that Microsoft decision, which to Maurice's point, did talk about the competitive process. So I think it is helpful to pause on that case, which you chose to emphasize because I think it does make the point. My concern is that some of the critiques of the consumer welfare standard are a little bit too abstract and rest on a caricature of what the courts have done with that standard in place.

And I would like to just go back and there are a couple of cases that I pulled up while I was listening to you. For example, 1958, Northern Pacific Railway. The Sherman Act was designed to be a comprehensive charter of economic liberty and of preserving free and unfettered competition as a rule of trade. It rests on the premise of the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic, political and social institutions.

That has been a bedrock principle that you will find in the Antitrust Division Justice Department statements of policy going way back, going back -- I know because I was there when it was written -- to the Reagan Administration.

And, finally -- and I have one minute, so I will jump to why I say I think it is particularly dangerous to throw away the consumer welfare standard without a good replacement. One of the things that I will pick up on, I think it was Barry who talked about the 1984 merger guidelines as being sort of a signal of what he thinks is wrong with the consumer welfare standard. Well, I happened to have been at the

Antitrust Division at the time that we did those merger guidelines and I will tell you antitrust enforcement was under a lot of pressure at the time for people who were concerned that it was not being applied in a smart way that was aware of how markets operated, in a way that was preventing, you know, the steel industry and other industries from being able to compete in the world marketplace.

We did not so much change the enforcement approach, but we changed the articulation of it. And I actually think that the consumer welfare standard saved antitrust. Because I think that antitrust was losing its legitimacy, was losing the consensus that has supported strong antitrust enforcement since then.

And, finally, with my remaining time, administrations going way back, including -- and Sharis can testify to this -- in the democratic -- with Christine Varney, for example, during the Obama Administration, in prior Republican administrations, today, we have made great efforts to try to convince the rest of the world that the consumer welfare standard is a good principle on which to build competition law. And I think that that has helped us to convince other countries about the importance of preserving competitive markets.

So my concern is that throwing away the consumer welfare standard is going to do much more harm than any good it could.

MR. SHELANSKI: All right. Thank you very much, Deb.

Gene?

MR. KIMMELMAN: Thank you, Howard. My head is hurting trying to figure out how to address this. So I am going to run down a list of a few things really quickly just to try to get back at it.

You know, I love a bunch of various quotes from Brandeis and others, and then it immediately makes me think of some quotes from Supreme Court cases that are the current law that are diametrically opposite to what Barry was saying. And I am just trying to figure out how to be practical here because Louis Brandeis is not on the court. None of the justices resemble Louis Brandeis. None of the people going on the Court of Appeals now look anything like that or think anything like that. It is just not our world and it is not the jurisprudence as interpreted. So I want to come back to the idea of legislation in a minute.

So how to make something productive out of this, what I keep hearing is that we are really about the competitive process in most instances and we are trying to figure out how to get at the framing of a standard, whether you call it consumer welfare or you try to adjust the name of it, what I keep hearing from everyone is there is enough confusion around how it is being applied that we ought to look at that more carefully. I think that is a fair thing to do.

I actually think the way to do this is to put it in front of Congress because the question is would Congress pass the Sherman Act today if it were before Congress or would it look like something different. We ought to have that public debate because what we are doing is we are talking about a balancing of values that is -- in the digital economy, maybe is worth rejiggering or thinking more carefully about where the burdens lie, what the presumptions are. I think that would all be extremely productive and appropriately before Congress because this is a set of policy tradeoffs.

Even if you were to try to think about moving away from a consumer framework, I will give you one example from my experience that I think is extremely relevant here. This is not about exactly what the courts say only, it is not about what the enforcers say only. I cut my teeth on the AT&T

breakup coming out of law school. And I have to tell you that I believe it is easy to say that that case emanated from the failure of regulation and the need for the Justice Department to step in, but I do not believe that that breakup, one of probably the most significant antitrust interventions in modern time, would have survived more than a few years if there had not been a regulation in place.

Because before the ink was dry on the pen -- from the pen of Judge Greene, there was a proposed $20 billion dollar set of rate increases across the country. And without regulation, Congress would not have stood for that for a minute. So my point is it is about the consumer on some level. It is about looking at consumer harm somewhere in the process. I do not think you can disregard that whether or not it is what you call the standard. Antitrust law will not survive if the benefits do not derive to the consuming public.

So from all of this, what I take from the various presentations is there is a lot of cleanup that needs to be done, a lot of need to focus on enforcement practices, clarity in enforcement practices, and I would say, from my perspective, aggressively pushing the courts to go to the limits, but not go beyond the limits of what antitrust can handle effectively.

But antitrust is not the only tool of competition policy, let alone labor policy or social welfare-type policies. We have sector-specific legislation across almost every sector of this country that deals with ways to both promote competition and promote other values. I think we need to align those with antitrust, and I think it is as much a role of the antitrust enforcers to help those agencies figure out how to work closely with strong antitrust enforcement.

The one sector we do not have that that I think we need to confront is the tech sector. It does not have that history of sector-specific regulation. We have a lot of questions being raised, both vertical, horizontal, potential competition. Maurice raises data. That is an important factor. I think we need to look carefully and say what, if anything, should there be in public accountability that goes beyond antitrust in that sector. I think that would be the productive way of taking all the good ideas that have been presented and framing it into the right policy debate for our society to address in the digital economy.

MR. SHELANSKI: Thank you very much, Gene.

I would like to turn to Sharis Pozen.

MS. POZEN: Sure. And I am with Gene, trying to think about how to frame this and feeling the ghost of Judge Bork, you know, who died in 2012 and wrote The Antitrust Paradox in 1978 as sort of the antitrust boogie man. And both Steve Salop's presentation and the presentation here today I find astonishing because a lot has gone on since then and a lot of development of antitrust jurisprudence and economics have gone on since then, but I'll leave that for another day.

So I look at this through the lens, I sit here today as the Vice President of General Electric, but also as a former enforcer. I started my career in competition and in consumer affairs answering the hotline in the Missouri Attorney General's Office, where consumers would call with their concerns. And, so, I feel like I have spent a good portion of my career concerned about consumers, thinking about consumers, starting at the Federal Trade Commission as a staff attorney, working in private practice, and then at DOJ, like Deb, as a deputy and then in the chair as the acting AAG.

I really do, as I said earlier, welcome

these debates. I think this kind of exchange forces us to figure out where we sit on the sides of these issues and various alternatives that have been presented today. I think the FTC sort of letting a thousand flowers bloom and analyzing these is important as well. But I continue to believe that consumers need to remain at the center of the analysis. And I'm very concerned that some of the presentations we had today take us far away from that. You know, I actually think that we might be seeing folks who aren't as concerned about the competitive process or consumers but instead perhaps a political agenda.

So why do I defend the use of consumer welfare standards, you know, whatever name we call it, because I would suggest what Tim Wu has articulated is incorporated into the consumer welfare standard, the competitive process is part of that today and has been part of that. As Deb said, we have a collection of robust jurisprudence in law enforcement -- hard and soft law -- that we can rely upon. It guides businesses like General Electric, enforcement agencies, and consumers.

The backbone of that collection of jurisprudence is economics and economic analysis, and

I believe that consumers benefit from competition. I believe in competition. I also believe in vigorous enforcement of the antitrust laws because I think consumers benefit from lower prices, more choices, and innovation, and I think competition derives that, and I think good competition enforcement allows that to continue going forward.

You know, businesses strive to deliver better products at lower costs. And I think that's all part of the economic analysis and learning that underlie our consumer welfare standard.

So when I think about what’s wrong with -- there’s nothing wrong with discussing it, but what’s wrong with shifting this, you know, to some of the other analyses that have been presented today? So, you know, should we be thinking about fairness for example? Should we be taking into account externalities like harms to workers or the environment? It all really sounds great to take those into account.

But, again, I think the unintended consequences of doing so far outweighs the benefits. So, first, I think there’s a level of subjectivity that’s added to the evaluation of a merger or conduct, and that would be intolerable, and the uncertainty that would provide, how would I advice GE to comply with the laws when there’s that much subjectivity if we were to use a fairness standard or evaluating externalities? I think that turns to standards that are in the eye of the beholder.

If someone who follows the beliefs of Ayn Rand is sitting at one of the agencies versus one of our, you know, colleagues today that are sitting at the agencies, I think it would cause a variance and I think cause enough confusion and uncertainty. Deb certainly touched upon that. I don't know that we have -- you know, how do you define what is fair, how do you define those issues?

Second, I think it ignores some political realities, as Gene pointed out, you know, in terms of our judges today, you know, the reality that we face. And there are a lot of people that decry a lot of the murders that have been cleared, you know, Amazon, Whole Foods, Instagram, Facebook, and Google’s acquisitions. As we talked about before, I think, thinking about those courts and what will happen in those courts, and if you lose a case and what the case law that comes out of that will mean to the rest of the enforcement agenda, whether it’s private plaintiffs or state AGs or the federal agencies, is important.

Case selection, as we talked about in the last panel, is, to me, critically important. Also, when I sat in the chair at DOJ, I saw how the political process can work and work to your disadvantage. We did the ag hearings, we looked at agricultural closely, we worked with the Department of Agriculture, but, in fact, we ran into an incredible buzzsaw because the industry rose up; Congress threatened the DOJ budget and said we’re going to shut down your budget, so we’re going to shut down all enforcement if you continue with this, and actually prohibited the Department of Agriculture from working with us on these issues.

So there’s a political reality that you have to take into account that I think has to be weighed into the -- you know, added into the balance.

MR. SHELANSKI: Great. Thanks very much, Sharis.

And Fiona.

MS. MORTON: All right, since I'm last, I’m going to try to synthesize a little bit. My feeling about this debate on consumer welfare standard is that it's a little bit of a red herring. So the consumer welfare standard was, I think over the last 30 years, redefined by defendants who are profit-maximizing and want to be allowed to merge with whoever they want and exclude whoever they want, and we would expect that.

And the goal of those kinds of parties is to raise the burden to the plaintiffs and try to convince the courts that plaintiffs have to achieve very specific but-for world estimates of prices and products that would have been invented if the merger were allowed to go through and so on. And one impact of that high burden of proof has been a big emphasis on price because economists have, for various reasons, moved further on price than, say, our studies of innovation. So we end up with the street lamp problem that Tim highlighted.

So then that standard succeeds, that redefinition of consumer welfare succeeds in influencing the courts. Now we have the left wing attacking that thing. Okay, that's not the consumer welfare standard. That's false that that’s the consumer welfare standard; however, it's true that that thing, the alternative defendant-friendly standard, has not worked. Okay, so the left wing is quite correct that what we have is a situation with insufficient, I think, antitrust enforcement, rising problems with competition, rising markups, declining labor share, problems with very static market structure because entry is harder and so forth.

Okay, now, do we fix this by including other values like literacy, democracy, and whatnot in the standard? I think Sharis has been eloquent about that; Deb has been eloquent about that; likewise Tim. I think Jane is right, if you want literary and democracy, you get a regulatory agency to do that and you do not ask an antitrust judge to do that.

So how would we actually fix the consumer welfare standard to go back to the thing that we actually intended in the first place? We have seen these harms accumulate since 1980. We need to get the balance of the cost of underenforcement, so monopoly prices and harms from lack of innovation and so on to balance the cost of overenforcement -- not as much innovation on ways to do things online, whatever.

So I think there’s a lot of evidence to say, as I said before, that we need to be a little bit more aggressive. How should we change? Some of the things that have come up today are ideas like let's focus on the competitive process. I think that's extremely helpful because a world in which an expert witness has said, tell to me the exact counterfactual that would have occurred if this dominant platform had not excluded this small entrant. How quickly would the entrant have grown? What products would the entrant have brought out? What prices would the entrant be charging? Okay, those are really difficult questions to answer when you don't see that world because the entrant was excluded.

So it's essentially an impossible standard, but being able to say, well, the entrant was excluded, and we have proof of that, and that's all we need to show because we feel that if the entrant's allowed in, the entrant will be doing something useful for the consumer, and that's the way markets work. So I think competitive process is a really good idea.

Monopsony, renewed attention on that is a good idea. That's just analogous to monopoly. We know exactly how to analyze that. And renewed attention to efficiencies to make sure that they're verifiable and merger-specific, as was emphasized this morning, and that the standard of proof there is high. We don't just find two random documents; we actually have really some serious analysis about those efficiencies, and the burden of proving those efficiencies is on the defendants because they're the experts in their business and their industry and they understand it.

So all of that would be terrific, and perhaps we would put those things in a law and have a better law. That’s great, but when I look out today, what I see, as Gene pointed out, is I see courts that are reluctant to protect consumers. We look at the Amex decision, and the court’s very anxious to protect Amex cardholders and that seemed to be all. And Amex cardholders, in case you do not know, are not a randomly drawn segment of the population. So if those are your set of decision-makers and you give them discretion, okay, you’re not going to get an improvement. Give them better laws, but still there has to be clear and convincing evidence, and it's up to a judge to decide what clear and convincing is. So it’s not clear to me that you move the ball very much, even if you have a lot better laws.

I think there are two options when your decision-makers are chosen or have been taught to not be protecting consumers. You have the kind of what I’ll call the German style option, and maybe Morris is along these lines. Let's make a long list of things you’re not allowed to do. And then if you pick any of those boxes, it's illegal.

The other one is to move the discretion to a different set of people. So the consumer welfare standard is fine; discretion is excellent; but we need different judges or a different court or some other setup as a way to run our antitrust laws if we'd like to get answers that are in the best interest of consumers and society. Thank you.

MR. SHELANSKI: Great. Thanks very much, Fiona.

Before we get some back and forth going amongst some panelists here, I just want to remind everybody that there are helpful folks out there with these cards, on which you can write your questions for the panelists. So I would encourage you to do so because it would be great to have some time at towards the end of the session when we address your questions.

We already have one asking for breakup of a divestiture and breakup of the large sports enterprise. We'll get to that later, but I would welcome your questions.

This has been really a fascinating and provocative panel. I think we've heard a variety of different viewpoints, ranging from really just a fundamental rethinking of what antitrust should be to I think a strong defense of the status quo, and then in between sort of ways that we can work within the existing framework, maybe restore forgotten aspects of that framework and push harder on some existing aspects of that framework. So I think we’ve got a very broad range of viewpoints.

And I’d like to sort of talk a little bit about where I think the consumer welfare standard comes from very briefly and then open up a couple of questions for the panel. And I will direct these questions, but really they can be answered by any of you. And I'm sure some of our four original presenters may have some rebuttal that they want to slip in there, too, to some of the commentary as well.

But I think one of the big themes that we’ve heard on the panel today is how we achieve fairly broad and long-term objectives; I would say heterogenous broad and long-term objectives through a statute and a set of institutions that effectively set up a reactive, case-by-case enforcement structure, whether that is public enforcement or private enforcement.

So we have these lofty goals of the antitrust laws. I think a fair reading of the legislative history and a lot of the early thinking in the courts about the antitrust laws was that they did have broad purposes, that the hope was that by enforcing competition and preventing monopoly, lots of good things would happen, among them, more economic competition, but included among them also a broader distribution and a prevention of monopoly, political power, and control over the legislative agenda.

So these are broad things that the antitrust laws chose to achieve, but, of course, they're very terse statutes developing through common law and that really came about through specific case-by-case kind of development. And I think this led to a serious question, which is how do we choose specific and consistent criteria to apply to these specific cases as they arrive that will, over time, continue to achieve these very general, long-term, and I would say potentially conflicting in a specific case objectives.

And so I view the consumer welfare standard as something of a pragmatic solution or answer to that question. What is the thing we do in the specific case? What is the criteria? What are the criteria? What is the standard that we apply in the specific case that cumulatively over time will seem to work towards achieving these broader statutory objectives that Barry and others I think have very articulately presented here this afternoon?

So in some sense, I view the consumer welfare standard as a method, as a pragmatic means, as a set of criteria, if you will, to apply in the specific case but not as a philosophical program in and of itself, at least when it arose, and I think when Deb talked about the 1984 guidelines as being a way to shore up, further define, and rearticulate the consumer welfare standard, I think that that's what it was. I felt that that was very much a methodological change, as opposed to a philosophical one.

But maybe, as often happens, the medium becomes the message; the method becomes the objective; and maybe there is a point where we have gone too far, and those things that were meant to be specific criteria to achieve broader ends have become the ends in and of themselves. And, so, what I have heard is a variety of solutions to try to restore the real objectives and not let what really should have been a set of methodological criteria become the objectives themselves.

And we’ve heard a variety of proposals on this panel, ranging from, I think, fairly a radical program of rethinking the antitrust laws fundamentally; a more regulatory program; perhaps a much more sort of rigid set of presumptions to think -- but all of this comes together, I think, in a way to restore a competitive process or come up with criteria to put in place effective competition.

So that leads me to a couple of questions that I want to throw out to the panelists, and I think I might start with you, Maurice, because you present what I view as something that's aimed to be another pragmatic solution, which is let's go from consumer welfare, which has spilled over into this too narrow set of objectives itself, and let's bring -- come back to a methodological solution called effective competition.

So when I think about that, though, I have to know what competition is. So my first question to you and then to the panelists is what is competition because I think that also gets to the competitive process question. But then when you start to talk about counting to four or other kinds of solutions, that, how do we get to that number? How do we know that's the right number? Doesn't that require, as Deb I think very correctly said, as Sharis and I think implicit in Fiona's remarks as well, was a rigorous empirical view of what will be good, but then how do we define good, and aren't we just back to the question of what is the relevant standard.

So what is competition, and how do we know when it's enough or effective? What is our metric?

MR. STUCKE: Sure. So, I mean, it’s a fun -- the interesting thing is I actually wrote a paper on what is competition, and you would think there would be a uniform definition of competition, and there isn't. There are various conceptions of competition and how competition works in different industries. So what -- the effect of competition is you look to see what the rivalry or the competitive dynamics is in that particular industry, and then this is aligned with the incipiency standard. Would that have a substantial lessening of competition? That’s within Section 7 of the Clayton Act.

And I think this is actually more realistic. Now, I’ve heard how consumers are front and center. That's not true. I mean, you look at radio mergers. The DOJ does not consider the impact of radio mergers on consumers or on listeners. They look like what Tim pointed out, at what’s quantifiable. They look purely on advertisers and the like.

