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FEDERAL TRADE COMMISSION  
  
COMPETITION AND CONSUMER PROTECTION  
  
IN THE 21ST CENTURY

Wednesday, November 1, 2018  
9:00 a.m.

Georgetown University Law School  
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1                                   P R O C E E D I N G S

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

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

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

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

23

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25

1 WELCOME AND INTRODUCTORY REMARKS

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

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

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

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

20 So, today, we take on the very modest task  
21 of looking both at vertical mergers and the consumer  
22 welfare standard. Both have made headlines of late,  
23 which is not always true in the antitrust world. The  
24 Department of Justice's ongoing litigation regarding  
25 the mergers of AT&T and Time Warner has drawn a great

1 bit of attention, in particular, to vertical merger  
2 law and the economic theories surrounding it.

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

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

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

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

10           Accordingly, the Commission has, as a  
11 general matter, typically taken a more skeptical view  
12 of horizontal mergers than they have of vertical  
13 mergers. But that is not to say the vertical mergers  
14 never raise competitive concerns. We will hear today  
15 from, among others, Steve Salop, whose work in the  
16 1980s concerning a theory of harm from raising rivals'  
17 costs finds its expression in enforcement that we and  
18 the Department of Justice do every day.

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

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

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

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

25           So, today, part of what I hope to hear is

1 what we have learned about vertical mergers since the  
2 early 1980s. How have the theory and the practice  
3 changed? What are the areas of vertical merger law  
4 that are unclear to businesses or courts from which  
5 the public, including those businesses and courts,  
6 would benefit from guidance from us at the agencies?  
7 Critically, do we have empirical support for the  
8 competitive benefits or the costs that are alleged to  
9 flow from vertical mergers? And would that empirical  
10 support support its health, presumptions in the law,  
11 either for or against? How reliable are the  
12 analytical tools that we use to evaluate vertical  
13 mergers, like vGUPPIs? And finally, in particular,  
14 with respect to the question of guidelines, what would  
15 new guidelines include?

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

20 Our second topic today is the consumer  
21 welfare standard. And I think most folks even out in  
22 the public know, this is the standard that we use  
23 across the board, mergers and conduct in courts and at  
24 agencies, to judge anticompetitive conduct. It is not  
25 only a standard that we in the U.S. apply, it is a



1 standard that is used by competition agencies around  
2 the world. It is an economically-grounded standard,  
3 and it requires that there be harm to consumers for  
4 conduct to be condemned. Mere harm to competitors is  
5 considered insufficient.

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

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

21           One is a continuing discussion about how we  
22 apply the standard, regarding whether enforcement is  
23 at the appropriate level, whether it is properly  
24 targeted. This is an introspective question on some  
25 level, in which scholars, economists, practitioners,

1 and enforcers all ask ourselves, are we bringing the  
2 right kinds of cases? Are we using the right kinds of  
3 evidence? Should we be doing more or less in certain  
4 places? The antitrust bar, the business community,  
5 and others benefit from this ongoing and active  
6 analysis.

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

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

1           I want to understand the proposed  
2 alternatives and how they would apply in practice day  
3 in and day out in antitrust enforcement from the  
4 Government's perspective and also in antitrust  
5 litigation in the courts.

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

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

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

23           As I mentioned at the beginning, today is a  
24 heck of a day. We are discussing two fascinating and  
25 very important topics, and I am really interested to

1 hear what everyone has to say about them. So thank  
2 you very much.

3 (Applause.)

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1                   PRESENTATION:   VERTICAL MERGERS

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

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

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

24                  So without further delay, Steve Salop.

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

1 Thanks, Bruce.

2 Thank you, Commissioner, for setting the  
3 stage.

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

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

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

19 Second point, that I do not think that the  
20 analysis of vertical and horizontal mergers should be  
21 treated as inherently different in oligopoly markets.  
22 Vertical mergers, as I will discuss, can lead to  
23 unilateral harms, can lead to coordinated harms just  
24 like horizontal mergers can. In some sense, the  
25 vertically-merging firms should be thought about as

1 indirect competitors in the premerger world, and that  
2 indirect competition is eliminated.

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

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

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

25 And the burden in merger law and across all

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

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

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



1 sensible.

2           And, you know, the benefit -- people argue  
3 the benefits are low because there have only been  
4 50-some-odd consent decrees -- actually, it is 58  
5 through June of this year -- in the last 25 years.  
6 And the benefits are low because there should not be  
7 any vertical merger enforcement. That is what someone  
8 like Professor Bork would argue.

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

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

24           So vertical mergers -- moving on, vertical  
25 mergers, they include both purely vertical deals, but

1 also complementary product deals. So a case like  
2 Ticketmaster-LiveNation, they were not vertically  
3 related, they were both selling complements.  
4 Sometimes mergers are both horizontal and vertical, so  
5 for example, the St. Luke's case that the FTC  
6 brought, the Idaho hospital case, the FTC focused on  
7 the horizontal aspects. At the same time, there was a  
8 private case that focused on the vertical aspects,  
9 that St. Luke's was taking over a large physician  
10 practice as well.

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

23 The basic economic benefits and harms,  
24 Commissioner Phillips laid them out, so I am just  
25 repeating them here. I would say in the foreclosure

1 area, what I told my students when I actually -- I  
2 have coincidentally taught this on Tuesday -- that  
3 input foreclosure is the stronger foreclosure story  
4 than customer foreclosure.

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

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

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

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

18           Vertical mergers are common, vertical  
19  integration is very common, but so is horizontal  
20  integration. Most firms produce multiple products  
21  that are substitutes for one another. So that is not  
22  -- you know, that is not an inherent difference.  
23  Partnerships among competitors are common; horizontal  
24  mergers are common. The idea that -- are vertical  
25  mergers inherently procompetitive? Well, so are

1 horizontal mergers. The guidelines say so, we know  
2 very few horizontal mergers are disturbed every year.

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

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

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

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

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

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

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

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

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

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

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

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

22           It is important -- this issue of the  
23 reciprocal licensing, I think is important, as a  
24 practical matter, because with CNBC -- I'm sorry, NBCU  
25 merged with Comcast, and if Time Warner-AT&T goes



1 through, then you are going to have these two  
2 vertically integrated firms that will have an  
3 incentive to engage in reciprocal licensing.

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

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

22           Now, I do not think that the efficiencies  
23 are enough to call for a different approach for  
24 enforcement for vertical mergers in oligopoly markets.  
25 So I lay out, you know, these four bullets here. I do

1 not think Bork carried the day; I do not think the  
2 econometrics carries the day; I do not think the fact  
3 that competitors complain carries the day; and I  
4 certainly do not think that Sylvania and Leegin lead  
5 to that.

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

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

19 Markets do not inevitably self-correct,  
20 contrary to what Frank Easterbrook would like us to  
21 believe, especially if the conduct raises the costs of  
22 rivals or erects barriers to entry. We have examples  
23 of cartels with large numbers of members going on for  
24 a decade, vitamins, for example. So the self-  
25 correction idea is limited. And in exclusion, the

1 reason why there is self-correction is argued is  
2 because there will be entry. But if the exclusion  
3 leads to barriers to entry, that does not work. So  
4 that fails.

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

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

22 Okay. So EMD, I think, you know, pretty  
23 much this -- I have already probably laid out all  
24 these points. We can often achieve vertical merger  
25 efficiencies by contract without the potential

1 anticompetitive harms. And that should be an issue in  
2 every vertical merger case.

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

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

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

22 Some of the theories test -- some of the  
23 papers test the wrong theory. And, of course, they  
24 are limited by the data that is available. So a lot  
25 of the evidence on vertical mergers is beer and cable

1 because they have good data, but the world is bigger  
2 than beer and cable.

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

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

25           Lastly, Sylvania and Leegin, people argue,

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

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

21 So I think that is the basics on why we  
22 should not be more permissive with respect to vertical  
23 mergers. The legal context -- I do not have a lot of  
24 time left -- you know, I think that -- let me just go  
25 here. I think we should basically be following the

1 three-step rule of reason that is established in  
2 Baker-Hughes and Heinz for horizontal mergers, we  
3 should port that over to vertical mergers, as well.

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

15 I note here and sort of the really crucial  
16 point in terms of the policy discussion that we have  
17 been having of where do you put the efficiencies in  
18 horizontal mergers, and the standard rule of reason  
19 across all of antitrust, efficiencies are step two,  
20 they are part of the rebuttal case. The plaintiff  
21 needs to show harm. If the plaintiff can show harm,  
22 then the burden shifts to the defendant to show some  
23 merger-specific, or in the case of restraints,  
24 restraint-specific efficiencies. If the defendant  
25 successfully shows that, then the burden shifts back

1 to the plaintiff to carry the burden of persuasion  
2 that there is net anticompetitive effect.

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

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

21 I would note that DOJ no longer thinks what  
22 they thought in 1984. These are the DOJ's proposed  
23 conclusions of law in the AT&T case, and I've  
24 underlined the ones that I think are notable. So they  
25 buy into the idea of incipency. They say the



1 relevant standard should be reasonable probability.  
2 They say you should use the same Section 7 standard  
3 for vertical and horizontal. They say you should not  
4 have to quantify up to the fourth decimal point. They  
5 say you should follow burden shifting, use the burden-  
6 shifting rule, and the burden is on the defendant to  
7 show efficiencies. And the efficiencies only count if  
8 there are -- if they are merger-specific.

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

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

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

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

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

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

1 of Dr. Pepper and 7-Up went up. So is that merger  
2 okay or not okay if you knew that?

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

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

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

8           So remedied -- no need to talk about  
9 remedy.

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

13           Thank you.

14           (Applause.)

15           MR. KOBAYASHI: Thanks, Steve.

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1                                   VERTICAL MERGERS (SESSION 1)

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

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

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

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

25                                  We also have next Margaret Slade from the

1 University of British Columbia, Vancouver School of  
2 Economics.

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

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

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

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

24 So guidelines have two primary benefits, I  
25 think. One is to provide information to companies so

1 they can avoid going down unproductive paths. A  
2 second benefit is to help prevent untethered  
3 arguments. I think both benefits are quite important,  
4 and on that basis, I generally support guidelines  
5 whenever useful guidelines are feasible.

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

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

24 So it might seem uncontroversial that the  
25 risk of input foreclosure would increase with upstream

1 market power, but there is a problem. Vertical and  
2 complementary product mergers between firms with  
3 market power create downward pressure on price that  
4 grows with the extent of market power. In fact, in  
5 textbook models, the downward pressure often dominates  
6 the foreclosure effects. It often rises faster with  
7 market power than the foreclosure effect.

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

18           So the logic that leads to, for example, a  
19 rebuttable presumption of harm for horizontal mergers  
20 in concentrated markets seems to suggest a rebuttable  
21 presumption of benefit for complements mergers in  
22 concentrated markets. I would add that the benefit is  
23 not limited to the elimination of double  
24 marginalization. Combining complements promotes  
25 complementary investment incentives, too. I have



1 always thought of the elimination of double  
2 marginalization as kind of a metaphor of internalizing  
3 the externalities from combining complements in ways  
4 that cause the firms to jointly do more of good things  
5 than they would have done if they were independent.

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

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

24 So this principle sounds reasonable, too,  
25 right? But, once again, there is a problem. Suppose

1 the downstream market is monopolized, which is the  
2 most market power you could have in the downstream  
3 market. Downstream monopoly makes it quite likely  
4 that firms will write efficient input contracts. In  
5 this case, the merged firm's static incentive to  
6 foreclose rivals selling into the monopolized market  
7 is no different than the incentive of the downstream  
8 firm prior to the merger. The merger might still  
9 raise dynamic foreclosure issues, and the old  
10 guidelines allude to this possibility. But it does  
11 not enhance incentives to foreclose merely to shift  
12 business.

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

20 So let's drill down a little bit. Candidate  
21 principle three digs a little deeper. That principle  
22 is harm from input foreclosure is more likely the  
23 greater the downstream value of diverted sales and the  
24 smaller the upstream margin. So small upstream  
25 margins mean a small EDM effect and large downstream

1 margins mean a large foreclosure effect. So this  
2 principle is in the spirit of price pressure analysis,  
3 which looks at how a merger changes the markup  
4 equations that come from firms optimizing conditions.

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

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

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

24 So this has been a problem in other areas of  
25 antitrust, for example, the misuse of critical loss

1 analysis where we frequently have seen analysis  
2 presented where the margins and the actual losses that  
3 are assumed are inconsistent with any kind of rational  
4 behavior. We do not want to replicate those kinds of  
5 problems in the analysis of vertical mergers. And the  
6 codification of simple arithmetic factors could lead  
7 us down this path if we are not careful.

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

18           The first of these factors makes foreclosure  
19 unlikely. So let's consider the second two factors.  
20 So, principle four, candidate principle four, harm  
21 from input foreclosure is more likely when input  
22 contracts are nonlinear. The simplest version of this  
23 idea is that bilaterally efficient contracts would  
24 transfer the input at marginal cost. So if firms sign  
25 such contracts, a vertical merger would not eliminate

1 double marginalization, but it may still foreclose  
2 rivals. If that is the case, net harm would be more  
3 likely because the input foreclosure effect would be  
4 more likely to dominate.

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

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

22 Finally, let's talk about bargaining, which  
23 has recently become a central focus in important  
24 vertical merger cases. The first rigorous analysis  
25 that I am aware of showing that vertical mergers can

1 harm competition under bargaining appeared in an  
2 unpublished doctoral dissertation in 1989. In a model  
3 with an upstream monopolist and downstream Cournot  
4 competitors, I found that under simultaneous Nash  
5 bargaining over input prices, what researchers now  
6 refer to as Nash and Nash bargaining, leads to a  
7 downstream price that is below the fully integrated  
8 monopoly level, as long as there is enough competition  
9 in the downstream market.

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

21 The seller has incentives to find ways out  
22 of that trap, and I think that should be a focus of  
23 some research. And empirical results that suggest  
24 that margins are positive at the upstream level  
25 suggest that sellers do not find their way completely

1 out of that trap, in which case, vertical mergers do  
2 eliminate some double marginalization and have  
3 benefits. There are trade-offs to evaluate.

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

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

20 And I think we do know some things that  
21 would allow articulating, at a very high level,  
22 possibilities from vertical restraints -- or vertical  
23 mergers, and you know, the agencies could write such  
24 guidelines and use them to try to construct models to  
25 bring cases. And, of course, consistency of the

1 models internally and logically and consistent with  
2 the empirics would be critical to going forward.

3 Thanks.

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

5 (Applause.)

6 MR. KOBAYASHI: Margaret?

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

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

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



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

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

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

23 Now, these, of course, are not related to  
24 product flows and pricing, but they are related to the  
25 transfer of intangibles, which unfortunately are very

1 hard to estimate. So I think it is very important  
2 that we have safety zones and they could be based on  
3 concentration indices. Concentration indices have  
4 many known problems, but I do not see a lot of  
5 alternatives. They require market definition, but  
6 once you have a market, they are fairly easy to  
7 calculate.

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

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

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

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

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

24           Now, for predicting what techniques, we need  
25 some techniques that are going to be -- that use only

1 premerger data. And I want to talk a little bit about  
2 horizontal mergers because a vertical merger  
3 simulation is just two horizontal mergers models  
4 pasted together with a bargaining model.

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

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

20           So the conclusions, unfortunately, are quite  
21 sensitive to these choices. And I have looked at this  
22 in a paper, and it is not just that you get -- if you  
23 change, say, from one demand specification to another,  
24 it is not just that you get different point estimates,  
25 which you would always get. It is the fact that one

1 point estimate may be outside the confidence regions  
2 of the other and vice versa. So it is one of the  
3 things that is hard to justify if somebody else could  
4 come back and overturn your collusions.

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

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

20 So there is a paper by Crawford, Lee,  
21 Whinston and Yurukoglu, and it is a very nice paper.  
22 They look at both harms and efficiencies. It is very  
23 specific to a market, cable TV and satellites, which I  
24 think is good. If you are going to learn something,  
25 you have to look at the specific market. And they

1     assume Nash-in-Nash, which is what Dan was mentioning.  
2     They conclude that vertical integration can either be  
3     beneficial or harmful depending on your set of  
4     circumstances. So the results are quite mixed.

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

13            I also think that quantitative techniques in  
14    vertical situations, they are not that reliable in  
15    horizontal situations. They are much more difficult  
16    to perform and to get it right in vertical situations,  
17    and that efficiencies are much harder to estimate  
18    because unlike the things that we know and are used to  
19    estimating like economies of scope and scale, transfer  
20    of intangible assets is not something that we are --  
21    and in fact, one of the papers that I have looked at  
22    -- I mean, in my own work with coauthors, one of the  
23    disappointing conclusions in the horizontal case is  
24    that, from a competition point of view, one of the big  
25    factors that we find is whether the merger is

1 beneficial or not depends a lot on technology  
2 transfer, whether productivity from the highly  
3 productive firm can be transferred to the other firm  
4 or whether they are going to have a merged firm as  
5 just the average of the two.

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

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

1 and organizational efficiencies.

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

6 MR. KOBAYASHI: Thank you, Margaret.

7 (Applause.)

8 MR. KOBAYASHI: Carl?

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

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

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



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

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

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

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

1 write guidelines again.

2 (Laughter.)

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

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

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

24 And, look, it is for a couple reasons.  
25 First, horizontal, you have direct loss of

1 competitors, and we understand that inherently leads  
2 to less competition. Then there may be some  
3 offsetting efficiencies. And you can study ostensibly  
4 the mark or the level at which the merging firms  
5 operate.

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

18 In vertical, there is also a similar  
19 fundamental tradeoff, which is -- at least in terms of  
20 this unilateral analysis is that -- I will talk about  
21 input foreclosure and my example will be I make  
22 microprocessors and Steve makes computers and I sell  
23 them to him. So if we merge, fundamental tradeoff is  
24 going to be, the merged firm is going to be less  
25 interested in selling the microprocessors to Margaret

1 who makes competing computers. That is inherent  
2 because the merged firm now has the Steve computer  
3 operation and that competes against the Margaret  
4 computer operation. Okay?