So what we would look at is what is the competitive process and what is the threat to the competitive process. And I think this is where the Supreme Court, before the whole consumer welfare, would look at what the legislative history desired, what were the particular evils that the legislature was aimed. And if you look at like the Klor’s decision, there you didn't have to show necessarily what the impact was on consumer prices. You didn't even have to show how the elimination of Klor’s would necessarily harm consumers.

All that the court pointed out is that it would impinge the competitive process. Now, you might come back and say, well, how do we know how much is enough. Granted, we can have the debate, but at least what I’m offering is something far more transparent than what the consumer welfare standard has today, where the court says, we're not bound by stare decisis. We're not bound by the legislative aims, that we can base it on our conception of modern economic theory, and it can evolve with new circumstances and new wisdom.

So you basically have an untethered Supreme Court through a rule of reason that doesn’t necessarily always consider the impact that it has on consumers.

MR. LYNN: Can I --

MR. SHELANSKI: Go ahead.

MR. LYNN: No, I mean, Howard, I think that's a terrifically important question, and it actually gets at the heart of everything that we do in this room and we do in America. You know, the answer is, like, how do we get to the particular number that’s right. You know, one option is that we have experts do it. We get a bunch of economists in a room. We get a bunch of lawyers who have spent the last 30 years, you know, thinking about this in a room, and then we close the door and you guys come out with a solution and you present it to the public. That's one option. That's actually how we’ve lived in this country for the last 35 years, you know.

Tim made very clear he would like to continue to live that way. He said I like antitrust being under the radar.

MS. POZEN: Oh, God, I can't let that stand. That is absolutely not true.

MR. LYNN: Not anymore, Tim. The other option -- the option is through public debate. You know, I mean, remember what I said before about what W.E.B. Dubois said, what is America? It’s a vision of democratic self-government, a domination of political life by the intelligent decision of free and self-sustaining men. So we can do the little, tiny group of experts, self-chosen experts, self-regulated experts, a little association of experts, or we can have all of the people involved. Those are the two options.

Now, in terms of getting to the number, how do we get to any of these numbers? The people decide. I mean, think about -- I’ll give you an example. Northwest Ordinance, at the beginning of this country, people were just drawing lines in the map.

Carl, we’ll get to you later.

Northwest Ordinance, drawing lines on the map. You could draw the lines this far apart; you can draw them this far apart. What was the result when people got together and drew the different lines? They drew in these different sections, and they made the law, they made the regulation, they made the policy such that each family would end up with about 160 acres, a quarter section.

That was a political decision made by the people of the United States working together. One family, 160 acres. Could -- there were other people that said, you know what, we’ll give one family a million acres and let them do with it what they will. That actually was in the southern part of the country. Maybe it was only 20,000 acres or 10,000 acres.

So we have two different visions. So we can go with the vision in which we give to one family

20,000 acres, an entire state to run, or we can say one family gets 160 acres. That's a decision for the people to make.

MR. WU: Can I get --

MR. SHELANSKI: Tim, sure.

Well, Sharis, you --

MS. POZEN: Yeah, I just have to kind of call bullshit on that. I’m sorry to use profanity. But, you know, again, if you’ve sat in the chair and made the decisions, if you’ve worked in the agency, if you’ve striven to take into account consumers, the idea that it's behind some closed door and decisions are magically made, how many consumer groups did I meet with? How many consumers did I talk to? I had consumers calling me on the phone. So I’m just -- I can't let that statement stand at all.

MR. LYNN: We can actually talk about the connection between General Electric and American antitrust laws.

MR. SHELANSKI: Whoa, whoa, whoa. I think that's getting pretty far outside, so yeah.

MR. WU: I’ll go back to what I was going to talk about. So, no, Howard, I want to draw on your and also Fiona's comments. I think it's very important not to discuss the consumer welfare standard in theory, you know, what it might be, what it originally was intended to be, but, in fact, what it is today.

And I see it, I think it, as Fiona suggested, primarily evolved into a burden on plaintiffs and government to prove price effects in each and every case. And the absence of available price effects is typically, not always, fatal, unless you have an extremely compelling alternative economic framework, which is hard to find. So that is what it has become, a burden on cases. And I think, you know, there are those who I respect, many in this room, who sort of fixed consumer welfare or understand it could be better. And, you know, I respect that view, but I think it is tainted. I mean, I think this is where it is today. It has become this situation where you're in an agency and you're, like, that looks like very anticompetitive conduct, oh, but we don't really have price effects, we can’t really -- we’re not going to be able to do much with this.

So, Debra, you asked if there are any cases I could think of that have gone wrong because of this -- I guess I’d call it the fake consumer -- whatever, this standard we have. Here’s a few -- the American Express case, the AT&T-Time Warner case, Brooke Group, the American Airlines predatory pricing case, the approval of Facebook's acquisition of Instagram, the approval of Facebook’s acquisition of WhatsApp, the approval of Google’s acquisition of Waze, a three-to-two merger, the approval of LiveNation-TicketMaster, the approval of the American Airlines-U.S. Air merger, the approval of the United Airlines-Continental merger. The list goes on and on. These are just well-known examples. I think these have all been failures in antitrust law to deal with anticompetitive mergers or anticompetitive conduct. And, you know, the AT&T-Time Warner case just recently tried shows the inherent vulnerability of this consumer welfare standard. Here, you have Carl Shapiro, you know, one of the greatest economists of this generation, demonstrating, you know, through a pricing model what harms were going to come from this merger, and Judge Leon, who just sits there and doesn't seem to understand economics very well at all, just says, no, I just don't agree with this, and it’s all poppycock and, you know, so we’re in a situation where it’s not like it’s this determinative science.

I mean, the fact you had an extremely convincing model and, you know, the best science we had and this war over price effects, which is what we’ve turned the antitrust law into, as I said before, has elevated the joke about the streetlight and the economist into the soul of the law. And what’s missing here is what you talked about, Howard, which is the long-term vision. I think the antitrust law is -- I think it’s the wisdom of the common law that we need to trust in, which is you have case-by-case situations and you call out anticompetitive conduct or not on categorical bases. That's how the common law works.

These, you know, case-by-case price effects studies do nothing to develop a common law. And I will just close by saying the law is better at protecting process than it is at maximizing welfare. You know, in so many areas we have in constitutional law we have high values, like equality, freedom of speech, and we protect those values by protecting processes. And that's what I think courts and lawyers do well. That's why I think we need to go back to the protection of the competitive process. Thank you.

MR. SHELANSKI: Deb and then Jon in response.

MS. GARZA: So, look, the benefit of the consumer welfare standard is that it tells you what we’re focusing on. We’re not focusing on protecting competitors or any other thing. It basically tells you this is where you are looking at. And, by the way, a consumer isn't necessarily the person who listens to the radio. It’s -- in all of the enforcement actions that have been brought, and whether it’s radio or television or other, it’s the immediate consumer, the entity in the chain of distribution.

So the people who buy advertising, radio and television stations sell advertising, the focus has been what’s the effect on the output of that advertising, and the price of advertising. So it’s a little bit of a caricature to insist that the consumer welfare standard puts blinders on judges and enforcers and allows them to look only very narrowly at the ultimate consumer.

That's not how the law has been applied. The value of the consumer welfare standard, though, is that it is -- it does rest on the notion that you have to have a theory of competitive harm. And we have used economics to help us to understand how markets operate and to help tell the story of the theory of competitive harm. That’s fundamentally what happens.

Now, you may disagree about how certain cases came up, but the question is, you know, whether the consumer welfare standard, that requirement that you have something that’s economically based, empirically based, that you have a theory of competitive harm, that you’re focused on -- not on competitors or some other thing, but you’re focused on, you know, the efficient allocation of resources and the benefit to consumers, the benefits that the court outlined in Northern Pacific Railway. That's what the standard is.

So the cases you mentioned, you haven't linked them to some specific problem with the consumer welfare standard as opposed to judges seeing the facts differently, enforcement agencies making a different call, and I don't think those cases at all prove that the consumer welfare standard has been a disaster. It’s not enough to name cases where you just disagreed with the results. We have to connect it to what is it about the consumer welfare standard, what is about having to use economics to prove a theory of harm, what is it that made those cases, you know, to be wrongly decided.

But, finally, on the price effects, you know, look, that’s one thing that we use. There are cases that are decided not based on price effects. We look at mergers where we predict an effect, not just on price, on innovation. We look at conduct that is exclusionary. You don't just have to have price effects. Private plaintiffs in order to recover damages, yes, indeed, you have to have price effects, but it’s not -- again, and I think it’s fine if people think about, well, what if we don't have price, we do not have that as a measure, how else can we look at the competitive effects? That’s fine. I just do not think that’s precluded by the consumer welfare standard.

MR. SHELANSKI: Great. Thank you, Deb. I’m going to go to Jon, and then I think Fiona had a comment after his.

MR. SALLET: So in some sense, a lot of the conversation is about two standards, both of which can be found in common law. I mean, two formulations: use of the term “consumer welfare,” the use of the term “competitive process.“ So why do I think competitive process is a clearer way of explaining what we’re up to?

Well, I started to read a quote, and I didn't read it all, but I want to go back to what the United States Government said, this Administration, to the Supreme Court last year. Although the Supreme Court -- “Although the Sherman Act is a ‘consumer welfare' prescription, courts do not enforce that prescription by making their own judgments about the allocation of resources that would best serve consumers' interests. Instead, consistent with the Sherman Act's fundamental policy of market competition, courts protect consumers by protecting the competitive process."

It is a formulation that is available to us under current law. And I think it is a clearer description of what we're looking at when we're looking at the protection of competition. And I think the example that comes up so clearly comes in buyer power.

Now, Deb has said, and she's right about this, that to antitrust professionals the term "consumer" doesn't always mean consumer. I mean it didn't mean it to Robert Bork, who used consumer welfare to talk about total welfare. But when one is in court litigating against people who are trying to do their best to defeat a government case, there is a potential for confusion.

My view is the Government bears the burden of persuasion, it need not bear a burden of unnecessary explanation. So two examples. In October of 2016, when I was at the Justice Department, with the FTC, we put out HR guidance on no-poach agreements, okay? So no -- it would be improper, indeed per se illegal, to have a naked restraint where competitors agree not to hire each other's workers or certain workers.

So I’ve been in conversations with very experienced antitrust people who say, but the problem with that is there’s no consumers in the picture. The consumer welfare standard requires impact on consumers. But it doesn't. It requires, as I think Carl will say in a few minutes, impact on trading partners.

Now I take Deb's point that one can define the term “consumers” to mean that, but when one is in court against an adversary who’s arguing the opposite, it’s just cleaner, simpler, and more to the point to say we’re looking at a competitive process, we’re looking at harm in this case to workers.

Second example. The Justice Department litigates the Anthem-Cigna merger at the end of 2016, coming into 2017. There is a buyer power claim, okay, that the merged entity will have power, unfair power, that it will use to extract lower prices from upstream hospitals and physicians. Not surprisingly, the merging parties say low prices are good, and they cite a lot of stuff that says -- and there’s a First Circuit case everybody cites, low prices are good, that's the end of the matter. It’s about consumers, they’re getting lower prices, our customers are getting lower prices.

Well, it’s not the right analysis because it’s a buyer power case, and we know from something like the Weyerhaeuser facts that one can have monopsony power, for example, that harms upstream sellers without reducing output and, therefore, not increasing higher prices to downstream consumers.

So it seems to me if we have an existing standard and it is clearer and it speaks to circumstances that we know are important with less confusion, it’s a good place to go.

MR. SHELANSKI: Okay, I want to -- Fiona, did you want to follow up?

MS. MORTON: Just very quickly. I just wanted to react to Deb's assertion that Tim hadn't proven that the consumer welfare standard is not working. I think what Tim and I are both saying is that the consumer welfare standard as originally envisioned is fine, there is nothing wrong with it, and what we’re, at least I am worried about, is the level at which that is applied.

If the standard of proof, if the burdens of proof are just too high for plaintiffs, then the courts aren't going to be able to balance -- they’re not balancing -- the harm from overenforcement with the harm from underenforcement. We have to balance those costs to get -- because we know we’re going to make mistakes. And I think the evidence has accumulated quite convincingly at this point that the harms from underenforcement, which is where we are now, are big and outweighing the other side.

And the cases that Tim rattled off are just case, you know, demonstrations of that very same point. So it’s the standard is not -- the standard we use, sorry, the standard that’s written down and that we all believe we’re using, I think is an excellent standard. That's the consumer welfare standard.

Has that been morphed in practice into something that allows for underenforcement? I think that’s what we’re seeing, and so the theories of harm are there and they’re fine. There’s nothing wrong with them, and we can articulate them and that, I think, is the problem.

MR. SHELANSKI: So Maurice wanted a very short remark.

MR. STUCKE: Right.

MR. SHELANSKI: And then I’m going to follow up with a different question.

MR. STUCKE: And I think our debate shows the extent to which the subjectivity, because when Deb says that people who buy advertising count, then that basically would give per se immunity to anyone in the digital economy where their products or services are given for free. And I do not know, I mean that’s really a normative judgment as to who counts and who doesn't count, and there the consumer under the consumer welfare standard wouldn't basically be taken into account.

MR. SHELANSKI: Gene.

MR. KIMMELMAN: Yeah, so, look, I think that last point from Maurice is an important one because I have been involved in a lot of those radio discussions, as well, radio and TV, and now it comes up in the digital marketplace. And if you flip it the other way and you’re not looking at advertisers and you’re looking at the individual citizen listening to the radio, how in the world are you going to measure that? And I do not want to end there.

What we have tried to do in that market is come up with ownership limits and market structure standards under the Communications Act. So I just --

I’m pointing that out because some of these problems that go beyond just a bad judge or a confused judge or an unfortunate settlement that maybe should have gone a little bit more one way or another way or should have been challenged rather than settled, a lot of these have to do with a specific problem and a specific kind of industry.

My experience is after having banged my head for 30 years trying to fight on vertical and horizontal enforcement, I learned the hard way, the school of hard knocks, that there are certain things that just you’re really not going to be able to do well with antitrust. And so I went to Congress, and we’ve done it with a few industries.

I suggest that's where we also -- we need to have that on the table here. If you do not like regulation, some of the kinds of problems, I think particularly that Maurice is addressing -- privacy, data protection -- really deserve attention, but I do not see how antitrust enforcement can get you from here to there without totally revamping things and causing other equally problematic difficulties.

And not just say I -- you know, I appreciate what Maurice has tried to do, and if I was just looking at effective competition, I would be really afraid, at least the statutory language he’s proposing, because I’ve dealt with effective competition standards that open up markets where there’s absolutely no competition whatsoever, done by regulatory agencies.

So the term sounds right, but it’s as much -- it’s easily as much an empty box in many circumstances as consumer welfare if you’re not really careful about defining it. And you, yourself, said, competition means different things in different kinds of markets. So I’m struggling here. That sounds to me much more like a sector-specific approach, which I endorse, rather than a generic antitrust framework.

MR. SHELANSKI: So I want to lead in a little bit on something that will bring up both the notion of what competitive process is, but also what the process should be for thinking about new approaches to antitrust problems.

So, Sharis, I want to start by directing this to you because you were, I think, a big part of something important that happened at the beginning of the Obama Administration, which was withdrawal of the so-called Section 2 report that had come out in the Bush Justice Department.

And one way to think about the Section 2 report is -- and I am sure there are people in this room who will correct me as to what really motivated it -- but one way to think about it is sort of a triumph of certain vertical models in antitrust that showed that, look, these vertical cases are so -- these conduct cases, particularly in the vertical, you know, Section 2 context, are so likely to be efficiency-oriented that public enforcement is really not terribly worthwhile, and sort of walking back from public enforcement of Section 2, particularly I think in vertical context.

And I think that we really had gotten to a point where there were very big barriers to plaintiffs. Plaintiffs weren't likely to win these cases, they weren't likely to win these cases because of what at that time the perceived economic wisdom had brought sort of antitrust policy to. So in the Obama Administration, there was a decision to remove that Section 2 report, partly as a statement to say we’re going to rethink this question, but then there’s a very hard question. When you have the pendulum moving in a particular direction over decades of accumulative research, enforcement experience, federal common law, it’s very hard to even start it swinging the other way.

So, Sharis, could you comment a little bit on what the thinking was substantively on what would follow the Section 2 report and what the thinking was procedurally on sort of how the Justice Department would think about what its enforcement criteria would be?

MS. POZEN: Sure. And when we arrived at DOJ in 2009, you know, that report had come out, and it represented an incredible body of work, so -- and that was said at the time when we removed it because it really was an accumulation of thought and cases over time. And so I think one of the things that gets lost in the discussions about its withdrawal is the fact that when the AAG withdrew it, she said this is an incredible body of work. However, and there was a however, it was the last paragraph about false positives that was concerning. It was the conclusions reached.

Also, if you remember, the Federal Trade Commission had not signed onto the Section 2 report. So, again, to, I believe it was Deb's comment earlier about international authorities, a lot of people were looking to the United States and saying you have, you know, a Section 2 report that’s not endorsed by both of your antitrust agencies, what does that mean and how should we interpret that?

So when the decision was made to withdraw it, the idea was to commend the work, because, you know, again a lot of work by both agencies had gone into it to focus on the beginning and the ending paragraphs and the false positives that were noted there and set a path to look for, you know, and prosecute and, you know, bring cases that, you know, would eliminate that sort of notion that we were all -- you know, we were going to continue to be concerned about false positives because that's the safest way to say it.

And we did bring a case, you know, in Texas, you know, regarding Texas hospitals alleging a Section 2 count. A lot of people have dismissed it as a small case, but, you know, again, it was an important case, and I have to say in other cases that we brought during that time, including the Blue Cross-Blue Shield case, there was a lot of discussion and discernment about how to plead that case.

And kind of getting back to Gene's point and the point I was trying to make, one of the reasons why we didn't include a Section 2 count, just to be clear, and the thought that went into that is because we were concerned it would diminish the Section 1 count that we actually felt like we could develop and proceed with and perhaps move the needle on these kinds of agreements in healthcare.

So it was that thought process that went into it, you know, how can we take this, how can we move it forward, how can we move the needle and do so in a meaningful way, you know, given where we started.

MR. SHELANSKI: So I want to pick up on sort of the process point that’s implicit in that. So in some sense, you’ve told a story of an agency that feels somewhat hemmed in by not the consumer welfare tests in concept, and this goes to Tim and Fiona's point that may have been just fine in concept, but the evolution of its application in a particular area and realizing that you would face possible consequences from trying too quickly as an enforcement agency to say, well, wait, we’re thinking a little bit differently, we’re going to draw on a different body of economics.