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

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

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

25 So I want to distinguish then between

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

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

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

1 other types of efficiencies that might be claimed.

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

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

19 So if originally, you know, I was charging  
20 -- the microprocessor was charging Steve, let's say,  
21 \$200 for microprocessor, but the production cost was  
22 only \$100, there is a margin there. And what the --  
23 the instruction is reduce -- the internal transfer  
24 price should go down to the true economic cost, which  
25 I will explain in a moment. So it is the elimination

1 of that one margin -- that is the elimination of one  
2 of the two margins. That is why it is the elimination  
3 of double marginalization. He is going to still earn  
4 a nice margin on his computers. That is how we are  
5 going to make money here. But we are not going to  
6 pick it up at both levels.

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

17           So, the key question then is, is it merger-  
18 specific? It is not about verifiability. Okay?  
19 Because it is inherent in having a merged entity. Is  
20 it merger-specific? Okay. So that is where I think  
21 guidelines and practice can evolve, guidelines could  
22 -- for example, we could say, wait a moment. Other  
23 people in this industry solve this through contract,  
24 two-part tariffs or other type of nonlinear pricing.  
25 They find a way to solve this inefficiency through

1 contract, so you do not need a merger so it is not  
2 going to count. In other words, you are going to  
3 achieve it from the merger, sure. That is a gimme.  
4 But you could have achieved it without the merger.

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

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

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

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



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

6 One other more technical point on this that  
7 is not, I think, widely understood is how large are  
8 these efficiencies that we are going to be balancing  
9 against raising rivals' cost, for example. So in my  
10 example with Steve where the production cost is \$100  
11 for the microprocessor and premerger I am charging him  
12 \$200 -- and everybody else for that matter I am  
13 charging \$200 -- and after the merger, it is not true  
14 that then the merged entity will instruct my upstream  
15 division to transfer the price at \$100, the production  
16 cost, because that is not the true economic cost.

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

1           So if, say, 80 percent of Steve's sales  
2     come at the expense of Margaret's computers, then  
3     there would be an opportunity cost of transferring  
4     the microprocessor to Steve, which would be the  
5     \$100 margin on Margaret's computers -- on the  
6     microprocessors sold to Margaret times 80 percent or  
7     \$80. So the proper instruction for the merged entity  
8     would be to transfer the microprocessors from Carl's  
9     upstream division to Steve's downstream division at  
10    production cost \$100, plus opportunity cost \$80, \$180.  
11    So the elimination of double marginalization would  
12    reduce the price from \$200 to \$180, not from \$200 to  
13    \$100. So when you are measuring these things, you  
14    need to account for this diversion.

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

25           The key thing is, if you have -- just input

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

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

20 If she really will be significantly weakened  
21 without these microprocessors, then we really want to  
22 look -- so if it does not matter very much, then we  
23 could be in sort of a safe harbor. If it does matter,  
24 then I do think we need to get into this balancing,  
25 and this is why I think it is so important to have the

1 guidelines, because if you are going to go to court  
2 and do this sort of balancing, I think Margaret just  
3 said a few moments ago, gee, of course, all economists  
4 know, you know, basically you do a bargaining model  
5 and you put it together with a downstream simulation,  
6 which makes it -- that seems like a good approach to  
7 me, but I am not highly confident every court will  
8 agree with that.

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

12           Thank you very much.

13           MR. KOBAYASHI: Thank you, Carl.

14           (Applause.)

15           MR. KOBAYASHI: Francine?

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

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

1 we worry about in these particular mergers.

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

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

23           So let me say it this way. But there is  
24 also just simply the possibility that we would hinder  
25 a lot of fairly efficient mergers. So it is trading

1 off these things that is making me more nervous about  
2 trying to write that down.

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

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

22 So one thing I wanted to highlight is that,  
23 in the horizontal merger guidelines, there is a  
24 statement that says that the interests of firms  
25 selling products that are complementary to those

1 offered by the merging firms often are well aligned  
2 with those of customers making their informed views  
3 valuable. And the reason I point this out is, again,  
4 vertical mergers often involve the combination of  
5 complementary products.

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

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

22 So I want to talk a little bit about some of  
23 the arguments that Professor Salop brought up when he  
24 talked about efficiencies, and, in particular, the  
25 fact that he argued that the merger efficiencies are

1 not specific to the merger. And Carl said a few  
2 things about that as well. My concern about -- I have  
3 spent quite a bit of time studying contracts, and my  
4 concern about that is the idea that you can fully  
5 generate the same kind of efficiencies through  
6 contracts is actually a relatively complicated and --  
7 you know, it is not so clear.

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

17           So for example, in some of my work, which is  
18 in what people sometimes describe as competitive  
19 industries and then sometimes not, franchisees --  
20 there are lots of controls that franchisors apply to  
21 their franchisees and yet there have been many  
22 disputes about where the price should be and, in  
23 particular, franchisees wanting to have a higher price  
24 than what the franchisor would want. So the  
25 franchisor had difficulty getting the price to be as



1 low as what they thought was beneficial to them.

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

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

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

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

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

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

21 So I will say just a few more words about  
22 organizing kind of the empirical evidence. Margaret  
23 Slade is quite right that much of the empirical  
24 evidence on vertical things does not involve vertical  
25 merger analysis. It is really about firms that are

1 vertically integrated, do we see them being more  
2 efficient or not? So there is a problem with matching  
3 the information that we get from this empirical  
4 literature with some of the analysis that we would  
5 need to do when it comes to vertical merger.

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

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

21 I want to add a few more things to that.  
22 Professor Salop talked about presumption. I am  
23 actually just going to just skip that. I think I have  
24 already said that we need to think, at least in terms  
25 of the double margin type of efficiencies, differently

1 from the way that he is approaching this.

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

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

19 So my last slide here said that vertical  
20 mergers and vertical restraints can be problematic,  
21 that we should be reviewing those. But given the  
22 current state of theory and empirical evidence, I  
23 think that the guidelines are not quite what I would  
24 propose at this point. I think that what we need is  
25 much more academic work that helps us understand

1 specific industries and specific contexts and the kind  
2 of cases that Professor Shapiro was involved with, the  
3 AT&T-Time Warner case to help us develop a better  
4 understanding of what is important in these and the  
5 kinds of tests and analyses that we could propose, and  
6 we just need to make more progress on that.

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

10 MR. KOBAYASHI: Thanks, Francine.

11 (Applause.)

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

15 (Laughter.)

16 MR. KOBAYASHI: So --

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

19 (Laughter.).

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

22 MR. SALOP: How about two minutes per  
23 person?

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

1 MR. SALOP: Okay. How about three?

2 MR. KOBAYASHI: No.

3 (Laughter.)

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

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

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

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

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

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

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

20 Now, in AT&T-Time Warner, for example, I  
21 thought about why they may not have been able to do  
22 it. It did not come up in the case except with this  
23 term "bargaining frictions." And I think the answer  
24 there, I think if they were really put to the test,  
25 they would say it was because of most favored nations

1 provisions. We could not eliminate double  
2 marginalizations because these MFNs are rampant all  
3 over the cable TV industry.

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

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

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

25 And that is another part about -- Professor



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

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

12 (Laughter.)

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

25 So the fact that Atalay found no shipments,

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

12 MR. KOBAYASHI: All right.

13 MR. SALOP: And --

14 MR. KOBAYASHI: Steve, you have to stop.

15 MR. SALOP: Thank you.

16 (Laughter.)

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

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

24 One point that is being missed is that  
25 absent a merger, an upstream firm with market power

1 that is selling through multiple downstream firms, a  
2 multilateral setting does not want to write a contract  
3 with any one of those downstream firms to transfer the  
4 product at marginal cost. Okay? Because that  
5 dissipates rents in the entire vertical structure and  
6 there is an incentive to try to construct contracts  
7 that do not do that.

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

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

18 MR. SHAPIRO: Yeah. I think on the  
19 efficiencies that are not elimination of double  
20 marginalization, it seems right to treat them the same  
21 as we do in horizontal mergers. So let's take  
22 example. When Carl's microprocessors merges with  
23 Steve's computers, we claim, oh, this is going to be  
24 great because we are going to have a better way to do  
25 the product roadmap and that tells Steve's computers

1 how to design the rest of the machine to use Carl's  
2 microprocessors and we are going to have a faster  
3 product cycle than we could without the merger, okay?  
4 It will be an efficiency.

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

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

24 And if those do not come home, then this  
25 theory does not get off the ground. So there are a

1 lot of deals you can say, I am not worried about, at  
2 least, this theory. So you can do a lot of the  
3 screening, call it safe harbor if you want, at least  
4 for that theory.

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

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

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

1 or consents mostly.

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

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

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

21           (Laughter.)

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

24           MR. KOBAYASHI: Well, I would actually say  
25 that is fine. Let's just randomly pick a bunch of

1     them and then you will not have selection issues.  But  
2     I tell you, I have looked at our resources at BE and  
3     they are not big enough to do that.  And so, you know,  
4     I think what the other approach is is we look at the  
5     margin.  Right?

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

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

13                    (Laughter.)

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

21                    MR. KOBAYASHI:  Okay.  No, I --

22                    MR. SALOP:  So that is my initial list.

23                    MR. KOBAYASHI:  We are truly collecting a  
24    list.  And part of the problem is is that people ask  
25    us to do them and we would like to do them, but we do

1 not have the data or a credible control group.

2 MR. SALOP: Well, you have CID authority.

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

6 Any of the other panelists?

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

9 MR. KOBAYASHI: Yeah.

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

13 MR. KOBAYASHI: Yeah. We had --

14 MS. LAFONTAINE: -- merging with the  
15 Butlers.

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

18 MS. LAFONTAINE: Right. A couple of them.

19 MR. KOBAYASHI: Yeah, yeah, yeah.

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



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

3                   MS. LAFONTAINE: Those of Coke and Pepsi.

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

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

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

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

12                  (Laughter.)

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

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

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

25                  (Laughter.)

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

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

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

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

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

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

1 worrying about the foreclosure. Any thoughts about  
2 that?

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

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

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

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

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

14 MR. SALOP: Thirty-seven.

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

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

20 MR. KOBAYASHI: Yes, '37. But, you know, it  
21 always seemed to me that these are efficiency-specific  
22 -- and especially in this discussion, specific to the  
23 merger -- seems to stand Coase 37 on its head. I  
24 mean, it really is -- he used the cost of using  
25 contract and the cost of using the market to explain

1 why we have firms at all. And you are asking, well,  
2 why don't we just use contracts instead of actually  
3 doing it within a firm? And so, I mean, it puzzles  
4 me, and maybe it is just where I was trained and the  
5 people who trained me as an economist.

6 MR. SALOP: But, Bruce, that is not even  
7 right in terms of where you were trained. You were  
8 trained to learn, oh, there is vertical integration by  
9 contract. That is what we learned from Ronald Coase,  
10 1937. If there is vertical integration by contract --  
11 and what that meant, especially where you were  
12 trained, is it meant you could get all the  
13 efficiencies from vertical integration with a  
14 contract. You did not actually need the vertical  
15 integration.

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

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

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

23 MR. KOBAYASHI: Yeah, okay.

24 MR. SHAPIRO: Bruce, I just want to note  
25 when you guys at George Mason, say, you have a

1 football team, is the count for the hike, it is like  
2 Coase 37, Stigler 64.

3 (Laughter.)

4 MR. SHAPIRO: Bork 78, hike.

5 (Laughter.)

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

8 (Laughter.)

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

12 (Laughter.)

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

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

22 (Applause.)

23

24

25

1                                   VERTICAL MERGERS (SESSION 2)

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

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

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

20                                  Bruce Kobayashi introduced us or suggested  
21 that this, being a panel of lawyers, would be the  
22 unimportant panel or the less important panel, and I  
23 agree. I mean, the economists, who came first as you  
24 saw, spend their time creating elegant, sophisticated,  
25 and complex conceptual models with Greek letters and

1 we enforce laws and block mergers. So you can decide  
2 which is more important to you specifically and pay  
3 the amount of attention to the panels that you choose  
4 based on that decision.

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

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

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



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

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

15 MS. POZEN: That sounds dirty.

16 (Laughter.)

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

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

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

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

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

24 So it is a great panel. Hopefully, we will  
25 keep you entertained and say something that is at

1 least marginally almost as important as some of the  
2 things said in the prior panel. So thank you. And  
3 with that, I am going to start asking questions but  
4 from a seated position.

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

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

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

25 And so in answer to your question, I would

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

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

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

25 We also, obviously, look to data. Market

1 shares are, of course, one of the important aspects,  
2 but there is lots of other data that is important  
3 in understanding the industry and the likelihood of  
4 harm.

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

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

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

24 The main difference in analyzing the  
25 vertical mergers is really the same as in horizontal

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

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

21 In other words, was there a high risk of  
22 what Bruce described as type two error where you  
23 thought there were a lot of potentially bad deals that  
24 you could not do anything about or was it the case  
25 that you just did not see a lot of potentially

1 problematic vertical mergers and what were the facts,  
2 what were the kinds of evidence that were most  
3 important to your assessment of them?

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

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

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

16 (Laughter.)

17 MR. HOFFMAN: Well, that is convenient.

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

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

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

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



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

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

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

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

1 might be.

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

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

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

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

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

24           Paul, to follow up on that, did you have a  
25 sense or do you have a sense that there is a large set

1 of vertical mergers that the agencies would like to  
2 challenge but are not?

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

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

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

25 But I am happy to just knock down the straw

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

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

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

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

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

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

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

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

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

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

24           MR. YDE: So that, you know, we think that  
25    there should be empirical evidence, you know, and this

1 has been said, again, many, many times, not just by  
2 Slade and Lafontaine and others, but for years, that  
3 where we had this ambiguity, Salinger said it in his  
4 original paper, when Jeffrey Church did that massive  
5 analysis of nonhorizontal merger theories for the  
6 purposes of justifying the European Commission  
7 guidelines, he said the same thing, that there  
8 basically is not a sufficient basis in the theory for  
9 vertical merger guidelines for any nonhorizontal  
10 merger guidelines, and so we really should try to see  
11 if we can get some more empirical evidence.

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

24 We must have a vast number of deals out  
25 there that during that period, you would consider to



1 be anticompetitive. I know you mentioned some of  
2 them. But we should be studying those, doing a  
3 retrospective to see if, in fact, we can develop a  
4 more robust support for some kind of a vertical merger  
5 theory that then would support or at least answer the  
6 questions of ambiguity that were raised by Dan O'Brien  
7 and have been raised by economists forever about  
8 vertical merger policy.

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

11 MR. YDE: Yeah, I am.

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

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

1 summarize the more recent empirical literature in the  
2 area, I think is helpful and important.

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

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

20 So I think that I need to step back even  
21 before that because starting 30 years ago, I was  
22 probably audacious enough to challenge the  
23 conventional wisdom of everything Paul just said, and  
24 I was banging my head, challenging mergers and asking  
25 enforcers to challenge mergers and challenge what I

1 thought was anticompetitive behavior in vertically  
2 integrated companies. So -- back to Time-Warner-  
3 Turner, in that era.

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

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

22 Now, whether it is actual guidelines or it  
23 is something comparable, I do not know. But Judge  
24 Leon referenced the '84 guidelines in the AT&T case.  
25 So it is not insignificant, whether Paul wants to look

1 at it or not. If jurists are using them, then we have  
2 a problem.

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

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

23 I think Carl framed it extremely well, and I  
24 came away from that thinking that where you have key  
25 questions, probably the biggest issue for the

1 enforcers to focus on is who bears the burden.  
2 Because I think the problem in enforcement has  
3 been too big a burden on the Government and too  
4 little on the defendant explaining how contracts  
5 would not suffice or their alternative ways to get  
6 efficiencies.

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

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

24           MR. HOFFMAN: Thanks. I am going to come  
25 back to remedies because I think there is a lot of

1 stuff to talk about there, but I wanted just one last  
2 point on this to follow up with a question to Paul,  
3 which actually builds on something you said, Gene.

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

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

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

25 MR. HOFFMAN: Leave nothing in the place.

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

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

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

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

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

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

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

23           And I have to say, as folks know, Carl  
24 Shapiro is hard to disagree with, right? And so the  
25 point about the judge using those guidelines is hard



1 to disagree with. So we have a set of guidelines that  
2 the whole world knows we have out there, that Europe  
3 has its own set of guidelines that are more recent.  
4 So to answer your question, Paul, what do you do?

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

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

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

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

10          MR. SALLET: Okay.

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

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

25                 So I would like -- if both of you would not

1 mind, I will start with you, Steve -- talking about  
2 what actually would be needed in guidelines and how  
3 robust and analytical and thorough do they need to be  
4 to be useful relative to the world in which we do not  
5 have them or we have the '84 guidelines?

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

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

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

19 (Laughter.)

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

22 MR. SALOP: We need the guidelines because  
23 the agencies need to state their enforcement  
24 intentions, okay? If what we have right now is AT&T-  
25 Time Warner's proposed conclusions of law and we have

1 your speech from last year, well, that's the whole  
2 breadth.

3 MR. HOFFMAN: It was Jon's speech, too.

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

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

14 (Laughter.)

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

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

24 MR. SALLET: Yes, I do. Just because I  
25 think -- look, there is a simple answer to all this,

1 it is all Carl Shapiro's fault.

2 (Laughter.)

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

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

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

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

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

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

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

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

20           And then, finally, I think -- well, no, two  
21    more. One is, one can ask the economists, are there  
22    any presumptions? Maybe there are no presumptions,  
23    but, of course, as Steve has said, the lack of a  
24    presumption does not mean the inherent failure to be  
25    able to make out a prima facie case. It is just we

1 want to know, are there such things that can be  
2 implemented? If there are, great. If there are not  
3 yet, do not include them and continue the research.