So the question is procedurally moving forward with thinking about the consumer welfare standard, I fully agree with Gene Kimmelman that this kind of set of hearings that the FTC is doing are vital to show that an agency is open to hearing all of these views and to thinking about these questions is critical.

I also have some sympathy, I must say, for Tim Brennan's view and maybe thinking back to when we had three economists and three lawyers sitting down and rewriting the 2010 Horizontal Merger Guidelines, it felt like paradise to me, and, you know, there was something very nice about the very technocratic and expert work that went into that, albeit it within a received framework.

But the question is, what can be done going forward? Do we need to get beyond thinking and even public hearings inside the agencies into a broader legislative process to get change? Or can we, staying largely within the expert structure, bring enough public accountability, public viewpoint, and public legitimacy to the existing process short of legislation through these hearings and then subsequent agency action? What is the process in which -- through which we are going to, A, decide whether change is really necessary, and, B, be able to accomplish it?

Gene?

MR. KIMMELMAN: Well, it’s a great framing, Howard. I think you do both. I think you need to push the envelope on enforcement in a way that is structured and principled. I think if we’re moving away from price, which I think makes sense in certain kinds of cases, certain kinds of markets, you still have to be precise. You have to have something that has a limiting principle and you have to have something that is understandable to all of the key players and stakeholders in the marketplace so that it is replicable and it is meaningful. So we need to work on that. Fiona says we haven't put as much attention into those things, and maybe that’s what we should, quality and innovation.

So that’s enforcement, but I think going back to the public, this has opened up a process that I think is vital. One of my biggest observations going into the Department of Justice is that, you know, the great thing was, it was a law enforcement institution, the walls are thick and often impenetrable by politics, I hope still -- they were.

But there is a downside to that, too, and that is that as many consumers called, Sharis, and consumers we see, we mostly saw expert lawyers and expert economists come in and got stuck behind those thick walls, and so getting out with real people who really have concerns about what is going on in the economy is, I think, critical. So I applaud the FTC for that.

I think we have to continue that, and I think part of that process is not jettisoning important principles and concepts. It’s getting out and engaging with the public and explaining how they work and how they do not work, what they do not do, but they, not leaving it there, letting people work with experts to figure out what else would you do if you weren't doing it through antitrust. What else is a plausible approach? I think that’s the constructive way of combining the two, Howard.

MR. SHELANSKI: So that's very helpful, Gene. And it actually ties in very closely to a good question we got from the audience. So there is virtue to this political insulation to this being off the radar, but there is the possibility it spills into an echo chamber of elitist thinking. I think we got some sense of that from Barry's remarks.

So, Tim, I would wonder how you answer that, Tim Brennan, how you answer that. Is this sort of lovely environment of intellectual experts shielded by thick walls, making decisions that affect people broadly in society, is that ultimately antidemocratic? Is there a way we can make those walls thinner without being penetrable to the wrong influences?

MR. BRENNAN: I do not think it has to do with the standard, just to get that out there. I mean, I do think that that’s a problem, and the ultimate arbiter of that is probably judges who have to be convinced, and that brings to mind an anecdote which was I used to think, probably going along with this elitist view, I thought a long time ago that maybe, you know, we should have specialized antitrust courts who can -- you know, where the judges can understand merger simulations and whatnot and all of that.

And I remember going to a session at ABA spring meetings where I think -- I believe it was Judge Diane Wood who argued against specialized courts on the grounds that if any ordinary -- if a federal judge can't understand an argument, how is an ordinary businessperson supposed to understand it? And so if judges feel more comfortable saying, look, I just do not understand this, this is -- you know, that you have to basically sell something in a way that is comprehensive, at least to that level, that might help.

MR. SHELANSKI: I’ve got Tim, Barry, and then Jon.

MR. WU: Yeah, listen, antitrust has a major elitism problem. I do not think there’s much doubt about it. You know, let's just stick with merger review as just one example. You know, these are of incredibly important consequences for everybody's lives. You know, the last ten years, you’ve had enormous consolidation of industry. The public cares about economic concentration. They care -- I mean, they do not articulate it as we would but they care about big business. They care about inequality that results from it. And I think that in light of current economic conditions the answer that we do not need to do anything is just not an answer at all. In fact, it’s almost embarrassment that we think we have this sort of all figured out.

You know, we love the antitrust law, we love playing this game, but I think we have to face some of the realities here, is that if we do not fix these problems, we have the real possibility of, you know, more extremist solutions, more intensity. You know, there’s a lesson from the 20th Century, which is if you do not fight basic economic problems, and if you do not -- if economic policy fails to serve the general public, and I just don't mean antitrust, I mean generally -- the 20th Century showed that it leads in some very dangerous directions.

And I think, we're, you know, in our kind of mini debates over the consumer welfare standard, at grave danger at arriving at a do-nothing kind of thing. And if the FTC takes that as a lesson from its hearings, I think that will be a grave mistake. Thank you.

MR. SHELANSKI: Barry.

MR. LYNN: Yeah, I mean, I agree with everything that Tim just said. I think those are fantastically important points, and just to put a little flesh on that, you know, people have been banging -- the people have been banging on the doors of this institution and the DOJ and the USDA for a long time. I mean, I think we could make a pretty good case that the Obama sort of movement of 2008 had lots of antimonopoly sentiment within it. Certainly the Tea Party movement in 2009, 2010 was an anticoncentrated control movement in its early days before it was captured. Occupy in 2011. Trump 2016. He took a lot of this antimonopoly energy and channeled it. You know, and like how does this actually sort of play out in the real world?

You know, going back to 2007, Candidate Obama wandered around Iowa, and he told the farmers of

Iowa that he was going to fight the great monopolies that were destroying their livelihoods. And they voted for him. That's why he's president, because he won Iowa.

And then when he came to power, and the folks from the DOJ went over and tried to -- initially were going to work with the USDA to try and do something for these farmers, after they had five hearings in which they got everybody all agitated and upset and ready to fight, they just closed that book. And even though, and this was not a case in which you actually -- a lot of those -- a lot of those problems could have been dealt with just through rulemaking through the Packers and Stockyards Act. It didn't have to go to court.

So that was a decision, and then when we saw all of those counties, all of those regions, all across rural America turning red in November of 2016, that was in no small part a reaction to that failure.

MR. SHELANSKI: We've got just a minute left, and I've been neglecting a little bit the far end of the table, so --

MR. KIMMELMAN: Can I just respond to that? I mean, Barry, I wish you had been there with me when we were trying to help the USDA move forward on the

Packers and Stockyard Act. It was a concerted effort with DOJ, economists and lawyers working with USDA. And they had some really, I thought, very creative and good ideas. Their problem was that Congress would not accept it, and basically with the threat of an appropriations rider shut down a lot of, I thought, very good initiatives.

And, I mean, yes, there could be other things that maybe should have been done, going backwards, we'd like to think about doing, and I could just say, there was a concerted effort to do this and this is just the reality of politics on top of antitrust and regulatory policy. You know, it just -- you have to look at all of them, and the politics there were the politics of agribusiness, I'm afraid to say, and to an unfortunate outcome.

MR. LYNN: It's the politics of the United States of America, not the politics of agribusiness.

MR. SHELANSKI: Okay, so I'm going to give the last word on the panel to Deb.

MS. GARZA: So then I will say something positive, and -- but political. I want to talk about the political isolation, because I think there is good news that we haven't been politically isolating the small P. You have to go to generalist courts to make your case. The agencies often give explanations for why they don't challenge transactions. Personally, I feel, although it’s a burden and I didn't want to do it when I was there, we should do more of that. Transparency will be enormously helpful.

Why does Makan Delrahim, Joe Simons, others, why do they travel around the country giving speeches all the time? It’s not because they like to be on a bus or a plane all the time. It’s in particular so that they get out and talk to the business community, consumer community, and explain what they’re doing and why. And in those -- having done that, that also gives the opportunity for people to feedback to them.

So I don't think we ought to be in an ivory tower, I don't think we are, but I applaud things like these hearings, things like the Antitrust Modernization Commission, things like enforcers getting out and talking to the constituencies, both consumer and business, and having generalist judges. So while we may be specialists that tend to practice in antitrust, I don't think that antitrust right now today is just an elitist institution that’s totally politically isolated.

MR. SHELANSKI: Thanks very much. I tell you, that’s a great note to wind up on. A couple of questions were from the audience, we didn't get a chance to get to. The good news is the next panel that will come back at 3:30 is going to be very much on a similar topic with, indeed, some of the similar, same participants, so I am going to leave these remaining questions up here for Derek and the next panel. And with that, I’d really like to thank our participants for a very interesting afternoon. Thank you.

(Applause.)

PRESENTATIONS: CONSUMER WELFARE STANDARD

MR. MOORE: We are going to get started for the last panel of the day. So the last panel of the day focuses on the same topic that the prior panel focused on, and unlike the prior panel, we have a little bit more space to work with, both physically and in terms of time.

We have two opening presentations. The first is going to be by Jon Nuechterlein, who is a partner and coleader in Sidley Austin’s Communications Regulatory Practice, and he also previously served as the General Counsel of the FTC and the Deputy General Counsel of the FCC.

Another presentation following Jon’s is going to be by Carl Shapiro, who was introduced earlier this morning, and I won’t read his bio again, but he is a professor at the University of California at Berkeley and served as Deputy Assistant Attorney General, Head of the Economic Analysis Group at the Department of Justice on two occasions.

So Jon will start us off.

MR. NUECHTERLEIN: Thank you, Derek. I’m very happy to be here. I’m going to begin with a little history lesson and a riddle. And the riddle is think of a company -- past or present -- that uses scale, vertical integration, and innovation to transform retailing, undersells its rivals, puts many of them out of business, and whose very success prompts calls for radical changes to the nation's antitrust laws.

The answer to this question is not Amazon. Amazon actually has only a small fraction of the retail sales today as Walmart. The answer, instead, is this company, A&P, which people my age or older will remember from the 20th Century. It was a powerhouse supermarket chain that by 1929 had really come to dominate retailing in America in a way that no other company had done before.

At this point, I'm going to make two disclosures and a disclaimer. The first disclosure is that the presentation I'm about to give is based on a paper that my colleague, Tim Muris, and I wrote that was funded by Amazon. The second disclosure is I worked at A&P as a teenager. That little grocery store, I spent two summers working as a bag boy in the A&P. The disclaimer is I will not let -- all views I express here today are my own, not those of any client or any former employer.

So how did A&P do it? How did it come to dominate retail sales in the early 20th Century?

Well, A&P basically had four different strategies. One was ruthless disintermediation. It went around wholesalers at the time the grocery business was very segmented into production, wholesaling, and retail distribution. A&P went right through wholesalers and bought directly from suppliers and, therefore, it was able to undersell its smaller rivals.

Second, A&P also spread throughout the country. It had hundreds of stores. It bought in bulk from producers. It was able to get enormous discounts from them.

Third is vertical integration. A&P was not only a distributor, a retail seller of groceries, but it was a manufacturer of groceries. It made butter; it made bread; it imported coffee. And it was also a great innovator. It may come as a surprise to some people to learn that there was a lot of innovation in the early 20th Century in retail sales, but, in fact, there was. A&P learned how to cut costs out of the distribution system, but it also did something that foreshadows what internet companies today do, which is to use consumer data to make its operations more efficient and more receptive to the actual interests of consumers.

So who benefitted from all this? Well,

consumers did. Who didn’t benefit? Smaller competitors and the displaced middlemen that A&P went around. And so this -- the reason I’m going to talk about this case today is because it really does identify sort of an archetypal example of where a company, through competition reduces the number of competitors, yet consumers are better off. So if we had an alternative standard called the competitive process standard, where would it leave us?

Ultimately, I think that the consumer welfare -- I’m going to defend the consumer welfare standard because I think it gives us a determinate objective that a more nebulous term like “competitive process” doesn’t give us.

So I’m going to -- there were a number of quick legislative and prosecutorial reactions to A&P over the -- throughout the early and mid 20th Century. I’m going to skip through a few of them just because we don't have a lot of time. I am just going to briefly mention them. One is Congress and a variety of states imposed heavy taxes, not just on A&P, but also a lot of other large chain stores so that they could be less successful in underselling smaller mom-and-pop businesses and other less efficient businesses.

There is also the Robinson-Patman Act whose mysteries I will not spend a lot of time on today. I still don't feel like I fully understand it, but one key to it is the original title of this act, which was the Wholesale Grocers Protection Act. And that is exactly what it was. It was designed to protect wholesalers and smaller retailers against large chain stores and often against the interests of consumers.

All right. So now the main event of my presentation is the criminal prosecution of A&P by the Department of Justice. By the way, this is counting down from two minutes. All right. Good. Okay. Excellent.

All right. So here is the main event. The main event is a criminal prosecution. People sometimes forget that the Sherman Act is a criminal statute and enforcement actions can be criminal. Today, we confine that to Section 1, but that wasn’t always the case, and DOJ actually went after A&P, the corporation, and its key executives, including the two founders of the modern A&P, for criminal violations and secured felony convictions of them.

Well, what was the theory of criminal liability? Well, one was predatory pricing. The theory here was that A&P was pricing its goods too low and putting smaller, less efficient businesses out of the market. But there was never a clear distinction in DOJ's case between competitive pricing and predatory pricing. This is a problem that afflicted a lot of predatory pricing claims back in the early to mid 20th Century. There were no determinative standards. It ended up being sort of a “know it when I see it” standard, but there was definitely not with anything comparable to what we would now call the recoupment requirement for plaintiffs.

And here is a quote by Morris Adelman, roughly contemporaneous with his prosecution that shows that you really kind of need to have a recoupment requirement in order to show why predatory pricing is a bad thing. Ultimately, the concern is that over the long run, consumers will have to pay more, will be worse off because of short-run price cuts, but that was never going to be a persuasive theory in the A&P case because there was no -- because the entry barriers were sufficiently low, and there was never a realistic scenario in which A&P was going to be able to hike its grocery prices to monopoly levels.

Theory number two DOJ brought: a monopsony theory. Here, the theory was that A&P was getting such good deals from grocery suppliers that the suppliers got angry and turned around and raised the rates that they were charging all the independent grocery stores, the smaller ones. Now, this is perplexing from an economic perspective because presumably the suppliers were charging profit-maximizing rates for the smaller grocery stores in the first place, and it’s unclear how it is that A&P was going to be -- through its insistence on lower rates was going to raise the cost of its rivals. DOJ never really tried to prove that.

So instead of analysis, we ultimately had rhetoric. This is an actual quote from a prosecutor in the A&P case. It’s amazing that you actually had prosecutors saying these things. “A&P should be convicted of a criminal offense because it sells foods cheaply to consumers in its own stores because it is a gigantic bloodsucker taking its toll from all levels of the industry.” Focus on other competitors in the industry rather than on the consumer beneficiaries of A&P's low prices.

Third theory of liability was one of vertical integration. As I mentioned, A&P was an early vertical integrator, one of the vertically integrated companies with A&P was a company called

ACCO, which was a purchasing agent. And what this company did is it went around the country and it bought fresh produce directly from farmers and other suppliers. Now, sometimes, ACCO, this affiliate of A&P, bought too much produce and there was some left over. What did A&P do? It didn’t throw the spare produce out; it sold it to other grocery stores, unaffiliated grocers. And obviously it was going to sell the spare produce to those grocers at a profit, so it was charging them more than it charged itself when it sold the produce to the A&P retail stores, but obviously the grocers, these independent grocers, didn't need to buy anything from the purchasing agent; they chose to because apparently the rates that ACCO was charging them were below the market rate.

So A&P was effectively allowing its competitors to share in its economies of scale. But the linchpin of the case against A&P was that there was something really unseemly about doing business with your competitors, having companies that were simultaneously your competitors and your customers and not treating them as customers as well as you treat your own operations.

And you can see this in a variety of old factory metaphors the district court thought were important to stress. It couldn't quite explain what was wrong about doing this, but it described these transactions as odious and unjustified.

So after DOJ had secured this criminal conviction of A&P and the -- and its executives, it tried to break the company up in a civil suit, and it languished for a few years during a change of administration in mid 20th Century DOJ. Ultimately, that case settled. A&P had to spin off these purchasing agents, but otherwise the company remained solvent long enough or me to work for it as a bag boy in the 1980s.

All right, I want to turn to a retrospective on this case that was published in the Yale Law Journal in 1949, and that's a long time ago, 1949. Here are some of the quotes from this Yale Law Journal note. This is an economics professor at Yale who is getting his law degree at the same time and later went on to teach elsewhere, and I am going to hold it as a mystery for a moment who it is. Here are some of the critiques he raised.

The court never drew a clear line between predatory and competitive price-cutting; implied nonsensically that vertical integration was illegal, per se, and no one ever made clear exactly, you know, when vertical integration would be a problem. The court’s analysis also disregarded the dynamic nature of competition and the fact that competition is brutal and often puts companies out of business, but that’s all in the interest of a competitive environment. And ultimately the DOJ's decision to use the Sherman Act to go after A&P was an indication that there was a real contradiction in the way DOJ was using the antitrust laws. In other words, antitrust philosophy on display in the A&P case was a paradox: policy at war with itself.

So who wrote this 1949 Yale note? And this is a trick question. It was not Robert Bork. It was not anybody else from the Chicago School. It was a very young Don Turner, who ended up coauthoring the leading treatise with Phil Areeda in antitrust and who also ended up being the Antitrust Chief in the Lyndon Johnson Administration, which is not terribly known for its economic conservativism.

This illustrates an important point, which is that the observations I just raised there about the need to distinguish between competitive and predatory price cuts, the need to understand the benefits of vertical integration, the need to understand that consumer-friendly competition often puts competitors out of business. Those are not new concepts that originated with Robert Bork or with the Chicago School in the ‘80s. These were well known to anyone who analyzed antitrust law in mid-century from the perspective of economics.

All right. I have -- and Derek has kindly told me that I can go a few minutes over. I’m going to contrast Don Turner's note with a recent -- more recent note that appeared in the Yale Law Journal by Lina Kahn, who is a very bright, rising star in antitrust circles and is viewed properly as a leading light of the populist movement in antitrust.

I am going to express severe disagreement with her position on this set of issues. So Lina Khan in attacking internet giants claims that we should dispense with the sort of the Brooke Group-oriented final distinction between competitive and predatory price-cutting, and in particular we should dispense with recoupment requirements for what she calls large platform providers. Instead we should look at, you know, whether companies exploit their size, and we should look at the rich set of concerns that animated earlier critics of predation.