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

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

16 MR. HOFFMAN: Thanks. So let me --

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

19 MR. HOFFMAN: Go ahead, Paul.

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

22 (Laughter.)

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

1 But we will --

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

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

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

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

22 But I think that is different from actually  
23 stating guidelines of the type that were drafted in  
24 '92 and in 2010.

25 MR. HOFFMAN: So I want to go to -- let me



1 go to Laura and then I have a question for Gene. But,  
2 actually, before that, I was reminded that I need to  
3 underscore to the audience that there are -- you have  
4 the opportunity to send us questions on note cards. I  
5 will ask them and, in fact, the question I have for  
6 Gene is a question I was sent to ask him, but I am  
7 going to go to Laura first. But please feel free to  
8 send up questions and they will get asked.

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

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

18 MS. WILKINSON: Well, that is a great  
19 question, and that is exactly why I think that whether  
20 you call it updating the guidelines, coming out with  
21 new guidelines, or calling it something short of  
22 guidelines, but to provide some guidance not only for  
23 the agency staff but for us as the antitrust bar, for  
24 the business community, for the courts, for the  
25 public, I think that while it is true that they will

1 have to be somewhat complex, but I do not think that  
2 that is a sufficient rationale for not doing  
3 something.

4 I am reminded of the adage, "Don't let  
5 perfect be the enemy of good." Just because we cannot  
6 clearly articulate every single economic model, I  
7 think there are some basic things that we understand  
8 about the types of anticompetitive harm that we look  
9 at in the vertical merger context. Even in the old  
10 '84 guidelines that we are disparaging today, it does  
11 reflect several different theories of harm. And so we  
12 would do the same here, I would expect.

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

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

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

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

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

21           MS. WILKINSON: Exactly. So that is, again,  
22 coming back to why I think guidance would be very  
23 helpful in terms of being able to point to the current  
24 views of the agencies, and as someone pointed out on  
25 the panel earlier, to show whether there are

1 differences between how the agencies are looking at  
2 vertical mergers today as well as the possible  
3 remedies, which I think is a point we are going to get  
4 to on this panel, but an important point in terms of  
5 counseling clients. This is not only how they will  
6 analyze it, but is it likely that remedies would be  
7 needed and, if so, what might they be.

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

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

23 So what I was referring to was not purely  
24 noneconomic, but not using the precise econometric  
25 tools or the precise tools of antitrust economics as

1 the sole basis on which to think about problems of  
2 verticality. I think a lot of what the public  
3 responds to -- and it is very frustrating in antitrust  
4 enforcement -- is that we often have markets that  
5 become more concentrated either because there was a  
6 lack of regulatory intervention in some sectors that  
7 maybe should have happened or previous mergers that  
8 have led to higher levels of concentration.

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

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

21           And I think it is a conflation of a broad  
22 set of factors that the public has these broader  
23 expectations that I think we need to be thinking  
24 about, but not necessarily by fundamentally changing  
25 antitrust enforcement approaches, but by thinking

1 about what deserves sector-specific attention, what  
2 possibly deserves sector-specific regulation or  
3 oversight, as opposed to antitrust.

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

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

20 I go back to the Cable Act, I mean, that was  
21 a direct intervention that one arguably could have  
22 done through antitrust. I do not think it would have  
23 been successful at that time. Congress jumped in.  
24 And it went far further with banning exclusive  
25 arrangements, limiting vertical integration and

1 horizontal concentration for a specific industry in a  
2 specific moment in time.

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

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

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

23 MR. KIMMELMAN: That audience of one is  
24 probably very reflective of the entire public. I do  
25 not want to force a broader set of issues into

1 antitrust analysis. I want antitrust to push the  
2 envelope on what it is capable of doing, and I do not  
3 think we have done as good a job in vertical  
4 enforcement, in looking at potential competition and  
5 in fully assessing innovation and quality. I think we  
6 can, I think we can do more, but a lot of what the  
7 public is expecting is not antitrust.

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

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

24 The first question for the audience is an  
25 interesting one and I think I will throw it, I guess,



1 originally to Sharis, but really open it up to anybody  
2 who wants to answer, which is should incipency be a  
3 ground for greater scrutiny of vertical mergers and,  
4 if so, when? So I guess the idea is that,  
5 fundamentally, if we are talking about Clayton 7, we  
6 are talking about incipency statute and it is always  
7 predictive, except in a case of maybe consummated  
8 merger, obviously, and even then the analysis is  
9 predictive.

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

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

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

25 And I think the reason why is, again, we

1 know what can be produced through verticality. We  
2 know the abilities and innovation, as long as  
3 competition is continuing at both levels of the  
4 equation in a vertical merger, right? And so that is  
5 kind of the answer.

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

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

17 MR. SALLET: Exactly, that is right.

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

21 MS. POZEN: I know.

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

24 MS. POZEN: Right.

25 MR. SALOP: So it is the process that you

1 need to go through, and to say we do not want to go  
2 through -- we are not going to go through the process  
3 because we are not sure of the answer, the agencies  
4 need to tell merging firms how they are going to view  
5 -- whether efficiencies are merger-specific or not.

6 MS. POZEN: Right.

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

11 MR. SALLET: Well, I thought they were  
12 Bruce's speech and --

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

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

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

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

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

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

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

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

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

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

25           (Laughter.)

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

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

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

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

21           That is just a natural consequence of the  
22 way these things work. It happened with respect to  
23 GUPPIs where the original authors basically described  
24 that as an on-ramp into the analysis that also was  
25 supposed to take into account efficiencies, some kind

1 of standard efficiencies associated with GUPPI  
2 calculation, and, instead, it sort of became what was  
3 considered the sufficient condition in a number of  
4 cases at the FTC and the DOJ. And that is certainly  
5 the way that we saw it when we were on the other side  
6 of the table from the economists who were working with  
7 GUPPIs.

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

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

23 (Laughter.)

24 MR. HOFFMAN: How can we treat EDM as a  
25 tack-on efficiency when the effect is isomorphic with

1 the price increase from a horizontal merger? And to  
2 rephrase that slightly, I think the point -- to put it  
3 in lawyer English, I think the point is that EDM,  
4 unlike a lot of horizontal merger efficiencies, and  
5 Carl touched on this, is an inherent effect of  
6 internalizing externalities just as the price increase  
7 implied in a horizontal merger is an internal -- is an  
8 effect of internalizing externalities that competing  
9 firms impose on each other.

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

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

24 So I mean, I think, in fact, the way the DOJ  
25 might see it is that Carl just put EDM into his model

1 because -- he put it into his model in case it turned  
2 out to be merger-specific. Carl never took a position  
3 on whether it was merger-specific. AT&T never  
4 explained why it was merger-specific. Therefore, it  
5 follows that if the D.C. Circuit says the burden on  
6 merger specificity is on the firms, then AT&T fails  
7 and the merger is found to be anticompetitive. So --

8 MR. HOFFMAN: So -- go ahead.

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

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



1 vertical mergers.

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

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

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

25           I also felt ill at ease with the combination

1 of the very strong statement at the fall forum that  
2 you mentioned, Bruce, that the AAG made about remedies  
3 in this circumstance. And there is -- you know, I  
4 want to give credit where credit is due. If you read  
5 the speech carefully that the AAG gave, he did  
6 preserve some instances where he thought that remedies  
7 would be acceptable, although we have not seen that  
8 defined by the DOJ.

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

21 But I want to take a step back and, you  
22 know, in this notion in terms of remedies and  
23 behavioral remedies, there is a spectrum of behavioral  
24 remedies, and we seem to lump everything in together  
25 into one category of behavioral. It is a very broad

1 category. We see remedies that can include, you know,  
2 reinforcement of contracting provisions that exist,  
3 licensing remedies, all the way up to the arbitration  
4 baseball remedy that we saw in NBCU-Comcast. So that  
5 is a spectrum.

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

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

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

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

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

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

25           So just as the agencies are flexible in

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

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

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

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

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

20           That said, of course, nobody has closed the  
21    door, including Makan, to any behavioral remedies.  
22    And I think there are three kinds that we ought to be  
23    thinking about more research on, right? One is  
24    information firewalls of the kind that the FTC has  
25    used in, for example, the Broadcom merger, important

1 to understand are they monitorable, measurable and  
2 work, because they do have a great deal of an  
3 immediate appeal.

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

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

22 On the other hand -- and, by the way, they  
23 find voice in congressional statutes of the kind Gene  
24 has talked about, and in FCC conditions, for example,  
25 in AT&T-DirecTV. On the other hand, what does it mean

1 to be discrimination is something that the FCC has  
2 looked at since 1934. It is not always an incredibly  
3 simple question.

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

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

19 MR. YDE: Yeah, just very quickly. I think  
20 behavioral remedies, in the way that they have been  
21 used, in particular, with respect to nondiscrimination  
22 provisions and information firewalls, that they  
23 actually do reflect the -- I think an appropriate  
24 level of skepticism or uncertainty about the potential  
25 anticompetitive effects of the transactions in which



1 those behavioral remedies have been used and they also  
2 reflect, I think, a recognition -- an appropriate  
3 recognition of the inherent efficiencies in those  
4 transactions or at least what people understand to be  
5 the efficiencies associated with those transactions.

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

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

19 MR. KIMMELMAN: Yeah. I mean, I cannot  
20 disagree with much of the framing that Jon put out  
21 there, but the problem with it is it is a little too  
22 theoretical for what is happening in actual  
23 enforcement, and that is, the easy case to be worried  
24 about is where a behavioral remedy is offered and it  
25 is the easy way out for enforcers and we ought to

1 avoid those in all circumstances. That just should  
2 not be on the table.

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

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

17 The downside is, in the kind of markets that  
18 Steve was most focused on, oligopolistic markets where  
19 we have substantial concerns, there is an equal  
20 problem to what Sharis said about business uncertainty  
21 and that is the uncertainty of the public that you are  
22 really getting at the core problem. The Comcast-NBCU  
23 decree just expired. I would assert that that market  
24 is every bit as concentrated as it was when we started  
25 that case now and the concerns are equally great. And

1 so while there are aspects of the decree I think that  
2 worked well, there were a lot that did not do  
3 everything we would have liked them to do. We now  
4 have a problem of the expiration.

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

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

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

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

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

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

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

24           MS. POZEN: Okay, sure.

25           MR. HOFFMAN: Should the agencies devote

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

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

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

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

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

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

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

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

3 (Laughter.)

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

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

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

22 MS. POZEN: Can I add to that?

23 MR. HOFFMAN: Sharis?

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

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

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

23 But I do think that you -- you know, we  
24 think about allocation of resources and the cases you  
25 bring and you do not bring, I do think that you

1 actually -- the litigation component of it and the  
2 advancement of antitrust and where the courts are  
3 today in thinking about these issues -- we saw it in  
4 Judge Leon's opinion in AT&T-Time Warner -- that was a  
5 risk that the Justice Department decided was worth  
6 taking. We will see if it pays off or not. We will  
7 see what the Court of Appeals does.

8 MR. HOFFMAN: So we have 25 seconds.

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

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

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

23 MS. WILKINSON: In the context of this  
24 panel, whether we end up with new vertical merger  
25 guidelines or a good report that comes out from this



1 session, we will have hopefully a bit more guidance  
2 for staff, the companies, the bar, and the courts.

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

5 (Applause.)

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

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

9           MR. LYNN: Thank you, Howard.

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

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

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

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

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

17           Isn't that a beautiful description of the  
18       American nation? "The domination of political life by  
19       the intelligent decision of free and self-sustaining  
20       men."

21           The election in 1912 began the modern era in  
22       antitrust. Over the first 14 months in power,  
23       President Wilson, in tandem with Congress, passed the  
24       Clayton Antitrust Act, the Federal Reserve Act, an  
25       antimonopoly tariff reform, a progressive income tax,

1 the FTC Act. And the key principles of this regime,  
2 because it was, in fact, a coherent intellectual and  
3 legal regime, the key principles were the main  
4 practical goal of antimonopoly is to extend checks and  
5 balances into the political economy. The foremost  
6 goal is not and must never be efficiency. Markets are  
7 made, they do not exist in any platonic ether. The  
8 making of markets is a political and moral act.

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

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

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

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

16           The effects of this change were understood  
17 at the time. In 1987, the former Chairman of this  
18 institution, Robert Pitofsky, in Congress, said of Mr.  
19 Bork and his work, underlying all of his thinking is a  
20 fundamental disdain for the competence of Congress and  
21 the Supreme Court to understand economics and apply  
22 its principles. His appointment would threaten the  
23 delicate balance among the legislative executive and  
24 judicial branches that is the heart of the American  
25 constitutional system. We would see a different sort

1 of country of companies if every segment of this  
2 economy were permitted to merge down to two or three  
3 giants without fear of antitrust exposure.

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

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

21 Platform monopolists exploit their choke-  
22 hold control over our communication systems to strip  
23 our free press of ad revenue and to make influential  
24 authors, reporters, editors, publishers afraid to  
25 speak their minds in public. The manipulation

1 machines of these monopolists serve also as the main  
2 conduit for the subversive propaganda and  
3 misinformation, both foreign and domestic, now tearing  
4 our nation apart.

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

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

22 My fifth point today, the traditional  
23 philosophy of antimonopoly was simpler, more  
24 predictable, and easier to enforce. Many people  
25 criticized us for not detailing how to make our vision



1 of antimonopoly work. They say we aim to use  
2 antimonopoly to specifically address all sorts of  
3 social and political ills.

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

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

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

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

1 word "Google."

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

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

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

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

4 (Applause.)

5 MR. SHELANSKI: Thank you very much, Barry.  
6 I will turn it over now to Jon Sallet.

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

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

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

1 by the way, he viewed opportunity and democracy and  
2 opportunity and the economy as closely linked.

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

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

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

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

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

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

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

22 So we know what he thought about how to  
23 proceed. We know he did not put into the proposed  
24 legislation anything like let's look at the political  
25 power of an institution, what are its lobbying

1 resources. What he did put into it were some very  
2 important measures that he thought focused on economic  
3 outcomes of monopoly. He looked at -- well, here is  
4 some language he wrote into the legislation. "To  
5 prohibit unfair or oppressive methods of competition."  
6 Not that far from the current standard of Section 5.

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

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

1 theory in place of litigated facts. He thought that  
2 was backwards.

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

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

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

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

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

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



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

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

25           Now, this decision has been much criticized,

1 I think sometimes with hindsight. But what I think is  
2 critical here was he was defending a rule, a  
3 limitation of trading hours that went to the idea of  
4 establishing what he thought would be a competitive  
5 process. He did not mandate any outcome, but it did  
6 permit bargaining to take place among people who all  
7 had information.

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

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

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

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

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

17 Thank you.

18 (Applause.)

19 MR. SHELANSKI: Thank you very much.

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

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

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

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

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

23           So what are some of the problems? And  
24 Marshall Steinbaum and I have outlined this in our  
25 latest report. First, there is no well-accepted

1 definition of consumer welfare. It means different  
2 things to different people. You look at the ICN  
3 surveys, that bears it out. It also raises  
4 significant rule of law concerns.

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

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

24           In fact, looking at prices can lead you to  
25 the wrong result with those dataopolies. So Facebook

1 acquires WhatsApp; they reduce price. Is that  
2 necessarily a good thing? Not necessarily if they are  
3 going to significantly reduce privacy protection. And  
4 even if we can identify who the consumers are and what  
5 welfare we are concerned with, trying to then measure  
6 the impact that a restraint has on that welfare can be  
7 very, very difficult, particularly with these  
8 dataopolies that ostensibly charge a zero price and  
9 reap their monopoly power through data that they  
10 collect through us.

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

21 The other problem is we have had a natural  
22 experiment now for 35 years, and it does not appear  
23 that the consumer welfare standard is much about  
24 consumers nor necessarily has helped improve their  
25 welfare. Instead, what we are hearing increasingly is

1 that the United States has a market power problem.  
2 And Marshall has done some excellent work on this  
3 involving labor. We also cite some recent studies  
4 that show this market power problem.

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

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

23 Preserve opportunities for competitors.  
24 That is a fundamental value of competition law. That  
25 is especially important in today's economy where we

1 are dealing with powerful platforms. And this is  
2 uncontroverted. If you look at the Supreme Court,  
3 time over time, they talk about protecting firms'  
4 right of freedom to trade.

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

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

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

25 One of the key take-aways that I hope you



1 get from my talk today is that today we have the worst  
2 of all possible worlds. I think it is beyond dispute  
3 that competition encompasses multiple economic,  
4 social, moral, and political goals. Some of you might  
5 say, no, it just encompasses one economic goal. But  
6 even among you, you cannot agree among yourselves that  
7 economic goal as narrowly to prevent tradeoffs and the  
8 like.

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

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

25 Market power, one of the things that you

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

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

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

25 Behavioral discrimination. Basically,

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

6 Thank you very much.

7 (Applause.)

8 MR. SHELANSKI: Thanks very much, Maurice.  
9 Tim, to you.

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

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

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

25 So here is what I think. You know, I think

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

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

25 So looking back, I think that if you think

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

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

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

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

18           So this is what I think is -- and I have  
19 mentioned this, but this is what I think, at its best,  
20 the consumer welfare standard becomes the process of  
21 competition standard. The two become one through the  
22 implication I just described. At its worst, it puts a  
23 burden on the plaintiff or on the Government in every  
24 single case to prove some kind of price effect on  
25 consumers. And without that, we will dismiss the case

1 and, also, without that, we will make an agency  
2 unwilling to go forward with a case it thinks it might  
3 lose. So this is what I think is how it has damaged  
4 the antitrust law.