Well, we looked at those rich set of concerns in the A&P case, and what we got instead of an analysis and a set of rules that companies know how to follow is rhetoric from a prosecutor, and my concern is that we’re likely to see the same sort of rhetoric if we dispense with the consumer welfare orientation of antitrust today.

In addition, Lina Kahn takes issue with Amazon's creation of a logistics empire to reduce delivery times. If you are able to get quick delivery from Amazon, it’s in part because Amazon has built out a whole infrastructure of warehouses, but it doesn't hoard the scale economies of the warehouses to itself; it allows third-party merchants to avail themselves of those scaled economies as well, and it actually reduces their costs.

The third-party merchants who participate in the marketplace are able to reduce their shipping costs more than they would if they were trying -- if they sought to deal with UPS and FedEx directly. So what’s the problem? The problem is, according to this note, the conflicts of interests, tarnished neutrality. Now, to me, those are words that outside the context of a fiduciary relationship aren't particularly persuasive.

To me, the question is, is this the sort of behavior that makes consumers better off or worse off over the long run, and I've never heard -- I've heard Carl and others give expositions of the raising rivals' cost theory of antitrust. I've never heard a clear exposition of how lowering rivals' costs is a basis for antitrust liability or why it should be.

This reminds me also of the attack on A&P's own purchasing agent, the theory that there is just something unseemly about doing business with your rivals. Okay. So imagine that Congress enacted a more populist vision of antitrust, and your job, like mine, is to answer calls from clients asking, well, what should we do about particular practices that we are considering?

So suppose that you get a call from Apple back ten years ago that said, you know, we have this really neat new device called the iPod and application called the iTunes music store. We liked it, we'd like to launch it at a low price, but we are a little concerned that we're going to be so popular that we put Olson's Books and Records and other record stores out of business. In fact, they did. Should we launch it? Should we price the songs at a higher level that we view as profit-maximizing because we want to cut Olson's Books and Records a break?

Or what about Netflix? Netflix put Potomac

Video out of business when it made use of more efficient distribution mechanisms to compete with local video stores. Amazon had a way to keep people, if they didn't want to buy physical books anymore, they didn't have to. They could buy a Kindle, they could download books at a very low price onto the Kindle. That also is very bad for Olson’s Books and Records, which, by the way, no longer exists, even though I liked it. And yet all of these are practices that we -- I think we celebrate as a country, because these are the source of disruptive economic developments that are extremely good for consumers that make America a global leader.

So I am going to skip right through this slide to go to one issue in particular that has been raised in some of the discussions, which is, if we augment antitrust analysis beyond consumer welfare to look at other values, well, one of those other values, among a constellation of others like labor rights and campaign finance reform, should be whether antitrust enforcers should look at the political implications and particular conduct for political deals.

So Tim Wu in the materials that were circulated before this conference has an interesting article in which he says, you know, does -- the enforcer should look at whether the complained-of conduct or merger tend to implicate important noneconomic values, particularly political values. So might it tend to bring about a longstanding, politically influential oligopoly? These are not issues today that are recognized under antitrust.

What could go wrong if we added these to the antitrust analysis? Well, a president could go wrong. These are actual tweets or campaign statements by our nation's chief executive who views antitrust as a weapon to punish his political enemies and reward his political friends. He is very explicit about saying that he would block the NBC-Comcast merger mainly because NBC is liberal, but he would approve the Sinclair merger with Tribune because they are conservative and America needs more conservative voices.

Now, the question is, do we want that sort of analysis explicit or even implicit in antitrust law? The consumer welfare standard with its precise focus on standards and economics insulates us from this sort of political influence.

All right, I’m going to close now by noting that the first panel addressed really two quite distinct sets of issues which are often conflated, and

I think Fiona pointed this out. There are -- one set of issues is, how can we improve antitrust to make consumers better off than the current enforcement environment does? So are there particular issues within antitrust like how to assess error costs? When do you use bright-line rules versus the rule of reason? When should we deploy concentration presumptions or should we change them in the horizontal merger contest? How should we think about vertical integration? Heard about that this morning. When should we supplement antitrust with sector-specific regulation like FCC rules about horizontal concentration in media industries?

Those are all useful questions -- debates for us to have. They are all within the rubric of the consumer welfare standard. And the populist movement that we see today is helpful in that it, I think, helps us think of new perspectives on this set of issues. What is not helpful is a request to move antitrust beyond what I think these three principles are in antitrust current consensus, which is how do we use rigorous economic analysis to advance the interests of consumers in virtually all market settings except for natural monopoly markets where you might want some degree of sector-specific regulation.

Thank you.

(Applause.)

MR. MOORE: Carl, you’re up.

MR. SHAPIRO: Good afternoon, everybody. Let's keep going here, maybe shake a little bit and keep moving. I want to first thank Chairman Simons, really, for bringing in such a diverse set of voices into this debate. I just think what we saw this afternoon was impressive in that respect. And as an academic, I might be tempted to kind of get into some of these arcane or philosophical or historical debates, but actually, I’m a practitioner, too, so I want to be very pragmatic.

And the question is, how do we move forward to make antitrust more effective and stronger? And actually we just heard and we heard on the earlier panel, let's distinguish making antitrust more effective and stronger on the one hand from what the standard should be. Now, they’re related, but they’re separate questions.

Okay, now, I was asked -- I guess just the two of us are supposed to be defending the consumer welfare standard. Well, I have a weird way of doing that, which is by proposing the protecting competition standard, okay? Now, and by the way, that little copyright here is a joke. Just to be clear, my point, and you will see this for the next few minutes, is that the consumer welfare standard, I think, as somebody said earlier, maybe it was Tim Wu, has been tainted and misused, in my view, to -- was it Fiona? She’s looking at me, Fiona Scott Morton -- tainted and misused to shrink back antitrust enforcement, and it has become confusing.

So I think that we should jettison that language but basically work with the fundamental idea, and that’s what I’m doing here with being a little cute with the trademark, which is a fake, which is a joke, but protecting competition standard. As I head into that, I want to align myself -- since we’ve already heard quite a bit on this, I want to align myself quite closely particularly with Gene Kimmelman and Fiona Scott Morton from the earlier conversations. And to a considerable extent, that surprises me actually, in some respects with Tim Wu as well, although not as wholly with him. Okay.

I think the fundamental issue is that the case law has gotten out of whack using a kind of a improper notion of consumer welfare standard and what that means and we need to fix that, but not to fundamentally change the standard we use in antitrust.

Okay. So what do I mean by the protecting competition standard? Just so it's clear, with the subtitle here, this is -- what I'm talking about here is in many ways, what some people, including myself in the past, would call the consumer welfare standard, but in my view done right and rebranded because it is tainted and confusing.

Okay, so what do I mean by this? And this will echo my testimony in front of the Senate Subcommittee on Antitrust last December. So I'm just going to read it because this is important to everything that follows, a business practice is judged to be anticompetitive if it harms trading parties on the other side of the market as a result of disruptive and competitive process. And I want to put a lot of weight on disrupting the competitive process, okay, but that's a little bit unclear what that means, and it could be vague. So we really want to talk about harming the trading parties on the other side.

Now, what are those trading parties? And by the way, Jon Sallet, I think earlier, had a very similar formulation and discussed some of these trading parties. So, look, in the traditional cartel case, you've got gas stations colluding to raise the price of gas sold to motorists. That's consumers of the trading parties. We think about that, and that’s fine. But if we have jet fuel -- if the suppliers of jet fuel are colluding to raise the price, well, the immediately injured parties are the airlines who buy the jet fuel. They’re re not consumers, okay? And to call them consumers would be confusing, okay?

And nor should we have to ask, well, did the airlines pass it on, the jet fuel increase to consumers in order to decide whether that price fixing was bad or some other conduct? No, no, we don't. So if you -- so you don't need to trace it to the final consumers. In that case, the trading parties are the customers, in the traditional formulation we have.

Same with horizontal merger, right, if the airlines merge, we have the passengers, we understand that. If railroads merge, maybe they charge more for their passengers, but maybe they charge more for the farmers to move their produce, obviously, particularly a late 19th Century concern. In that case, we would think of the railroads as basically or somebody -- it’s really akin to a monopsony power, right? The farmers only have one way to get their product to market, okay? So we want to look upstream as well, and we have the no-poach cases involving the workers where the DOJ, you know, went after that.

So it’s very clear, I think, from the actual case law and the enforcement and economics that the trading parties could be upstream or downstream, okay? Now it’s true the focus has been more downstream, and that doesn't need to stay the case, but to fix that doesn't mean changing the standard, it just means bringing the cases if workers are hurt, okay, or farmers are hurt. And so that -- and so that is -- we’re good on that, okay? Again, the consumer welfare language is confusing, but in terms of the underlying economics, as Fiona Scott Morton said, we understand monopsony, that's fine. Okay.

Now, I think here is where we get -- start to engage a little bit with some of the things on the previous panel. In my view and what I am putting forward, the goal of antitrust law and policy -- as an economist, I don't like to talk about, you know, what’s the law or not, but I kind of stray into that, but the policy or the economic goal is to protect competition. Okay, now, when I say protecting competition, it means safeguarding the competitive process.

Now, we have to unpack that, what does that mean? Okay. And I would say it means that we can -- if firms are competing legitimately we have to define that, we accept the results of that process. Okay? And if we think the outcome is not acceptable, there is a monopoly that’s durable and we just can't live with, but that firm got there through merits, then we need some sort of sector-specific regulation. Okay?

Now, this is not a Chicago School view. This is not a -- does not have to do -- not about the consumer welfare standard. I am going to take whatever it is, one minute of my time, to read from what Judge Learned Hand said in the Alcoa case in the ‘40s, because I think it says it so well, and I just really don't think we want to depart from this. He said, “A single producer may be the survivor out of a group of active competitors, merely by virtue of his superior skill, foresight and industry. In such cases a strong argument can be made that, although, the result may expose the public to the evils of monopoly, the Act” -- the Sherman Act he’s referring to -- “does not mean to condemn the resultant of those very forces which it is its prime object to foster: finis opus coronat.” You can figure out the Latin.

“The successful competitor, having been urged to compete, must not be turned upon when he wins,” and I think you’re a&P case, of course, is very much as you have described it along those lines.

Okay. So I really don't think it is a good idea. I think there would be very limited support for the idea of abandoning that principle. Okay.

Now, I think what you’re hearing from Maurice Stucke, for example, his lead bullet there was preservation of competitive market structures. Okay? Now, if you have a single firm that gets big and gains a lot of share, maybe a monopoly position through this process, without any question that they did it legitimately, you would not have a competitive market structure, as you measured market shares.

So that is a departure. That's a significant difference. I don't think we want to go there, but that's one of the issues potentially on the table. I think we want to live with the results of competition and then, of course, enforce the antitrust laws vigorously against to constrain such a monopolist but not to break them up just because the market structure looks concentrated or is concentrated.

Okay, now, when we follow this approach, the structure to the inquiry we ask -- so I said whether trading partners have been harmed as a result of conduct that disrupts the competitive process. So we’re thinking about the trading parties; we’re not particularly concerned, per se, if the competitors are injured, and that’s become a mantra, and we’re not saying there’s anything wrong with being big, okay?

Now, if you don't agree with that, then you’re in a different space, then you’re not protecting competition, you’re doing some other social policy. I don't think that should be antitrust's role, but that’s potentially one of the things potentially at the end of the debate. I think this gives coherence to what we’re talking about. And how would I illustrate that?

So let's just go through a few examples. And I think, by the way, we all want to move this debate forward, and I certainly hope the FTC, as they take all of this on board, is instead of talking about disruptive, competitive process, let's talk about specific fact patterns to see where there’s a difference between what different people are saying.

So take horizontal price fixing, okay, that disrupts the competitive process, they raise price, they’re not competing, and it harms the customer is clear. What about standard-setting? It’s an agreement among competitors, they agree to only -- to produce products that meet a certain standard. People who produce noncompliant products, it’s not going to be commercially attractive, it reduces choice. How do we choose between those two? I mean, why is standard-setting not per se illegal? Right, it’s an agreement, it has all these -- it sounds like it disrupts the competitive process. They don't compete with all of these incompatible products.

Well, how do we tell? We say, well, we actually think in most cases the standard-setting leads to consumer benefits, a larger market, lower prices, you know, other benefits of compatibility so that's how we tell. Okay, we tell by looking at how does it affect the trading parties, not through just some notion of the process.

Likewise for horizontal mergers, we don't think just because two firms or competitors merge in the end they don't compete anymore. The market is more concentrated, but we don't say that’s per se illegal because we understand there may be some efficiencies associated with that. How do we judge? Well, we ultimately look at the effect on -- usually on the consumers, on the customers in any event for the normal downstream posture. And likewise for predatory pricing as has been explained, we need a boundary between what’s legitimate price competition that we welcome and some sort of predatory or exclusionary price fixing.

Now, the courts have come up with a standard through Brooke Group, and it involves below cost and recoupment. I tend to think that recoupment piece is overstated, and I think that could be worked on and probably should be worked on, but the notion that we need a boundary and ultimately it’s really about do we think this is going to harm the customers. You know, from ultimately high prices later or less innovation or not? And I don't really want to not do that step. Okay? Otherwise, I don't know how I’m going to have a boundary between legitimate pricing and not.

The Microsoft case we heard about is a very good case. There was discussion about it earlier. Again, the reason -- we evaluate that based on do we think that was going to reduce innovation. Believe me, that’s not about price effects, and it’s never really about price effects, and you couldn’t do price effects for some product that wasn't going to be out there for a few years but it came out in a good way, okay.

So I think this trading parties and disrupting the creative process, both of those pieces are needed with whatever you call the standard. I'm calling that the protecting competition standard. Okay, so let's then compare that with some of the attacks on the consumer welfare standard which we've just heard, okay. And, again, I want to -- particularly Tim Wu, I thought, said very eloquently, look, the way the court cases have evolved over the last 20, 30, 40 years has shrunken antitrust enforcement and it’s a problem. And Fiona Scott Morton said we have more issues about market power.

I agree with both of those statements, but I do not think it means we need to abandon this mode of analysis. In fact, I think we should not.

So what are the criticisms? First, some of them are based on misconceptions. It’s not -- the consumer welfare standard is not just about price or short runs. And it doesn’t ignore the suppliers. We have the no-poach cases in some of the case law. It’s just a misconception. Now, there's a reason that misconception has taken root because the word “consumer welfare standard” sounds like it’s about consumers. It gets people confused.

That's why I think we need to change the language, okay. You can't expect the people -- the community at large to know that somehow when you say “consumer welfare” you include the workers who didn't have a good chance to get competition for employment opportunities. It sure doesn’t sound like it handles that. Why would we think people should know that? So there's a real problem there with just the words and the branding, if you will.

Some criticisms -- most of the criticisms, actually -- relate to excessive burdens of proof on plaintiffs. So, you know, in every area, and a lot of what Maurice Stucke is putting forward with some proposed legislative changes, I think basically all of those -- or almost all of those -- the ones that work for me are -- they’re excessive burdens on the plaintiffs.

Look, you cannot -- and if it means the economists are coming into court and have to prove the measure of these price effects and sometimes in the future or new price, that's very hard. Believe me, I'm been cross examined on those things. You can’t -- we're not able to do that a lot of the time, okay? So if inability to do that means the plaintiff loses, we're not in the right place.

So we can do a lot with shifting the burdens of proof and the presumptions, and I’m going to talk about that in a moment. So that's a legitimate -- I think a very important concern about the evolution of case law, but it's not about the standard. Okay, take the standard, rebrand it, give it a name that people understand, and tighten things up. Now, whether the current courts are going to do that, I'm not so confident, but that's what hopefully the FTC based on these hearings can help push us in that direction.

Okay. All right. So the same point a different way. Even if -- look, I think most people who are informed would say that antitrust was not in good balance in the ‘60s, okay, the economics was not that sound, and there was a bunch of cases that -- and A&P in the ‘50s, I guess, as well.

So there were needed corrections, and it's true it came around the same time, some of it, as this upsurge in some of the consumer welfare standard. And I think the courts overshot, like I said, but to fix that, we should -- we should fix that with, you know, through the approaches I've described, not by throwing out the standard and doing something either vague or that doesn’t have the elements I described, which is disrupting the competitive process, harming trading parties.

Also, economics, some people who are attacking the consumer welfare standard are basically, well, it's a plot by the -- these economists love to measure things and it’s kind of these experts who missed the point. Look, economics is just a tool, and if anybody thinks you can do antitrust without economics, come talk to me later. Okay.

So, all right, so what does it mean going forward? I think there's a lot of work in economics going on right now, the last couple years and I'm sure the next several years. In my field, industrial organization economics, in academics, researchers and elsewhere, that is indeed showing. I would say generally that larger companies have a bigger share of the economy. Firm size has gone up. A bunch of markets have become more concentrated. It's hard to measure that systematically, but that seems to be the case. Some very efficient superstar firms, they’re called in some of the literature, are taking share from other firms. They're becoming geographically broader. Globalization is part of this. That is a process that has been going on for some time and probably will continue unless it’s stopped through some public policies.

So what does that mean? Does that mean that antitrust has failed us? No, I don't think so. A lot of that -- and Amazon is a good example -- sure looks to be the competitive process at work. Not all of it, you have to go case by case, but a lot of -- those trends are broad and they reflect scale economies, information technology. And one of the things that industrial organization economists have learned in the last 10 or 15 years that many of you may not know is there's this tremendous evidence that in a given industry there’s enormous variation in the efficiency of the firms, okay.

So if you have this model about, oh, all the firms compete and they’re winning and they all end up roughly comparable, that is not what happens in the real world. You get enormous variation, and that persists. And the larger -- the more efficient firms tend to get bigger, and that’s just an ongoing process. So that process means when we get some markets that are more concentrated through that competitive process, we're going to also be getting -- that is, in fact, benefitting consumers, and we want to encourage it actually, okay, although it's tough on the people who -- on the firms who are less efficient, to be sure.

So all that's happening. That means we need antitrust more. Okay, the fact is it means there's more market power in the economy. That's what the evidence is showing. Higher margins, we can debate about how to measure that. More concentrated markets, entry barriers can be very difficult. If you're trying to enter a market where there are three or four big players who’ve been in there for a long time and they’re very efficient, that's pretty tough. You're small, you haven’t done it, that's tough, okay?