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

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

23 So you are, you are sitting in the agency  
24 and someone comes and complains about conduct. You  
25 know, it could be multiple parties, it could be a

1 single party, whatever it is, there is a complaint  
2 about conduct. And the question that the enforcer, I  
3 think, needs to be asking and, frankly, is often  
4 asking is whether these complaints of conduct, whether  
5 these disruptions are part of the competitive process  
6 or a disruption of the competitive process. That is  
7 essentially what Brandeis is saying in the Chicago  
8 Board of Trade opinion. And I could quote it, whether  
9 it promotes competition or whether as such it may  
10 suppress or even destroy competition.

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

17 In some ways, at the risk of abusing  
18 metaphor, I think that the enforcers are and should be  
19 in the position not unlike a sports referee in a  
20 football game or soccer game, to be a little more  
21 European about it. And, you know, you have, in the  
22 course of these games, obviously a series of  
23 maneuvers, tackles, purported fouls. And in every --  
24 you know, what the referee needs to figure out is  
25 whether that was actually part of the competition, a



1 legal tackle like in football, or whether it was  
2 something that interferes or tends to destroy  
3 competition, you know, holding penalties, pass  
4 interference, and so forth, so that the competition  
5 itself gets destroyed. And I do not know if you can  
6 get much better than having the enforcer in the  
7 position.

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

16           To return to the sports referee, so the  
17 referee is just calling is that a foul that is hurting  
18 competition or is that part of competition. If the  
19 referee was then asked whether the foul in question  
20 was injurious to the fans, i.e., the consumers of the  
21 game, in each and every instance, you would have a  
22 completely different, almost an absurd standard. But  
23 somehow that is where we have ended up, in sort of a  
24 case-by-case review of each individual foul as to  
25 whether it has harmed consumers, when really I think

1 what we should be concerned about is the competitive  
2 process.

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

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

17 So thank you very much.

18 (Applause.)

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

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25

1 THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW

2 (SESSION 1)

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

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

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

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

25 And, finally, Fiona Scott Morton, former

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

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

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

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

23 I will just mention because of Sharis on the  
24 panel, that on the media voracity thing, that is not  
25 just a 2016 campaign issue. I had some people come up

1 to me back when GE bought NBC saying that merger  
2 should be blocked because now NBC is not going to  
3 cover defense contracting anymore. So there is a lot  
4 that is around on this.

5 Next, my views on this are more pragmatic  
6 than they are really philosophical. On CSAR  
7 (phonetic) concerns -- first, this is the great Fred  
8 Gwynne from the even greater "My Cousin Vinny." And  
9 this is up here to kind of symbolize the question, you  
10 know,  
11 how are judges supposed to do all of this balancing  
12 of all the things we have heard about today, and for  
13 that matter, enforcers, businesspeople, and others on  
14 this.

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

25 Now, a slide that got lost in translation or

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

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

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

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

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

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

25           Thank you.

1 (Applause.)

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

5 Deb, I would like to turn it to you.

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

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

20 Now, I do think it is important that we  
21 continually assess the performance of antitrust  
22 enforcement and whether we are achieving the right  
23 results. I was part of such an effort as chair of the  
24 Antitrust Modernization Commission that looked at  
25 these issues, including the consumer welfare standard



1 from 2004 to 2007, and I am a fan of these hearings.  
2 But I think that our assessments have to have a strong  
3 empirical foundation and I do not believe that the  
4 case has been made for repudiating the consumer  
5 welfare standard or for any better replacement  
6 standard.

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

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

15 (Laughter.)

16 MS. GARZA: Yeah, well, and, actually, Tim,  
17 I want to thank you because you helped me make that  
18 point because you talk about the Microsoft case and I  
19 think it actually disproves the thesis. You  
20 acknowledged that some might argue -- that Doug  
21 Melamed argued that the D.C. Circuit's opinion proved  
22 that the consumer welfare standard is sufficiently  
23 flexible to protect competition, including where the  
24 focus is now price effects. And I would say the same.  
25 I would say that it does because it does. It is

1 strange to me to use a case that came out right as  
2 proof that there is a risk of it coming out wrong.

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

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

25 And I would like to just go back and there

1 are a couple of cases that I pulled up while I was  
2 listening to you. For example, 1958, Northern Pacific  
3 Railway. The Sherman Act was designed to be a  
4 comprehensive charter of economic liberty and of  
5 preserving free and unfettered competition as a rule  
6 of trade. It rests on the premise of the unrestrained  
7 interaction of competitive forces will yield the best  
8 allocation of our economic resources, the lowest  
9 prices, the highest quality and the greatest material  
10 progress, while at the same time providing an  
11 environment conducive to the preservation of our  
12 democratic, political and social institutions.

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

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

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

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

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

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

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

6           Gene?

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

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

24           So how to make something productive out of  
25  this, what I keep hearing is that we are really about

1 the competitive process in most instances and we are  
2 trying to figure out how to get at the framing of a  
3 standard, whether you call it consumer welfare or you  
4 try to adjust the name of it, what I keep hearing from  
5 everyone is there is enough confusion around how it is  
6 being applied that we ought to look at that more  
7 carefully. I think that is a fair thing to do.

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

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

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

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

20           So from all of this, what I take from the  
21 various presentations is there is a lot of cleanup  
22 that needs to be done, a lot of need to focus on  
23 enforcement practices, clarity in enforcement  
24 practices, and I would say, from my perspective,  
25 aggressively pushing the courts to go to the limits,

1 but not go beyond the limits of what antitrust can  
2 handle effectively.

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

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



1 MR. SHELANSKI: Thank you very much, Gene.

2 I would like to turn to Sharis Pozen.

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

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

25 I really do, as I said earlier, welcome

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

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

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

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

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

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

21           But, again, I think the unintended  
22 consequences of doing so far outweighs the benefits.  
23 So, first, I think there's a level of subjectivity  
24 that's added to the evaluation of a merger or conduct,  
25 and that would be intolerable, and the uncertainty

1 that would provide, how would I advice GE to comply  
2 with the laws when there's that much subjectivity if  
3 we were to use a fairness standard or evaluating  
4 externalities? I think that turns to standards that  
5 are in the eye of the beholder.

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

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

1 important.

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

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

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

20 And Fiona.

21 MS. MORTON: All right, since I'm last, I'm  
22 going to try to synthesize a little bit. My feeling  
23 about this debate on consumer welfare standard is that  
24 it's a little bit of a red herring. So the consumer  
25 welfare standard was, I think over the last 30 years,

1 redefined by defendants who are profit-maximizing and  
2 want to be allowed to merge with whoever they want and  
3 exclude whoever they want, and we would expect that.

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

15           So then that standard succeeds, that  
16 redefinition of consumer welfare succeeds in  
17 influencing the courts. Now we have the left wing  
18 attacking that thing. Okay, that's not the consumer  
19 welfare standard. That's false that that's the  
20 consumer welfare standard; however, it's true that  
21 that thing, the alternative defendant-friendly  
22 standard, has not worked. Okay, so the left wing is  
23 quite correct that what we have is a situation with  
24 insufficient, I think, antitrust enforcement, rising  
25 problems with competition, rising markups, declining

1 labor share, problems with very static market  
2 structure because entry is harder and so forth.

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

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

18 So I think there's a lot of evidence to say,  
19 as I said before, that we need to be a little bit  
20 more aggressive. How should we change? Some of the  
21 things that have come up today are ideas like let's  
22 focus on the competitive process. I think that's  
23 extremely helpful because a world in which an expert  
24 witness has said, tell to me the exact counterfactual  
25 that would have occurred if this dominant platform had

1 not excluded this small entrant. How quickly would  
2 the entrant have grown? What products would the  
3 entrant have brought out? What prices would the  
4 entrant be charging? Okay, those are really difficult  
5 questions to answer when you don't see that world  
6 because the entrant was excluded.

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

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



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

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

24           The other one is to move the discretion to a  
25 different set of people. So the consumer welfare

1 standard is fine; discretion is excellent; but we need  
2 different judges or a different court or some other  
3 setup as a way to run our antitrust laws if we'd like  
4 to get answers that are in the best interest of  
5 consumers and society. Thank you.

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

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

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

19 This has been really a fascinating and  
20 provocative panel. I think we've heard a variety of  
21 different viewpoints, ranging from really just a  
22 fundamental rethinking of what antitrust should be to  
23 I think a strong defense of the status quo, and then  
24 in between sort of ways that we can work within the  
25 existing framework, maybe restore forgotten aspects of

1 that framework and push harder on some existing  
2 aspects of that framework. So I think we've got a  
3 very broad range of viewpoints.

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

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

20 So we have these lofty goals of the  
21 antitrust laws. I think a fair reading of the  
22 legislative history and a lot of the early thinking in  
23 the courts about the antitrust laws was that they did  
24 have broad purposes, that the hope was that by  
25 enforcing competition and preventing monopoly, lots of

1 good things would happen, among them, more economic  
2 competition, but included among them also a broader  
3 distribution and a prevention of monopoly, political  
4 power, and control over the legislative agenda.