So the notion that entry barriers are somehow generally low, I don't think that's a valid assumption. So we need antitrust more, okay? But that doesn't mean we need a new standard. It means we need antitrust more. So how should we do that? So, of course, I’m suggesting the protecting competition standard. And, again, it’s the consumer welfare standard done right with a better name.

And I think the FTC can play a big role in this, okay, and I hope that's the lesson they will take from these hearings is that we need antitrust more. An overly narrow reading of consumer welfare and excessive burdens on plaintiffs have shrunken antitrust in a way that's not been helpful for consumers or other parties who are suffering from market power on the other side of the market.

In horizontal mergers, we can do this by making sure we keep and strengthen the Philadelphia National Bank structural presumption, and plus a few other things. Mergers, it's a predictive exercise. If the consumer welfare standard is supposed to mean that you have to go in and precisely predict exactly what the price effects will be, well, that's not going to be very good for effective enforcement, but that's not what the standard should mean.

The standard should mean you’re looking at is it likely that there will be harm to competition and the customers in the normal case will be hurt. Is it likely based on the best you can tell? Maybe it will be fewer products offered; maybe it will be higher prices; maybe it will be something else; maybe it will be less privacy protection; you know, whatever it is.

So you don’t -- you can't predict things precisely. We can use some other metrics to gauge things, not just Herfindahls, and I think we should be quite demanding on an entry defense because, a lot markets, entry is not easy and we shouldn't just think it is.

Okay, so that should be really a burden on the defense, unless it’s very clear to show that entry's easy. Okay, and we've had that debate for a while, and I think we've moved things in that direction. That's all within the consumer welfare or protecting competition standard.

Exclusionary conduct. Again, the courts, you know, have trimmed it back so much. These pay-for-delay cases should not be so hard. Okay, the economics is not that complicated. So something's gone wrong that it's been 20 years and it's still working its way through and the courts are struggling with it, and, you know, I've talked to a number of federal judges about this, and it’s hard -- you know, the agencies need to help them; the economists need to help them, but it's not about a different standard. And we could similarly talk about what to do for exclusive dealing.

Okay, so I think that's really -- that's what I'm encouraging the FTC to take away from this session and these hearings today at least, this afternoon at least, that don't blow up what we've learned, including the A&P case, including a lot of other things. Don't blow that up. Build on that and do more because we need to do more now, but use the protecting competition standard. Thank you.

(Applause.)

MR. MOORE: Thank you, Carl.

THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW
(SESSION 2)

MR. MOORE: I'd like to invite the other panelists to come up to the stage. Three of our panelists are veterans from the prior panel -- Fiona Scott Morton, Maurice Stucke, and Barry Lynn -- so I won't introduce them. Our final panelist is Geoff Manne, who has the same job as Barry but for a different organization. He's the Founder and Executive Director of the International Center for Law and Economics. And each panelist, each discussant has five minutes to respond to the opening presentations, and we'll go in order in which they are sitting on the table, and we'll start with Barry.

MR. LYNN: I'm going to mainly -- well, first, I'll start off by saying I greatly appreciated Carl's presentation. It's really good to see Carl moving towards Tim and Gene. I'd say it's important that we -- the idea that Carl is moving towards it, actually setting aside the consumer, the term “consumer” is, as I made clear in my own presentation, I believe that's of fundamental importance just so that we begin to get back to understanding the prime purpose of what our antimonopoly laws were created for. I'm going to just focus -- what I’m mainly going to do is focus -- so actually what I want to say with Carl is I think there's a lot of opportunity for us to continue this conversation and move towards getting to a real understanding.

With Jon, I actually have a number of questions for Jon, a whole, you know -- in your presentation, you said that consumers benefitted, and I would just say, like, for how long would they benefit from this system in which you have this really massive single retailer, for the controlling thing. You know, do they benefit on price, do they benefit in terms of quality, do they benefit in terms of variety? You know, are we talking about the physical goods that are sold in this store? Are we talking about the retail services, you know? I mean, what is the effect on suppliers of this kind of consolidation?

You know, what is this -- you know, obviously we know what the effect is on horizontal competitors, you know, but there's a lot of evidence after all that monopsony drives consolidation amongst suppliers. I mean, we saw this with the P&G and Gillette merger. You know, is that a good thing? You know, with the A&P, when the A&P drove that kind of consolidation, is that a good thing? You know, it's a question that we have to answer.

You know, you say that A&P created customer value by studying how people like their butter, you know, innovation. Are you saying that independent grocers were not able to do the same thing?

You said that A&P cut out the middlemen. Are you saying that A&P is not, as a retailer, simply another middleman, just bigger and more powerful?

Speaking of middlemen, you mentioned how A&P is vertically integrated. And we had a lot of conversations earlier about vertical integration. Do you see a difference between when, say, Jill's Grocery vertically integrates into selling jam at the corner of Pine Street and Main Street? And when Amazon vertically integrates into publishing, say, books when it controls 50 or 60 or 70 or 80 percent of the market for different lines in book selling?

You know, you made a bunch of comments on predatory pricing. Are you saying that a large retailer that engages in predatory pricing cannot recoup its losses after knocking out its rivals? Are you saying that Wall Street does not routinely in the periods when it is legal provide capital to certain corporations specifically to undersell, bankrupt, and replace their rivals, you know? I mean, J.P. Morgan did this with the AT&T. Bain Capital did this with

Staples.

Are you saying that foreign mercantilist states -- China, Brazil -- don't sometimes provide capital for certain industries precisely to undersell their rivals in ways that drive out American businesses, American manufacturers?

You know, did you know that sort of Anheuser-Busch, InBev, Heinz, Kraft, Pilgrim’s Pride, Swift are all owned, all run by a set of, like, capitalists that receive funding from the Brazilian State to expand and to bankrupt their rivals?

You say that consolidation such as we saw by A&P leads to lower prices. Is that always true? Are you saying that you don't believe that Smithian systems of competition work?

Do you know where your thoughts originated? You mentioned Don Turner in 1949. You know, I would actually turn everybody -- I think everyone should go study Bill Kovacic's paper from a few years back on the double helix of modern antitrust. Yes, Turner and Areeda and Breyer and Alfred Kahn agreed with the Chicago Schoolers in many fundamental ways, but -- and this is really key -- it's really important for the folks in this community to understand it, where did Turner and Areeda and Breyer and Alfred Kahn get a lot of their basic thinking? It came from John Kenneth Galbraith, who was a command-and-control socialist who relied Thorstein Veblen for his intellectual guidance. Thorstein Veblen, as some of you know, relied on -- he was a representative of the new nationalism of Teddy Roosevelt at the time when Teddy Roosevelt was promoting corporatism, even a sort of fascism.

Can you describe the ultimate outcome of your vision of competition? Where does -- when you just let the A&P system continue on and on unstopped, where does that go?

Where does the Walmart system go if you don't stop it? Where does the Amazon system lead? Do we really just want one corporation selling everything? I mean, didn't the Soviet Union try that and it didn't work all that well? I mean, I have some others, but I think that's sufficient.

MR. MOORE: So we're going to let all of the panelists give their five-minute presentations, and then Carl and Jon will have a chance to respond.

Barry did most of my job for me by posing a number of questions for Jon, so we'll move on to Maurice.

MR. STUCKE: All right. Well, thank you. So, so far, we've been talking now how effective has the consumer welfare standard been in the past 35 years. And while that's interesting and, you know, we have evidence that suggests that it may not have been as successful as some have claimed, the real issue is where are we going forward in the data-driven economy. And, here, what I see is a growing divide between the EU, Australia, and other jurisdictions in the U.S., and there's a greater concern over these giant tech platforms -- dataopolies -- and the risks that they impose.

Now, if you look at it strictly from a consumer welfare standard, they may not necessarily be that bad because price is going down, quality, because of network effects, are going up. And you might think, well, that's a good thing. But what the market inquiries that the Europeans are undertaking is that there are potential risks. The ACCC, for example, is doing a platform inquiry on the power of these platforms.

And, so, three points here that are relevant. First, when companies -- when these dataopolies vertically integrate, their incentives can change, and they have various tools that can then make it harder to compete. So that's why the European Commission is now looking at Amazon in a preliminary inquiry on its use of data to thwart rivals.

Second, we hear about, oh, if you open up the boogie man, you know, like political issues and whatever. Antitrust has always had a political component. I mean, it was always the concern about how economic power can translate into political power. And the issue with these dataopolies now is that they even post even greater concerns than some of the monopolies in the past because of the way they interact with consumers, their gatekeeper function, and the like.

And then the third is, you know, no-fault monopolies. No, we're not arguing no-fault monopolies. And impact on trading parties, that's a step in the right direction. But I would still then ask, Carl, how would you then handle Klor’s? How would you handle, then, when a powerful firm acquires a nascent competitive threat? How would you deal with sort of exclusionary practices where you can't necessarily determine what impact it's going to have, let's say on something that's quantifiable?

And, so, you know, in our book Big Data and Competition Policy, we point out Google-Waze, and the struggle that the predecessor to the CMA had in trying to identify how is Google's acquisition of Waze likely to harm consumers. And that's very difficult. And it used to be that Alcoa and Rome, that you didn't have to show that. You can show that there was an effect.

Now, Carl raises a fair point: What if the market naturally tends towards a monopoly on the goodness of the heart of the monopolists? Yeah, that might be a problem. And then the other point I think that’s key here, and I don’t want anyone to confuse it, is we never argue that antitrust is the elixir. What we argue in the data-driven economy, you need greater coordination among the competition officials, the privacy officials, the consumer protection officials, and you need greater coordination among the jurisdictions. So I'll just leave it at that.

MR. MOORE: Thanks, Maurice.

Geoff, it's your turn.

MR. MANNE: Thanks, Derek, and thanks to the FTC for having me. So I thought I would just start by adding to the many quotes from Brandeis that we've already heard. I can't really have too many Brandeis quotes. This one goes something along the lines of consumers are, “servile, self-indulgent, indolent, and ignorant.” And as we did already hear, actually, Brandeis also was no fan of low prices. In fact, he thought they were pernicious.

My point in mentioning these is just to draw attention to the problems of expanding the conception of the consumer welfare standard or of the purpose of antitrust when you may not like where the expansion takes you. Even the standard-bearer of this process is someone who absolutely had ideas that I think most of us would disagree strenuously with.

I think it's interesting -- I think someone mentioned this before -- that we're talking about the consumer welfare standard. I don't think we're really talking about the consumer welfare standard. I think that for at least two reasons. I'll start with two. I'll probably come up with some more.

The first reason is that I think what we're really talking about here -- and Maurice's comments just brought this home to me -- is whether we start with a presumption, we start with the basic presumption of antitrust as one that is inhospitable to un-understood business practices or one that is relatively inhospitable to their condemnation.

That's fundamentally what we're talking about here. We are talking about the future of data and large platforms and where it leads us; the sense, the feeling, that there is something wrong; and the question whether we should greet these relatively new structures, the consequences of which we don't perfectly understand, with relative skepticism or relative approval unless and until it's demonstrated that there's actually something problematic there.

This is not the consumer welfare standard. Neither of those views is consistent with the consumer welfare standard, but I think that's actually what we're talking about. We're actually talking about -- and this gets us to the second reason that we're not really talking about the consumer welfare standard -- we are, in fact, talking about the achievement of social and political objectives mostly that are focused on restraints on business conduct that proponents haven't been able to achieve and fear they can't achieve through direct legislative means.

I learned from the last panel that this is actually a discussion about the structure of our government. I learned that antitrust judges are fools, that we should do antitrust by plebiscite, or maybe we should do it by locking experts in a room and having them come up with the right answers. I also learned that political influence seems to only go one direction.

All of that could possibly be true, but I don't really understand what it has to do with antitrust or the consumer welfare standard. The stated aim -- preserving competition, protecting competition promoting competition, however you defined it -- is perfectly commensurate with the consumer welfare standard. Carl is exactly right about this. There is nothing -- you know, I’ve said that actually before, but, you know, I’m glad to get to say it again.

MR. SHAPIRO: Thank you.

MR. MANNE: There's nothing in the consumer welfare standard that says you can't fiddle with the specific levers, the specific doctrines by which cases are decided. And, in fact, this would be my third reason why we're not really talking about the consumer welfare standard is because the consumer welfare standard isn't operable. What matters -- and I think, Carl, you essentially said this -- is the presumptions, the burden-shifting, the standards of proof, the actually process by which we decide antitrust cases.

Those are the mechanisms by which any of this will actually change, if it changes at all, and those are the conversations that we should be having. Now, my problem with the presumption coming in from Barry and Maurice and actually also Carl is that usually before we move from a status quo to a new position, especially one that effectively imposes ex ante remedies, right, let's say this isn’t driving Carl with this, but let’s say you start with a sort of structural approach, basically in particular one that says even more obviously let's break up some existing companies because they've exceeded whatever threshold we've decided. You're imposing a remedy, and usually we require proof before you impose a remedy -- proof of a harm and proof of the connection between the remedy and the harm that it will actually solve the harm.

We have some evidence in this regard. We've talked about it a little bit. Everyone's probably familiar with the papers that are out there; no doubt there will be more. It is impossible to say that any of them have demonstrated all of the things that you need to demonstrate to make a transformation of antitrust, which means the increase in concentration that people have pointed to.

It's not so clear that that actually has happened. That it is a costly one, that it is a problematic one, not one that is not being caused by increases in inefficiency or scale effects and the like, that it is caused by some defect in not just the manner or the amount of enforcement -- of antitrust enforcement but also these mechanisms that we've been using to do it; and that indeed changing it in these particular ways, especially the ones that would impose structural and other presumptions ex ante, would solve the purported problems.

None of that has actually been demonstrated. We have a little bit of evidence to suggest it’s something we should look at, and that's why, as others have said, I will second that this process is great, I'm delighted that the FTC is doing this, and I think we should continue to do this and talk about it, but I think we need a lot more proof before we actually impose that kind of a remedy.

MR. MOORE: Fiona.

MS. MORTON: So thank you for the invitation to be on this panel and the previous one. I'll start with an apology. On the first day of these hearings, the one that did happen despite the hurricane, Jason Furman left in the middle of his panel for another meritorious engagement, and I'm afraid I have to do the same thing today, so I have Derek’s permission for that, and I apologize in advance. When I get up and leave, it's not because of what somebody is saying.

I wanted to comment on Carl's protecting competition standard, which I think is really terrific. I also teach in a business school, and we have a marketing department. It turns out people hire those students, and so we can rebrand, and if we're trying to convince both the public and the judiciary that something has changed, I think the renaming is critical.

I think emphasis on trading parties is more comprehensive, it's more clear. I think that the “as a result” portion of Carl's standard protects competition and not competitors who are exiting or having trouble for some other reason. I think disrupting the competitive process again goes back to this idea of proof and burden. Does the plaintiff have to have precision about anticompetitive effects that are going to occur in an unseen but-for world, a world that doesn't happen because the competitor's excluded, a world that doesn't happen because the merger has not yet occurred?

And I think Geoff's point just a second ago was exactly a demonstration of why we need this. That is to say if you're going to tell me we don't have enough proof and you’ve got to articulate exactly all the reasons that the economy's going to go to hell in a handbasket if we don't change this standard before we change it, that's exactly the kind of high burden that stops us from acting appropriately in balancing the error cost of what do we know about the harms from underenforcement compared to the harms from overenforcement.

Turning to Carl's standard and how it relates to what Maurice had said, let me note that in contrast to what Geoff just remarked, Carl said nothing about market structure. Or, rather, he said you take the market structure you get from the competitive process, okay.

MR. MANNE: I took him out of that. I said --

MS. MORTON: Okay, and that’s -- oh, I see, okay, you omitted. Excuse me, I misheard. Geoff omitted Carl from that point, which is correct.

So we take the result we get from competition and the competitive process, but we need to keep up the enforcement pressure on that entity regardless. So, for example, let's imagine that Amazon obtained the market power and the market share that it has through the competitive process, and I'm certainly an enthusiastic customer. Does Amazon now get a free pass under the antitrust laws because they acquired that market share on the merits? No, of course. We keep up the enforcement pressure, and, indeed, as Carl pointed out, when we have concentrated markets, this is even more necessary than usual because there isn't another competitor there who is strong to be keeping up the competitive pressure.

So that means we need to be doing much more on potential competition theories, on exclusionary conduct as disrupting the competitive process, keeping a competitor out of the market, on facilitating practices that might be enabling coordinated effects in the market because we're not having as many competitors as we otherwise would, and, in general, on protecting small players perhaps with data portability, perhaps with other kinds of techniques, but also with antitrust enforcement because though small players are the only thing that stands between the consumer and, let's say, a monopolist or a very concentrated market structure because somebody has grown, as Carl said -- we have more IT, we have more globalization -- that the efficient size of a firm looks like it's getting bigger.

And that's good for consumers, provided that the large firm continues to feel the heat of competitive pressure and performs to benefit consumers.

So I think this is exactly the right way to go: rebrand, rename, be more clear, change presumptions and burdens to make it clear that the plaintiff does not have to specify all sorts of but-for specifics, and shift the whole system, tighten it up and shift it so that we're getting a little bit more enforcement. And that protects us both in terms of mistakes we now understand that we've been making for the last 10 or 20 years, but also to create a level of competitive pressure that helps the consumer in the inevitable situation of more concentrated markets, which are due to forces outside our control, exogenous forces having to do with technological change and globalization and so on. So that’s -- that’s, I think, really the sensible middle ground here.

MR. MOORE: Thank you, Fiona. We are now beginning the Q&A portion of the panel. I’d like to -- that's going to be question number one.

I'd like to remind everyone in the audience that my colleagues will be passing out note cards. If you write your question down on a note card, it will be passed up to me, and I will ask the question if there is time.

One way I'd like to differentiate this panel from the prior panel is I'd like to get a little bit more specific and think about how the various legal standards might apply to specific examples. But, first, I'd like to give Jon first and then Carl an opportunity to respond to some of the comments and questions that were posed to them.

MR. NUECHTERLEIN: Sure. A couple things. One is I'm also a fan of Carl's rebranding. Consumer welfare standard has always been sort of the awkward shorthand to describe a standard that embraces a variety of other things, but ultimately, in any given case, this is a standard rather than competing values and unclear objectives. And I think Carl and I are on the same page with respect to that.

I want to say a quick word about burden-shifting in the modern world. I think we are overlooking that there are some pro-plaintiff, burden-shifting mechanisms already in place. So I'm going to take Microsoft and McWane as examples of Section 2 cases where once the Government shows anticompetitive conduct by a monopolist then the burden actually shifts to the monopolist to prove that the but-for world wouldn't have been any better anyways.

The Government doesn't actually have to prove anything about the but-for world in that context. We can talk a little bit more later about burden-shifting and HHIs, but HHI is for another context, and we may very well believe that the line is drawn in the wrong place right now for horizontal mergers. That's another context in which you do have effective burden-shifting that favors plaintiffs.

Okay. Barry asked a variety of questions about the A&P case. I'm happy to field them very briefly. His various questions actually reminded me a little bit of the sort of questions that I would get from Stephen Breyer when I would argue in the Supreme Court. It came in -- I think it was like a seven-part question, and I was always a little concerned that I wasn't going to get to all of them, and I may not get to all of them here, but you'll remind me if I don't.

And that, by the way is I think the only thing that Barry has in common with Stephen Breyer. Stephen Breyer, of course, is the author of the Barry Wright predatory pricing case which previewed essentially what ended up being the Brooke Group decision by the Supreme Court.

Okay, one is did consumers benefit from A&P's activities. Yeah, they paid much lower prices and they got access to stores with an enormous variety of produce and other grocery goods in them.

Did they sustain those benefits for a long time? Yes, they sure did. A&P was in business when I was in high school, and they continued to sell at prices -- their goods at very low prices. There was never any period in which A&P disserved consumers by excluding competition and then jacking up its rates. There are no consumer victims in the A&P story.

There are wholesaler victims. Barry points out that, well, A&P was kind of a wholesale purchaser. Sure, it was. It bought directly from suppliers, but that ended up benefitting consumers as well because in the process it eliminated the double marginalization. It was able to undersell retail stores that were dependent on intermediaries who were profit-taking, and the result, again, was the consumers were better off.

Barry asks, well, you know, this whole A&P system, where does it go? If we allow companies like A&P to prosper, don't we just end up with natural monopolies in all these industries? No, not really. As someone who worked for a struggling A&P store in the ‘80s can tell you, there's a lot of competition for groceries out there. Kroger cropped up, and it’s now the number two retailer today after Walmart. Safeway is out there; Giant is out there. All these companies were selling groceries at very, very, very low prices, and there was never anything that could remotely be called a recoupment period.

Finally, Barry asked about what -- oh, Barry asked what -- do I think the vertical integration is different in kind if it's undertaken by a dominant company. Well, let's think about Netflix for example. Netflix is a dominant provider of streaming video services in this country. It recently vertically integrated into video content production. I don't know anyone who thinks that's a bad thing, even though Netflix obviously has market power in the streaming video market.

Finally, Barry asked whether I'm okay with foreign states like Brazil driving rivals out by subsidizing products that are exported to the United States. I'm really against that, actually. And part of the reason is that's not competition; that's the Government using its coercive authority to extract taxes from its own citizens so as to drive out market-based companies not on the merits.

MR. MOORE: Carl.

MR. SHAPIRO: Thanks. Let me first respond to some things that Maurice said. I think we're in agreement that we should be realistic about and think about how antitrust fits in with a range of other policies such as issues having to do with data security, data privacy, consumer protection, et cetera.

So, you know, obviously, that brings in something like Facebook. From what everything I know, Facebook seems like they've had many serious missteps, but I haven't heard any clear antitrust elements. Maybe there’s a case I haven't heard of, okay, I’m not saying, but the point is we shouldn't be expecting antitrust to do all those things. We should be looking to sector-specific regulations. Gene Kimmelman emphasized this point.

I kind of doubt the current FCC or FTC. Maybe they need -- I don't know whether they have the statutory authorities, you know, probably not in some of these areas, and maybe that is a place we can look to Europe, but that, to me, is not about the competitive process in antitrust; it's about other areas where we need to have regulations to control some of these companies that are having such a powerful impact on our society and our citizens. Okay, so that's the first point. I think we both agree.

Second, you raised the point where you said about nascent competitive threats and it’s hard to tell what's going to happen in those cases. I couldn't agree more. I think it’s -- and there's a separate hearing the FTC's holding on some of those issues. I think it's a very hard area to know exactly what to do, but I certainly -- I guess I'm generally quite open at this moment to saying if the FTC, DOJ, hopefully the courts then, would widen the aperture in terms of how we think about potential competition cases, okay, particularly if it’s a dominant firm and the acquired firm is a possible, maybe likely, adjacent, could-become-a-threat-in-the-future, you know, I can't totally formulate that now in two minutes, but that can be handled -- and it seems like the Clayton Act’s incipiency standard leaves some running room for that, serious running room.

I see no reason to change this standard we're using. I mean, why wouldn't the protecting competition standard work fine for that? That's a completely separate issue about how do we handle those cases where it's going to be hard to know what's going to happen. And that relates somewhat to Geoff's point, too.

Those are the two main things, although there's a side point. You mentioned the firm that gains the dominant position, I think you said through the goodness of their heart. Well, that really wasn't what I was counting on actually. I was thinking about pure selfish pursuit of profits, which is why we need to control these forces. Okay.

And then, Geoff, I want to respond to some of things you said. I agree that a good question to ask is how do we react to novel business strategies, which often are brought about by changing technology and business forms, okay. I think it's true that there was a time 50 years ago where there was a tendency to be hostile towards them, okay, of antitrust authorities or courts, like, oh, we haven't seen this before, it looks suspicious.

I think that time's long passed. And, you know, I did work -- a lot of work on network effects and understanding, you know, how that works. The work goes back 30 years now. And, so, no, that was not -- it was recognized, the importance of those, and it's a form of scale economy. It's not inhospitable to them where things companies might do to foster interoperability or grow -- so I just don't think that is -- it's something to be aware of, for sure, but I don't think it's driving things now and leading to, you know, false positive antitrust enforcement.

MR. MANNE: I wasn’t talking about the status quo. I was talking about the movement away from the status quo.

MR. SHAPIRO: Oh, I see, okay. So, then, maybe we’re -- thanks. That's helpful clarification. So I think we need to continue to be, I guess I would say, open and fairly neutral regarding a new practice but apply the approach that I've described and not think because it’s new it’s bad or because it’s new it’s necessarily good, but we need to understand it. So maybe we're just in agreement with that maybe. Thank you.

The other thing, and this is my last point, Geoff, you said if we're going to -- I don't know quite how you put it. We're going to need a lot more proof to make certain changes. And since I'm not advocating throwing out the basic standard but I am suggesting we tighten things up, I would turn that around on you actually and put it this way.

Over the past 30, 40 years, 20, 30, 40 years we've had, I think by -- all who follow this would agree, a substantial shrinking of the cases the plaintiffs can win, additional burdens and all that we’ve talked -- the Supreme Court has led that, primarily in Sherman Act cases, and we've also certainly had a reduction in merger enforcement from 1968 to today.

That's been a very substantial change. A lot of that has come without an empirical basis. Okay, a lot of that the courts have just decided they wanted to do things and they've done it. So I would turn that around and say wait a moment, we had all this shift without a lot of proof, and so maybe we should back up a little bit back to where we were, not -- although I don't want to go back to 1968, don't get me wrong -- well, not in the guidelines, in some other cases I would, but in other respects it was a good year -- actually, it was a very bad year in most respects.

MR. MANNE: The music was good.

MR. SHAPIRO: Music, thank you. So, no, I think the problem is that the shrinking of antitrust has occurred without an empirical basis and proof and that's part of the problem.

MR. MOORE: Okay, thank you.

We'll now move on to more specific questions, and I'd like to start with Carl's helpful framing about some -- what he calls misconceptions with respect to the consumer welfare standard as renamed by Carl. So one of the misconceptions that

Carl identifies is the idea that the standard, however named, ignores harm to suppliers.

So let's think about a pure merger to monopoly that affects a labor market. And there are no plausible effects on the downstream market. So an example of such a case might be a merger between the only two coal mines in a geographic area in West Virginia, and assuming there is strong evidence on effects on workers, both quantitative and qualitative, that the merged firm will decrease the quantity of jobs that are available and put downward pressure on wages.

So this dovetails quite nicely with a question from the audience which is what if lower marginal cost as a result of a merger is caused by monopsony power. So the question that I'm going to pose to Geoff is, do you have a concern that the consumer welfare standard as currently applied in courts would not capture that sort of case, would say -- that harm doesn't count.

MR. MANNE: Yeah, well you made it as easy as possible. There's no question that it would be captured. I'll just read you some of the language from the Horizontal Merger Guidelines for example. “Mergers of competing buyers can enhance market power on the buying side of the market just as mergers of competing sellers can enhance market power on the selling side of the market. Agencies may conclude that the merger of competing buyers is likely to lessen competition in a manner harmful to sellers.”

I don't think there's any question that it comes under the expectations of the agencies and that it would be upheld by courts. I don't recall it having happened in a merger context, but certainly the agencies have applied labor market monopsony sort of theories in the Section 2 context, and that doesn't seem to have been problematic.

What I do think is problematic, and I’ll just toss out there, is that in some of the arguments about sort of connecting social ills to increase concentration, and maybe it's just being a little bit too lax or speaking in slogans, but there is, to me, an implication that monopoly power in a product market has a relationship and can or does cause monopsony power in the labor market.

And to my understanding, there is absolutely no connection there at all, right? But when we talk about concentration in the economy and look at this and say it's a problem, we're talking about product markets, I think. And so when we then in the next breath say, and this increasing concentration has caused real problems for labor, I just don't think, and we can talk about the appropriate standard of proof, but that certainly hasn't been demonstrated, and it certainly isn't theoretically required or even likely to be the case. So, I mean, I have more to say on this, but I think it's very clear, given the hypothetical.

MR. MOORE: Does anybody on the panel disagree that it's clear?

MR. STUCKE: Well, I mean, it's nice in theory, but in reality, the antitrust agencies rarely look at what impact that a merger will have on labor. I think there was this recent no-poaching agreement among three rival equipment manufacturers, and then two of them merged. The interesting thing is if they were looking downward, and you would see evidence of actual collusion, that would then suggest that the merger might actually make things worse. It could make things better, but it could make things worse.

Because they failed to look upward, they never really saw that there was this no-poaching agreement, and nor did they consider then what sort of impact then that the merger might have had now because now instead of having three competitors you just have two. So I think this is a major blind spot. I mean, you've got --

MR. MANNE: Do we think that they don’t know about it? I mean, you have a large staff of very smart and dedicated people who are pouring over millions and millions of documents. I'm certain that they know. I'm certain that everyone who has anything to gain by making sure they know makes sure they know.

And I'm pretty confident -- I mean, you know, Deb and Sharis ware getting, I think, a little bit upset on the last panel because I think there was definitely an implication that the agencies are really not doing their job. And, of course, I think they’re doing their job too well and they should really just knock off for a couple years.

MR. STUCKE: No.

MR. MANNE: Not really, but this is -- this kind of thing that you're mentioning, I'm pretty sure they would notice and they would look at it.

MR. STUCKE: No, I mean, all my time at the -- when I was at the agency, we did a lot of mergers. I mean, we focused primarily on downstream effects. And there were occasionally that we would look upstream but mostly downstream. We never really considered impact on labor. Sometimes they said that

that's irrelevant.

And then the other thing is is that invariably, even where, you know, we went to what was quantifiable. I remember one time we had this case involving white bread, and the beauty of that case was having the unilateral effects theory. I think, Carl, you were there with Continental and Interstate Bakeries, and it was a breakthrough, but in a way it was sort of a curse because now with the scan data we can precisely predict what the likely price effects -- and that became the sort of trigger towards unilateral effects, and I think that even had a diminishment on coordinated effects, even downstream.

I mean, Carl, do you remember a specific case where the focus was upstream on labor in all your time at the agency?

MR. SHAPIRO: Well, I think we can -- the FTC -- the case just this last summer, was it BioFilm -- somebody help me out with that -- which involved -- one of the counts was monopsony power in several cities in acquiring human plasma, that the donors would not have the opportunity to get a competitive rate for donating their plasma. These, I think, are generally people that have very little money. So that was in there.

Now, those aren’t exactly -- they’re not employees, but they are individuals. It’s very similar. They're looking upstream. But I agree it's not very common. Okay, I mean, the DOJ has looked at it. We've done -- we, they, have done it in agricultural markets sometimes involving farmers. There was a chicken-processing merger case, for example.

So, to me, it's just an open question. Are there more mergers? Are there many mergers where there is -- let's just start with the obvious, is a significant increase in concentration caused by the merger in a relevant labor market, which would typically be an occupation in a really narrow geography, say? I don't know the answer to that.

We have some data now coming out on what concentration in these labor markets might look like. I'm sure some are highly concentrated -- certain specialties, particularly in certain areas. I think that's not a bad thing for the agencies to look at. I think it has not been routine so far as I know to do so. It’s just a question of whether that would -- you don’t want too many resources spending on that if it's mostly going to be nothing going on, but in principle, that is worth looking at.

MR. LYNN: I think there's another way of looking at that, which is it's not necessarily -- and, actually, what I’m about to say doesn't imply there's a necessary connection between the concept of consumer welfare and the actions of the agencies, but what we can look at is the actions of the agencies in recent years, especially the FTC.

We actually have -- my team -- Phil Longman from my team put out an article just earlier this week in the Washington Monthly. I’d encourage you all to read it. And it’s looking at sort of the FTC's enforcement actions against labor union -- individuals trying to form labor unions, individuals trying to form trade associations, you know. And he starts off with a story about the move against church organists.

You know, I know it’s a -- those of you who do go to church, I know that the organist cartel is one of the great threats to our republic, but they did take on -- you know, they did devote taxpayer resources to taking on the church organists. They've also, in recent years, targeted ice-skating instructors, animal breeders, music teachers, public defenders, doctors and dentists in private practice, home health aides, truck and Uber drivers.

MR. SHAPIRO: You're saying that you -- I think you’re saying, and I want to understand, that those sort of collective actions by certain classes of workers or professionals you think should be given more running room under the antitrust law, even if, let's say, it looked like a cartel type of arrangement like a union? Is that what you’re -- is that the direction you’re going in?

MR. LYNN: A union is a cartel.

MR. SHAPIRO: Well, I'm just asking which direction you're going in.

MR. LYNN: Yeah, I would say -- I mean, that's exactly what we were saying --

MR. SHAPIRO: Okay.

MR. LYNN: -- is that the FTC should probably never or extremely rarely be targeting people like church organists and ice-skating instructors. And certainly --

MR. SHAPIRO: Because competition among them needs to be reduced for some reason.

MR. LYNN: If these people choose -- this is actually going back to -- you know, we can take this back to, you know, 200 years. I mean, I’m sure you don't me want to go into another lecture about that.

MR. SHAPIRO: That’s why --

MR. LYNN: You know, it's been one of the great freedoms in the United States is that if you were an independent actor you can get together with your fellow workers, you can get together with your fellow farmers, you can get together if you were an independent businessperson with your fellow independent businesspeople and create unions and cooperatives and trade associations to promote your joint interests.

MR. MOORE: To real estate agents for example? Should they be able collude on --

MR. NEUCHTERLEIN: All different types of trade associations.

MR. LYNN: Actually, if you guys want to look at Zillow -- if you guys want to look at Zillow, I mean, if the FTC would look at Zillow, that would actually be probably pretty useful right now.

MR. MOORE: Can you draw a distinction between trade associations that deserve scrutiny and trade associations that don't deserve scrutiny? I just want to be clear about what these cases are about. They're not lawsuits against individuals; they are lawsuits against trade associations, sometimes that had many thousands of members. And I'd like to be clear about particularly the content of the consent agreements that the FTC has reached with those trade associations.

So I'm just going to read the aid to -- the analysis for public comment in the case against the professional skaters. These are teachers of ice skating. And the case involved the code of ethics of the trade association, and the code of ethics states that no member shall solicit pupils of another member, and prior to acting as a coach, the member shall determine the nature and extent of any earlier teaching relationship with that skater and other members.

The association enforced its code of ethics through a grievance process, which resulted in varying penalties, including suspended membership and probation. The association sanctioned coaches for soliciting students of other members, even when the students and their parents want to switch coaches. And being a member of the Professional Skaters Association was required to participate in competitions like the U.S. Skating Federation and to be a member of Team USA.

So the question is do you think that conduct should be legal and why?

MR. LYNN: It sounds a lot like the NFL. And if you -- you actually -- if you have like a limited amount of resources, maybe you could actually target the NFL for keeping Colin Kaepernick off of the --

MR. SHAPIRO: But that’s not answering the question.

MR. LYNN: No, this is answering the question.

MR. SHAPIRO: No, no, that's an analogy that’s not a very good analogy. I think the question was well posed.

MR. LYNN: It is a very good analogy. It is a direct analogy.

MR. SHAPIRO: Okay, fine, whether -- let's not argue about that. The skating fact pattern -- look, it seems to me -- I just want to understand what you're saying. It seems to me you're saying this group should -- you welcome their not competing against each other in order to get a presumably higher rate and have a better life, right, because of a higher income, and that should be that -- you welcome that. That's what we're talking about, right? Is that right?

MR. MOORE: And one point of clarification --

MR. LYNN: I’m going to say this again.

We’re dealing with -- there's limited resources in this agency. There’s limited resources -- I hear you guys all the time at the FTC, we need more funds; at the DOJ, we need more funds. We need to pay more -- you know

MR. NUECHTERLEIN: I’ve never said that.

MR. LYNN: So it’s like, with the limited resources that you have, I look around and I see many targets. I mean, we could talk about Google and Facebook monopolizing the advertising industry. Stripping advertising -- you know, it’s like you got a limited number of people in the FTC and a limited -- so use those people carefully. Use the taxpayers’ dollars wisely.

MR. SHAPIRO: Okay, so if they use the taxpayers’ dollars wisely and issue a statement about what they think should be allowed and not, okay, and then maybe there would be private enforcement. It’s not about government resources, I just want to know, this conduct that you welcome, because you seem like you welcome it, but then you say, well, I just don't want them to go after it. So I just want to understand whether this cartel-like behavior is something you welcome or you just think it's not that bad so they shouldn't bother.

MR. MOORE: And I'd like to make one point about the resources that it took for all of these cases. I actually checked with the Anticompetitive Practices Division that worked on these cases, and one attorney and no economists worked on these cases, and they weren't full-time on any of these cases. They weren't litigated; they all reached a settlement that the only penalty --

MR. LYNN: If you're a church organist cartel, and the FTC comes after you, you're going to give up real fast.

MR. MOORE: So the idea is that there would be a deterrent effect that other trade associations, perhaps trade associations that affect a larger amount of economic commerce in the United States, might be deterred by engaging in similar conduct.

MR. SHAPIRO: But Congress has various statutory provisions, such as particularly in the agricultural area where farmers are allowed to form cooperatives. So Congress has made a decision that that's allowed. Okay, and we -- okay, I'm just saying, you think -- you would go for the same type of approach for the skater -- for the skating coaches. I think that's what you're saying, and I don't know why you're struggling, either yes or no.

MR. LYNN: Oh, there's no struggling here.

MR. SHAPIRO: Okay, so is it yes or no?

MR. LYNN: Of course. Whatever is good -- whatever rules govern the ability of farmers to come together, whatever rules govern the ability of workers to come together, any small enterprise that wants --

MR. STUCKE: I just -- I mean, first --

MR. SHAPIRO: Thank you. That’s clear now.

MR. STUCKE: I mean, first to Barry's point, I mean, there is scholarship in -- you know, academic scholarship. Jack Kirkwood talked about at times when small sellers should be able to get together when they’re dealing with a monopsony, and so he raises that. I mean, that was one of the concerns.

So, I mean, it's not -- there is literature -- academic literature that supports Barry's point. I think Barry's larger point, though, is when you're looking at press resources and you look at potential harm and you look at the European Commission and what it's doing, and Carl said, I don't see any antitrust case against Facebook. Well, the point is cartel or -- we can talk about that at other points. But you do see then these other competition agencies that are engaged with these giant tech platforms and are opening up inquiries. And you see the FTC and the DOJ do basically nothing when it comes to these powerful tech platforms that when you have one DOJ case since 2000, that's this abdication.

And, so, when you're saying we need more resources and the like, I think you have to then justify how you're using your resources and why aren’t you bringing the type of cases -- like when Carl and I were back at the Division bringing the Microsoft case was intensive. But that did a lot --

MR. MANNE: Are you suggesting it’s because they think they can't win in court? I mean, that's what this is about, right? If all this comes down to is a different preference for prosecutorial discretion, we don't really have to have a panel about that.

I mean, there are important questions here as we were discussing a little bit earlier with respect to the sort of presumptions and where they should be drawn. But the panel is about -- I mean, that would apply to this panel if what you're saying is the way the law has developed, they don't bring those cases because they can't win them and they are relegated to bringing cases against poor struggling skating coaches because that's really where the law has left us.

And maybe that is what you're saying, but that's a very different thing than are they -- you know, do they have enough resources.

MR. MOORE: Jon.

MR. NUECHTERLEIN: So I'm just going to echo what other enforcers in the prior administration remember, which is that we did bring close cases. I personally argued the McWane case in the 11th Circuit over a fierce dissent by Josh Wright. I can't count how many pay-for-delay cases the FTC brought over the years. These also were close cases. It actually weathered a number of judicial defeats before it doubled down. Hospital merger cases that were deemed a dead letter back in the ‘90s, the FTC got around and reformed its economic analysis and came up with a winning strategy to oppose anticompetitive hospital mergers.

I don't think the FTC has been asleep at the switch. I'm sure that if they had more resources it would go after more anticompetitive conduct, but I don't see the FTC cutting very many facets of industry in its slack.

MR. MOORE: And I’d also like to point out that if you took all of the resources that were applied to the trade association cases you wouldn't get very far if you're going to bring another case like Microsoft with those resources.

So I would like to move on to market structure and the 1968 Merger Guidelines, which Barry spoke about in the last panel and has spoken about a number of times before. First point out that one of the primary authors of the 1968 Merger Guidelines was Don Turner, and Mark Niefer has an article in a past issue of Antitrust magazine that talks about the formation of the 1968 Merger Guidelines and how they were developed, and I would recommend that to everybody.

So the ‘68 Merger Guidelines have strict structural presumptions and essentially say that if the market is concentrated at a certain level, a firm with X share can't buy a firm that has Y share, and it’s quite specific. And I gather that part of Barry's admiration for the ‘68 guidelines is because it removes some discretion from the process. It makes it predictable, which I think we can all agree predictability is generally good.

The question that I want to focus on relates to the specific presumptions and market share requirements that are in the 1968 guidelines. And I want to frame that against the idea that there's quite a bit of heterogeneity in terms of how markets are structured. Economies of scale might be far more significant in one market compared to another, which would mean that minimum efficient scale would be different in one market compared to another. And if minimum efficient scale is higher, you would expect to have fewer firms.

And in addition to that, competition might look different in one market compared to another. The vertical merger panels this morning talked about the Cournot model and the Bertrand model. They're very old models and very simple, and I learned about them in Econ 101, and I think they've been developed since they were first developed and they're much more complicated now. But the simple Cournot model of duopoly, producers choose quantity. In equilibrium, price is above marginal cost; industry output is below the level that would occur under perfect competition; and there's a deadweight loss.

In the Bertrand model, firms compete on price and the basic equilibrium result is that price equals marginal cost; output is at the competitive level; and there's no deadweight loss. So you have two identical structures, and the outcomes are different. So given the heterogeneity and perhaps depending on the circumstances, somewhat limited signal that structure provides -- this is to both Barry and Maurice -- I'm curious why we should focus more on structure.

MR. LYNN: No, it's a great question. If you don't focus on structure, if you don't have some basic goal, you end up in a winner-take-all situation. One of the weaknesses, as far as I understand it, of Carl's new proposal, and I haven't looked at it carefully and maybe it's not true, but one of the weaknesses is that it basically -- the focus on competition without a focus on market structure leads to the complete consolidation of markets.

MR. SHAPIRO: We're talking about mergers now, not unilateral conduct.

MR. LYNN: I understand. But in terms of the -- in terms of the -- you know, it's important to go back and understand what -- how we saw these things for most of the 20th Century. How did we see these? We carefully separated out -- you know, you talk there’s a lot of heterogeneity. You said there's different markets are different, and that's obviously true.

You know, one of the things that we used to do a much better job of is clearly separating out what is a network monopoly, what is a complex industrial firm that is dedicated to the application of industrial arts to mass manufacture, and then what is just a business that could be handled by a family. And we had different sets of rules for each of those different areas for most of the 20th Century when it came to farmers and small businesses, you know, small shopkeepers.

You had -- the goal was actually to keep the small shopkeepers, the farmer, the independent businessperson in their business to avoid concentration, to prevent concentration throughout that entire political economy. Now, we could debate whether that's smart or not. We could debate about whether that led to all kinds of inefficiencies, but that was the goal. And that’s -- it’s not -- there’s no ifs, ands, or buts. I mean, it’s like that was what people aimed at.

When it came to, say, production of automobiles, the production of chemicals, later the production of semiconductors, you know, the antitrust enforcers didn’t say, oh, we're going to keep things really small. You know, it’s like when you hold up a semiconductor chip, inside of that semiconductor chip, there's like a thousand different markets that used to exist, but they've all been vertically integrated away.

So the antitrust enforcers didn't stand in the way of the engineers who are seeking to integrate something that was much better, more effective, more beautiful, so they let that happen. But they said there’s going to be a limit to the number of -- the amount of the market share that a car manufacturer or a semiconductor manufacturer or a chemical manufacturer can have. And that's about one-quarter of the marketplace. If you go above that, then we're going to have to start really talking about that.

And then when it came to network monopolies, communications firms and railroads, there are some really simple rules that were applied to that. No vertical integration, no discrimination. Now, this was a -- this wasn't all under the roof of antitrust. This was under the roof of antimonopoly. This was under the roof of the U.S. Government.

You know, so it’s like we can't say that it's left entirely to the antitrust people to come up with this regime. The American people came up with this regime. We ran it for a long time, and it did a lot of things really well to those who didn’t want a boss. They could go in and have -- run their own farm or run their own business.

To those who wanted to go in the industrial system and be an employee, they could do that. You also had back then a pretty strong right to unionize if you're an industrial company. And then when all individual producers, all individual businesses, and all individual consumers came to the intermediate companies, the communications firms and the transportation firms, there was various forms of common carriers to keep those enterprises neutral and to ensure that the massive political power in any enterprise was not being misused to concentrate political power, as we see today with the communications and transportation network monopolies of today which are Google and Facebook and Amazon.

So there's a lot of different approaches, and we have to actually understand how to use these approaches to deal with the actual problem at hand.

MR. SHAPIRO: That is not the answer I expected when asked about Cournot versus Bertrand, I have to tell you.

MR. MOORE: I want to give Maurice a chance to respond to that question because he emphasized structure in his opening presentation.

MR. STUCKE: Sure, yeah. So I go back to --

whenever I'm in doubt I think of Bernie Hollander, for those of you know who spent many years at the DOJ, and his favorite -- I asked him one time, who is his favorite AAG, and he said Stanley Barnes. And Stanley Barnes, during the Eisenhower Administration, said in his study of the antitrust laws that legal requirements are prescribed by legislatures and courts, not by economic science.

And I heard earlier today that, well, we're in the prediction business. First off, we don't know how accurate we are in our predictions. Nobody knows. I mean, you would think we would -- I mean, and I think this is commendable about the FTC in the hospital retrospectives, they could actually change the law, but we don’t know how accurately we’re actually predicting price effects.

Now Jon Kwoka looked at the post-merger reviews. Some of you have problems with that. He himself identified limitations with that, but it's questionable to what extent we're actually accurately predicting price effects. The other thing is the -- we're not arguing that these mergers are per se illegal, we're just saying that it switches the presumption because there are things that are measurable and there are things that aren't measurable. And those things that aren't measurable can be as important if not more important.

So another person when you go to doubt is Hayek. Hayek said that in many of the sciences, what's measurable is what's important. But for economics, what's measurable isn't what's important. And what we're seeing now is evidence of a market power problem that doesn't come necessarily from efficiencies, and you're seeing an inverted U relationship with respect to innovation, that when you can have very high concentration, that can actually have an adverse effect on innovation.

So what we propose, and this is currently legislation, is that when you're having markets like this, and that could address then what Carl talked about, the incipiency, is when you have a company that's already a monopoly, you could then deal with the Alcoa-Rome situation where a monopoly then acquires a very small firm.

And the reason why I think this is important with dataopolies is this. Back in the ‘90s, Microsoft didn't really have a great sense of where consumers were going, but in controlling these platforms right now, they can see what are some of the nascent competitive threats, what apps are being downloaded and the like. And that gives them an insight, and we call this the now-casting radar.

And that's the concern because they could see trends possibly before the Antitrust Division or the FTC, and they can eliminate those nascent competitive threats, either by buying them or subtly engaging in pressure that the agency won't necessarily pick up, and then you could have a market power problem. So that's why we proposed, then, reversing the burden on mergers.

MR. SHAPIRO: Can I just respond?

MR. MOORE: Go ahead.

MR. SHAPIRO: The question was about the economic theory has different predictions about oligopoly, so how we do feel -- how can we have this structural presumption because we don't really know that much. And I guess -- I have a paper with Herb Hovenkamp pretty recently about the importance of the structural presumption, where Herb on the law basically says, look, it's very solid law going back to Philadelphia National Bank and we need to strengthen it. And I say more on the economic side, there's a lot of good economics supporting structural presumption.

So I think it’s true in any given market it can be very hard to predict this is kind of the point about if you look for specific numbers it's going to be hard, and the structural presumption is a way to cut through that in a pro -- to help enforcement in a lot of respects. And so I think we need to strengthen it. So -- but while recognizing it's hard to predict and markets are different.

And that's, I think, why the Merger Guidelines, you know, what the agencies can do is go beyond. They're not just going to do what they did in ‘68, right? They're going to go and look more carefully, okay, here are the -- what do we know about the way the market is evolving and all these other things and try to look at effects and not just structure. But, really, it's a different process at the courts than at the agencies. There's different institutional competencies.

And so I do think what you can do in a few cases where you can look deeply to help make a better enforcement decision is quite differently when you get into court where the structural presumption’s valuable and needed even though it is and because it's hard to predict.

MR. MANNE: Can I just add one little quick thing --

MR. MOORE: Go ahead, Geoff.

MR. MANNE: -- which is precisely that process. You know, there is uncertainty, there's obviously administrative value to presumptions. It helps if they're actually grounded in, you know, some sort of reason to think that they cut in one direction or the other, but even that's not required for administratability purposes.

But what's great about the system we have now is that if the economy changes or a particular market changes in such a way that the structural presumption doesn't really make much sense anymore, there is at least a process by which it can be adjudicated in court. And the courts, over time, will adjust the way they approach the structural presumption.

What would be the worst of all possible worlds is imposing an inviolable structural presumption that isn't subject to any kind of amendment by the --

MR. NUECHTERLEIN: As a litigator, I can tell you that nothing's inviolable because the antecedent question of how you define markets is often --

MR. MANNE: Whenever I say inviolable,

assume I mean relatively.

MR. SHAPIRO: But I don't think we'd want to go back to where it would be irrebuttable, for example --

MR. MANNE: Right.

MR. SHAPIRO: -- which it was kind of close in ‘68, right?

MR. MANNE: Or if they passed any of the industrial reorganization acts.

MR. SHAPIRO: I wouldn't want to go back there. Maybe some others here would.

MR. MANNE: Or if they had passed any of the industrial organization acts. I mean --

MR. SHAPIRO: I wouldn’t want to go back there. Maybe some others here would. But that’s

MR. MANNE: I just want to caution against that. I’m just saying, I agree with what you're saying, and I just want to make sure it's clear that part of the benefit is that it can actually adjust over time.

MR. MOORE: I said I was going to get into more specific fact patterns or hypotheticals, and I'm not going to do that with this question because there are two opposing questions from the audience, and it's too delightful not to ask them, and they’re very high-level questions.

So, one, if the consumer in the consumer welfare standard is so confusing, why not use a total welfare standard? And the other question is, can we please put the total welfare standard to bed? So I will pose that question to the panel and see if anybody wants to articulate a defense of the total welfare standard.

Go ahead, Geoff.

MR. MANNE: Surprising, isn't it? It's not that I'm going to articulate a defense of the total welfare standard. I'm actually going to use it to do two things: number one, to point out that one of the reasons we have a consumer welfare standard as a sort of stand-in for total welfare standard is because it is itself actually a compromise for the sake of economizing and the like on the understanding that producers benefit when consumers benefit but also benefit if they can take advantage of consumers, would basically say, well, look, you know, and it's hard to distinguish between the two.

Well, let's not look at the welfare of producers; we'll look at the welfare of consumers, and we'll capture most of it. And there's a number of other reasons, too, that the consumer welfare standard is sort of a stand-in for total welfare. It's not perfect, of course. In a sort of ideal world, if we were social engineers, we might actually want a total welfare standard if we could be sure that it wasn't -- that we were actually increasing total welfare.

And the problem is, of course, the uncertainty, the ambiguity and the like, and that's, again, precisely why we have the standard that we do use. Moving even farther, further away from that, I guess, would make sort of even less sense to me, especially when it's justified on the basis of the problems of uncertainty.

And, again, I think this is sort of what we've been dancing around quite a bit here, that is, of course, there is a benefit to increasing administratability and reducing uncertainty, but it doesn't help you any if you're reducing uncertainty in a direction that actually is the opposite of the direction you want to go. So you want to have some basis for the sort of presumption you apply. I think that's what we've done with the consumer welfare standard, but if we had the mechanism to relatively, reliably, and inexpensively adopt a total welfare standard, I would be all for it.

MR. MOORE: Go ahead, Maurice.

MR. STUCKE: I want do a shout-out to Marshall and then also Mark Glick. And Mark Glick has just recently come out with a paper, and Marshall was emphasizing this with me, is that total welfare is unworkable when we rely on a partial equilibrium model. And, particularly, like, we don't even capture, like, the earlier question had something about reduction in marginal costs.

Normally, we look at that as a good thing, but what if that reduction of marginal cost is actually at the expense upstream on labor or farmers and the like? We're not necessarily capturing that. So when we’re talking -- I mean, we can't even capture innovation or quantify privacy or quantify quality and the like. And we can't even do that under a partial equilibrium model. How would we then try to determine all of the effects that a merger might have on a total economy?

And Marshall can add to that, but that's my understanding.

MR. MOORE: Okay, I’d like to move on to think about -- and this is going to be geared first at you, Maurice, to think about how your proposed standard would handle a specific example of conduct. So when I think about welfare or welfare analysis, I think about how do we think about tradeoffs. And agencies and courts often have to make tradeoffs in part because the evidence that we're looking at is ambiguous, so the facts might support a plausible claim of exclusion or predation but also might support a claim that the conduct benefits consumers or creates efficiencies.

And I think I'll focus specifically on predatory pricing, but you can think about this in terms of vertical restraints, and you can think about this in terms of innovation that some might call predatory innovation, but I think we'll focus on predatory pricing. So the challenge in identifying the correct legal standard is to pick a standard that helps the decision-maker distinguish between beneficial conduct and harmful conduct when at a very high level the conduct looks like it could be both.

The D.C. Circuit in Microsoft said the challenge for an antitrust court lies in stating a general rule for distinguishing between exclusionary acts which reduce social welfare and competitive acts which increase it. So in the context of a predatory pricing allegation, how would your standard operate? You have an example of a company offering low prices. So, you know, the first cut is to ask whether those prices are below cost; and, second, would it matter if the seller offers multiple products? So here I'm trying to capture what you might think about loss leading or how your standard might analyze loss leading.

MR. STUCKE: Okay, sure. So, yeah, actually, we talked predatory pricing yesterday in class. And what we propose is basically what the standard is currently in Europe, whereby if a dominant firm is engaged in sustained pricing that's below average variable costs, or let’s say marginal costs or another appropriate cost measure, then that is presumptively anticompetitive. And you don't necessarily have to prove recoupment.

Now, I think Carl said that, you know, the recoupment, well, we can talk about the recoupment. I think, my understanding, going around antitrust circles, that after Leegin, there hasn't been any successful predation case brought by either agency, correct me if I'm wrong. And the only one we were able to get is where Spirit Airlines survived summary judgment.

I do know that Bruce Brugmann brought a predatory pricing case under California state law where there wasn’t a recoupment against New Times, and

I think he prevailed, but I'm unfamiliar with any successful predatory pricing case since that decision. And I'm interested because Spencer Weber Waller is also doing a paper on this.

And, so, what've rose is something that's already now employed in Europe and it would foster then greater convergence.

MR. NUECHTERLEIN: Well, I mean, you're describing a -- can I?

MR. MOORE: Go ahead.

MR. NUECHTERLEIN: You're describing a set of circumstances in which a regulator, let's say, has accurately found that a producer is pricing on a sustained basis below marginal low cost. Either that producer is acting rationally or it expects to recoup those losses at some point. So if you just assume that most businesses operate rationally, then recoupment is more or less built into a finding of genuine, long-term -- not long-term, but genuine, sustained, below-marginal-cost pricing.

MR. STUCKE: Right, and there you have -- like, let's go back to Leegin. There, you had 18 months pricing below average variable cost, and there was strong evidence of anticompetitive intent, predatory intent. So, here, the company believed in what it was doing. And the majority was rather paternalistic. They said, no, despite what you may believe, you could not prevail in this market. And I think this is where Justice Stevens says in this dissent, that in that market, they knew how to dance this dance very well.

MR. NUECHTERLEIN: So there are a couple questions here. One of them is how often is this really a problem and what are the costs of false positives and false negatives, what are the error costs in this context. And I think in that respect Justice Breyer, and very rightly, got it exactly right, which is you don't want to create systemic disincentives for companies to lower prices. That's not to say that there cannot be successful prosecutions for predation, but the theory of those prosecutions has to be that at some point consumers will be net worse off than they would be in the absence of the strategy.

MR. SHAPIRO: I think it's important to throw into this mix, I mean, the notion of recoupment here, I think as has been discussed and probably in most people's minds, is the company prices below cost and then at some time in the future they recoup that somehow through some positive margins.

Let me just suggest, and this relates to your question about multiproduct, is that you really have to be careful. I think if a monopolist is pricing below an appropriate measure of cost that they have some explaining to do. That’s how I think about it. Now, there’s different ways they can explain it, okay?

The way that would favor -- that we might be all for is when they say, yeah, we're going to drive everybody out and then we're going to make the money later, okay, by jacking up the price. Well, that's what we're worried about. But what if they say, well, no, actually, what’s happened is we're actually at a fairly smaller scale of production right now so it's actually pretty expensive -- imagine it’s an automobile or something or some other manufacturing item -- but we know that by getting down the learning curve and getting scale, we're going to get our costs down, and we're trying to get there, and we’ll get there faster, okay. So is that a defense?

Okay, well, the economics of that would say, well, actually, if you look at the economics of learning by doing, that by producing more today you learn and produce less in the future, the currently measured cost of that car is actually not the right measure of cost because you get some future benefits on the cost side due to scale. So you have to measure it correctly. It might look like they're below cost but not really.

Another one would be, you know, they sell this product because it's bringing people in the door and they're going to buy some other products just in the same transaction or the same month. That's not a temporal recoupment. So I think you need to be careful, but if it really is temporal recoupment in the future, then that's more suspicious.

But I don't know how you can do -- now, that all should fit fine within the -- are the trading -- the customers ultimately hurt. So I don't think any of this disturbs the use of the protecting competition standard, no matter how you come out, and I tend to come out thinking that in Brooke Group the court put in too many hurdles and that's why we don't see any plaintiffs really bringing, much less winning, these cases.

MR. MANNE: That’s not why. That’s not why. We don’t see it because it doesn't make a lot of sense. I mean, or there is no way to tell that that's not the reason. I mean --

MR. SHAPIRO: Well, I'm saying the standard is overly restrictive, and, therefore, it is reasonable to infer that --

MR. MANNE: Or it’s properly restrictive.

MR. SHAPIRO: that -- well, I’m saying overly and you’re saying properly. We’re having a conversation.

MR. MANNE: Well, I know, but what I’m saying is that the fact that it's hard to bring one of these cases is not itself any evidence whatsoever that we don't have enough of those cases. You may be able to point to the specific restrictions in the economic literature and say, hey, given what we know, this is actually too restrictive. That's something very different.

That’s not what Maurice’s point was. Maurice was saying, well, clearly it's not -- it’s overly restricted because we don't have any cases, but those are not --

MR. SHAPIRO: Well, I didn't mean to make that syllogism just like that, Geoff.

MR. STUCKE: Well, let me just quickly -- I mean, you're right, but one of the things, if you look at some of the research among firms, it’s like what are sort of acts that you engage in to thwart rivals. There was an old study about this, but one of the things that they cited was predatory pricing. So, I mean, I think it's an empirical thing, is to see what extent is that occurring and what is it -- and I think, there, look at other jurisdictions, look at states, see the type of claims that are being brought, and then that can tell you how often it actually occurs.

MR. NUECHTERLEIN: I think a lot of the -- I mean, the analysis --

MR. MOORE: Wait, actually --

MR. NUECHTERLEIN: Go ahead, Derek.

MR. MOORE: We've got, I guess, five minutes left.

MR. LYNN: This has been a fascinating last five minutes, I thought. I was just, you know, on the edge of my seat, you know, but actually Geoff Manne said something really important earlier today, which is this isn't just a discussion about consumer welfare; this is a discussion about bigger issues. So I'm going to -- I want to do a little quote here, another one. This is from our friend Bob Pitofsky.

MR. MOORE: I had one final question that I want to ask the panel, so you've got, like, 30 seconds.

MR. LYNN: This is -- actually this is very pertinent.

MR. MOORE: No, no, no. Thirty seconds, Barry.

MR. LYNN: “Antitrust is about more than economics.” This is Bob Pitofsky in the late 1990s when he was head of the FTC. “If someone monopolizes a cosmetics field, they're going to take money out of consumers' pockets.” That's kind of like the conversation we just had. “But the implications for democratic values are zero. On the other hand, if they monopolize books, you're talking about implications that go way beyond the wholesale price of what books might be.”

We have, my organization back on June 12th, we had Makan Delrahim come to this event that I --

MR. MOORE: You're over 30 seconds, Barry.

MR. LYNN: You know, it’s like we're going to -- are we going to talk about only consumer welfare and leave the big issues on the table? What I actually would like Mr. Shapiro to actually tell me is how in his new system that he's come up with under this new standard, how are you going to deal with the monopolization that is taking place of the advertising industry that it supports and has supported for more than 200 years.

MR. MOORE: Okay, I'm going to move on, and we're going to talk about Supreme Court cases. So this is a question for every member of the panel. I'm going to give you a magic wand, and the magic wand allows you to strike any decisions on the books by the Supreme Court. And the question is --

MR. NUECHTERLEIN: Antitrust-related?

MR. MOORE: Antitrust-related, yes, yes. Antitrust decision, yeah, that's not a can of worms that I would like to open.

MR. LYNN: Bob Pitofsky felt that it was antitrust-related.

MR. MOORE: So the question is --

MR. LYNN: What’s happened since Bob Pitofsky was head of this agency?

MR. MOORE: So the question is what decision would you choose to strike and why, and in particular why is the decision that you choose inconsistent with your view about how the agency should be evaluating antitrust cases under your preferred standard?

MR. NUECHTERLEIN: I'm just going to pick the cases I hate the most. After I thought about your question last night, I'm not sure it does a lot of damage anymore. The case was Utah Pie, which was an absolutely insane predatory pricing case. I’m happy to describe the facts, but I think it would take up too much time doing it.

MR. MOORE: Carl?

MR. SHAPIRO: I would strike Citizens United, but I'm not sure that's an antitrust case, so I would go with American Express.

MR. MOORE: Barry.

MR. SHAPIRO: American Express, but I think so it’s consistent, I think of that case because that clearly disrupted the competitive process, harmed the trading partners, the merchants, disrupted price competition, and the Supreme Court -- you should read Breyer's dissent. It’s really sparkling.

MR. MOORE: Barry.

MR. LYNN: I agree with Carl.

MR. MOORE: Maurice?

MR. STUCKE: See, I don’t think a magic wand --

MR. SHAPIRO: A hundred percent, man. We’re totally aligned, I can tell.

MR. STUCKE: Well, I agree with both of them, but here’s the thing. I don’t think it's a magic wand of one case. And I would point out Leegin, not because I necessarily disagreed with the result, but what I saw particularly pernicious in Leegin and what I see in antitrust generally is, number one, is how bad dicta then takes a life of its own. Where in Sylvania in a footnote, they said the primary purpose is interbrand competition.

Number two is how the court then basically said it's untethered. It's not really bound by stare decisis. It’s not necessarily bound by the legislative aim. It really just then determines what it finds as the prevailing economic wisdom, which is really dangerous then when you have an unmoored Supreme Court.

MR. MOORE: Okay, Geoff.

MR. MANNE: I'm going to say if Maurice and Barry at all get their way it has to be Chevron because we are absolutely going to need checks on agency and executive discretion. But if you insist on an actual antitrust case, the easy answer, I guess, would be Philadelphia National Bank.

MR. MOORE: So now that we have roughly 100 seconds left, I'm going to give you 100 seconds to criticize the FTC and no more than 100 seconds. So this magic wand allows you to change any decision made by the FTC over the last 20 years. This could include a case that was not pursued but should have been, a case that settled but should have been litigated, a case that was pursued or should not have been, or something else.

And I'm encouraging you to focus on a decision made by the agency, not the effect of some decision like the moderator will consider something like the 11th Circuit should have decided Schering-Plough the other way, a copout.

So we'll go with Jon.

MR. NUECHTERLEIN: I'm going to -- so as the Commission's former lawyer, I'm going to take a hard pass on that one.

MR. SHAPIRO: My mother taught me when someone invites you over, you're gracious, so I will decline.

MR. MOORE: Okay.

MR. STUCKE: The FTC should have taken down Google.

MR. MOORE: Maurice.

MR. STUCKE: Yeah, I mean I think Google-DoubleClick, what I've heard throughout the day, would -- I mean, I don't necessarily fault the agency at that time, although I think you had some good dissent in that case, but I would think that and some of the other Google transactions certainly warrant a post-merger retrospective.

MR. MOORE: Geoff.

MR. MANNE: Libbey-Anchor Hocking and Whole Foods-Wild Oats. I think that -- and there are others, too, but those in particular were sort of pernicious in the extent to which they relied on channels of distribution to defined markets and wrote out any possibility of supply-side substitution.

MR. MOORE: So we have ten seconds left, which is not enough time for another question. I just want to say to all of you, it was a delight -- one of the highlights of my year so far -- to be moderating this panel, and I’d like to encourage everybody to give the panelists a big round of applause.

(Applause.)

MR. MOORE: So I’d like everybody on the panel to stay in their seats because we have closing remarks from our newest commissioner, Commissioner Christine Wilson.

CLOSING REMARKS

COMMISSIONER WILSON: Good afternoon, everybody. It is great to be back here at my alma mater talking about one of my favorite topics -- antitrust law -- and I'm going to sound like a geek when I say it, but talking about my two favorite subtopics of antitrust law -- the appropriate welfare standard and vertical mergers.

Because I want to get you home in time for dinner, I'm only going to talk about vertical mergers. I'll save consumer welfare for another day. So it is good to be back here on Steve Salop's stomping grounds. He was a professor of mine when I was here. I think I took every single class that he offered, and I was his research assistant.

So as he will be able to attest, I've been thinking about vertical mergers for many years. While I was his research assistant, one of my first jobs was to do research in conjunction with his draft paper on vertical mergers. And that draft paper eventually became the article that he and Michael Riordon published in the Antitrust Law Journal.

So with the benefit of both that research and subsequent developments in the law and in policy, I'd like to discuss three core points on which I believe there is broad agreement. First, sound vertical merger policy requires a firm economic foundation. The legality of a transaction depends on its likely economic effects. Forecasting those effects, in turn, requires a clear understanding of the underlying economic principles.

So stepping back, vertical mergers, as we've heard today, bring together firms at different levels of production, whereas horizontal mergers bring together firms that compete at the same level. So horizontal mergers combine substitutes like two brands of soft drinks; and vertical mergers involve complements such as soft drink manufacturers like Coke and Pepsi and the downstream firms that bottle and distribute their products.

So for many years, economists disputed whether and to what extent vertical restraints and vertical mergers raised competitive concerns. George Hay once said that vertical mergers are the area of greatest disagreement among lawyers and economists. And another one of my mentors, University of Florida Professor Roger Blair, made an even stronger assertion. In his 1983 book on vertical integration, Blair said that vertical mergers are an intellectual battle ground akin to the Mekong Delta. And if you watched a couple of the early panels today, you might understand what he meant.

So the battle on vertical mergers was slowly won by those who believe vertical mergers were less likely to raise competitive concerns in horizontal mergers. Writing in the 1950s, when the law treated vertical and horizontal arrangements in a similar fashion, Bob Bork wrote that a comparison of the law and the economics of vertical integration makes clear that the two bear little resemblance. Of course, that was long before GTE-Sylvania, let alone Leegin. And by 1991, Judge Doug Ginsburg was describing the rule for vertical restraints as one of de facto legality, a characterization that my friend, Professor Danny Sokol, echoed after the Supreme Court decided Legion.

But in his article in the Antitrust Law Journal, Steve Salop identified several potential harms flowing from vertical mergers. And if you were here this morning, you heard his thoughts on the circumstances under which vertical mergers could give rise to anticompetitive effects. That said, a number of other panelists today took issue both with the scenarios that Steve outlined and with our ability to apply those theories in a rigorous and systematic way.

Many of the panelists seemed to say that vertical mergers are less likely to raise competitive concerns than horizontal mergers, and this sentiment echoes the 2007 joint submission to the OECD Competition Committee in which both DOJ and the FTC said, Vertical mergers merit a stronger presumption of being efficient than do horizontal mergers and should be allowed to proceed except in those few cases where convincing, fact-based evidence relating to the specific circumstances of the vertical merger indicates likely competitive harm. And they drew on this conclusion largely because as Bruce Hoffman explained earlier this year, a vertical merger both reduces or eliminates transaction costs and can eliminate the double marginalization problem.

So we're left with two important empirical questions. First, are vertical mergers more likely to generate efficiencies that on balance fully offset anticompetitive harm; and, second, are those efficiencies merger-specific. Ultimately, the answer to these two questions will determine whether the agencies should continue to believe that vertical mergers are less likely than horizontal ones to raise competitive concerns.

Here’s the good news. An economist friend of mine once quipped that the benefit of an empirical question is that the answer is knowable. So that's precisely why the Commission historically has conducted merger retrospectives and under Chairman Simons will continue this important work.

On to my second point. Although a sound economic foundation is necessary, the facts are often determinative, or as that joint OECD submission put it, our analysis in each case necessarily depends upon the specific circumstances of each vertical merger.

Two vertical merger cases from my last tour of duty at the Commission illustrate this point neatly. So let me take you back to 2002. Salt Lake City hosted the Winter Olympics. Star Wars II was in movie theaters, and I was Chief of Staff to Chairman Tim Muris. That summer, the Commission decided two vertical merger cases. In the first one, Cytyc sought to acquire Digene. Both companies made products that screened for a particular type of cancer but their products were complements. There was also some evidence that products might in the future become substitutes. These facts led the FTC to vote five-zero to challenge the merger.

In its challenge, the Commission argued the combined firm would have the ability and the incentive to foreclose both an existing competitor and new entrants, and the parties ultimately abandoned the deal. But at the same time, the Commission cleared a second vertical merger without a remedy. This was the proposed merger of Synopsis and Avant. The products here were complements, in this case, used at different stages of the process to design computer chips.

And after a thorough investigation, then Bureau Director Simons concluded, at bottom, there just wasn't enough evidence that Synopsis would have either the incentive or the ability to foreclose competitive products sufficiently to harm consumers. And customers were also supportive of the deal, believing it would allow the merged company to more efficiently design next-generation computer chips.

So in short, the FTC had two simultaneous vertical mergers that it was evaluating. It was being decided by the same bureau director and the same commissioners, and it posed the same legal and economic questions. But the facts of those two cases differed materially and, thus, the outcomes were different. And, so, as I said, facts matter.

And my third point. If the economic theory and the facts suggest that a remedy is necessary, obviously we must ensure the remedy we seek is appropriate. Enforcers seek to preserve the competition otherwise lost as a result of the merger while permitting the parties to achieve the efficiencies of vertical integration. Historically, the agencies have done so by imposing firewalls, nondiscrimination obligations, and transparency provisions.

For example, the Commission imposed a firewall in the two vertical mergers involving carbonated soft drink manufacturers and their bottlers. And the Commission continues to take that approach today, most recently when it imposed two of those remedies -- a firewall and a nondiscrimination provision -- as a condition of allowing Northrop Grumman to acquire the upstream firm Orbital ATK.

But in recent years, there's been some discussion about whether the agencies should consider remedies beyond those that I just mentioned. Some like the Antitrust Division under Christine Varney have advocated for a broader set of behavioral remedies. Others, like the Antitrust Divisions under Makan Delrahim, expressed a preference for structural relief in vertical mergers. And that discussion continues today.

Last month, Makan Delrahim announced the withdrawal of the 2011 edition of the Division's Guide to Merger Remedies in favor of the 2004 edition. And just two days ago, he announced his intention to issue new vertical merger guidelines. In the second panel today, several participants agreed that updated agency guidance would be useful and that the topic of remedies should be included. At both agencies, the choice of remedy necessarily depends upon the assessment of a merger’s likely effects, which is an empirical question.

As I mentioned a moment ago, the Commission believes that these questions are best answered with strong empirical work. The Commission has already released two studies examining the efficacy of its merger remedies, and I hope that this work continues. The information we glean from this kind of analysis will help us refine our approach to crafting vertical merger remedies and calibrate our overall enforcement efforts.

So to conclude so I can get you home in time for dinner, today's panels continue a longstanding debate, and while there's plenty of scope for disagreement, there's also broad agreement on three points. First, sound policy requires a firm economic foundation. Second, the facts of each case matter a great deal. And, third, if a remedy is necessary, we, as enforcers, must think hard which remedy is best positioned to preserve the competition that would otherwise be eliminated by the proposed transaction.

So in closing, I would like to thank all of the panelists and particularly Steve Salop, who I don't see at the moment, for their participation in today's sessions. The participation of all of the panelists in the sessions that we've already had and today's sessions and in the sessions to come will be incredibly valuable as the FTC continues grappling with these important issues. Thanks.

(Applause.)

(Hearing adjourned at 5:44 p.m.)

CERTIFICATE OF REPORTER

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