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

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

24           So in some sense, I view the consumer  
25 welfare standard as a method, as a pragmatic means, as

1 a set of criteria, if you will, to apply in the  
2 specific case but not as a philosophical program in  
3 and of itself, at least when it arose, and I think  
4 when Deb talked about the 1984 guidelines as being a  
5 way to shore up, further define, and rearticulate the  
6 consumer welfare standard, I think that that's what it  
7 was. I felt that that was very much a methodological  
8 change, as opposed to a philosophical one.

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

19 And we've heard a variety of proposals  
20 on this panel, ranging from, I think, fairly a  
21 radical program of rethinking the antitrust laws  
22 fundamentally; a more regulatory program; perhaps  
23 a much more sort of rigid set of presumptions to  
24 think -- but all of this comes together, I think,  
25 in a way to restore a competitive process or come

1 up with criteria to put in place effective  
2 competition.

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

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

25 So what is competition, and how do we know

1 when it's enough or effective? What is our metric?

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

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

21 So what we would look at is what is the  
22 competitive process and what is the threat to the  
23 competitive process. And I think this is where the  
24 Supreme Court, before the whole consumer welfare,  
25 would look at what the legislative history desired,

1 what were the particular evils that the legislature  
2 was aimed. And if you look at like the Klor's  
3 decision, there you didn't have to show necessarily  
4 what the impact was on consumer prices. You didn't  
5 even have to show how the elimination of Klor's would  
6 necessarily harm consumers.

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

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

22 MR. LYNN: Can I --

23 MR. SHELANSKI: Go ahead.

24 MR. LYNN: No, I mean, Howard, I think  
25 that's a terrifically important question, and it



1 actually gets at the heart of everything that we do in  
2 this room and we do in America. You know, the answer  
3 is, like, how do we get to the particular number  
4 that's right. You know, one option is that we have  
5 experts do it. We get a bunch of economists in a  
6 room. We get a bunch of lawyers who have spent the  
7 last 30 years, you know, thinking about this in a  
8 room, and then we close the door and you guys come out  
9 with a solution and you present it to the public.  
10 That's one option. That's actually how we've lived in  
11 this country for the last 35 years, you know.

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

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

17 MR. LYNN: Not anymore, Tim. The other  
18 option -- the option is through public debate. You  
19 know, I mean, remember what I said before about what  
20 W.E.B. Dubois said, what is America? It's a vision of  
21 democratic self-government, a domination of political  
22 life by the intelligent decision of free and self-  
23 sustaining men. So we can do the little, tiny group  
24 of experts, self-chosen experts, self-regulated  
25 experts, a little association of experts, or we can

1 have all of the people involved. Those are the two  
2 options.

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

8 Carl, we'll get to you later.

9 Northwest Ordinance, drawing lines on the  
10 map. You could draw the lines this far apart; you can  
11 draw them this far apart. What was the result when  
12 people got together and drew the different lines?  
13 They drew in these different sections, and they made  
14 the law, they made the regulation, they made the  
15 policy such that each family would end up with about  
16 160 acres, a quarter section.

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

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

1 20,000 acres, an entire state to run, or we can say  
2 one family gets 160 acres. That's a decision for the  
3 people to make.

4 MR. WU: Can I get --

5 MR. SHELANSKI: Tim, sure.

6 Well, Sharis, you --

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

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

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

22 MR. WU: I'll go back to what I was going to  
23 talk about. So, no, Howard, I want to draw on your  
24 and also Fiona's comments. I think it's very  
25 important not to discuss the consumer welfare standard

1 in theory, you know, what it might be, what it  
2 originally was intended to be, but, in fact, what it  
3 is today.

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

21           So, Debra, you asked if there are any cases  
22 I could think of that have gone wrong because of this  
23 -- I guess I'd call it the fake consumer -- whatever,  
24 this standard we have. Here's a few -- the American  
25 Express case, the AT&T-Time Warner case, Brooke Group,

1 the American Airlines predatory pricing case, the  
2 approval of Facebook's acquisition of Instagram, the  
3 approval of Facebook's acquisition of WhatsApp, the  
4 approval of Google's acquisition of Waze, a three-to-  
5 two merger, the approval of LiveNation-TicketMaster,  
6 the approval of the American Airlines-U.S. Air merger,  
7 the approval of the United Airlines-Continental  
8 merger. The list goes on and on. These are just  
9 well-known examples. I think these have all been  
10 failures in antitrust law to deal with anticompetitive  
11 mergers or anticompetitive conduct. And, you know,  
12 the AT&T-Time Warner case just recently tried shows  
13 the inherent vulnerability of this consumer welfare  
14 standard. Here, you have Carl Shapiro, you know, one  
15 of the greatest economists of this generation,  
16 demonstrating, you know, through a pricing model what  
17 harms were going to come from this merger, and Judge  
18 Leon, who just sits there and doesn't seem to  
19 understand economics very well at all, just says, no,  
20 I just don't agree with this, and it's all poppycock  
21 and, you know, so we're in a situation where it's not  
22 like it's this determinative science.

23 I mean, the fact you had an extremely  
24 convincing model and, you know, the best science we  
25 had and this war over price effects, which is what

1 we've turned the antitrust law into, as I said before,  
2 has elevated the joke about the streetlight and the  
3 economist into the soul of the law. And what's  
4 missing here is what you talked about, Howard, which  
5 is the long-term vision. I think the antitrust law is  
6 -- I think it's the wisdom of the common law that we  
7 need to trust in, which is you have case-by-case  
8 situations and you call out anticompetitive conduct or  
9 not on categorical bases. That's how the common law  
10 works.

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

21           MR. SHELANSKI: Deb and then Jon in  
22 response.

23           MS. GARZA: So, look, the benefit of the  
24 consumer welfare standard is that it tells you what  
25 we're focusing on. We're not focusing on protecting

1 competitors or any other thing. It basically tells  
2 you this is where you are looking at. And, by the  
3 way, a consumer isn't necessarily the person who  
4 listens to the radio. It's -- in all of the  
5 enforcement actions that have been brought, and  
6 whether it's radio or television or other, it's the  
7 immediate consumer, the entity in the chain of  
8 distribution.

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

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

24 Now, you may disagree about how certain  
25 cases came up, but the question is, you know, whether

1 the consumer welfare standard, that requirement that  
2 you have something that's economically based,  
3 empirically based, that you have a theory of  
4 competitive harm, that you're focused on -- not on  
5 competitors or some other thing, but you're focused  
6 on, you know, the efficient allocation of resources  
7 and the benefit to consumers, the benefits that the  
8 court outlined in Northern Pacific Railway. That's  
9 what the standard is.

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

22 But, finally, on the price effects, you  
23 know, look, that's one thing that we use. There are  
24 cases that are decided not based on price effects. We  
25 look at mergers where we predict an effect, not just



1 on price, on innovation. We look at conduct that is  
2 exclusionary. You don't just have to have price  
3 effects. Private plaintiffs in order to recover  
4 damages, yes, indeed, you have to have price effects,  
5 but it's not -- again, and I think it's fine if people  
6 think about, well, what if we don't have price, we do  
7 not have that as a measure, how else can we look at  
8 the competitive effects? That's fine. I just do not  
9 think that's precluded by the consumer welfare  
10 standard.

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

14 MR. SALLET: So in some sense, a lot of the  
15 conversation is about two standards, both of which can  
16 be found in common law. I mean, two formulations:  
17 use of the term "consumer welfare," the use of the  
18 term "competitive process." So why do I think  
19 competitive process is a clearer way of explaining  
20 what we're up to?

21 Well, I started to read a quote, and I  
22 didn't read it all, but I want to go back to what the  
23 United States Government said, this Administration, to  
24 the Supreme Court last year. Although the Supreme  
25 Court -- "Although the Sherman Act is a 'consumer

1 welfare' prescription, courts do not enforce that  
2 prescription by making their own judgments about the  
3 allocation of resources that would best serve  
4 consumers' interests. Instead, consistent with the  
5 Sherman Act's fundamental policy of market  
6 competition, courts protect consumers by protecting  
7 the competitive process."

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

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

22           My view is the Government bears the burden  
23 of persuasion, it need not bear a burden of  
24 unnecessary explanation. So two examples. In October  
25 of 2016, when I was at the Justice Department, with

1 the FTC, we put out HR guidance on no-poach  
2 agreements, okay? So no -- it would be improper,  
3 indeed per se illegal, to have a naked restraint where  
4 competitors agree not to hire each other's workers or  
5 certain workers.

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

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

19 Second example. The Justice Department  
20 litigates the Anthem-Cigna merger at the end of 2016,  
21 coming into 2017. There is a buyer power claim, okay,  
22 that the merged entity will have power, unfair power,  
23 that it will use to extract lower prices from upstream  
24 hospitals and physicians. Not surprisingly, the  
25 merging parties say low prices are good, and they cite

1 a lot of stuff that says -- and there's a First  
2 Circuit case everybody cites, low prices are good,  
3 that's the end of the matter. It's about consumers,  
4 they're getting lower prices, our customers are  
5 getting lower prices.

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

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

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

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

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

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

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

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

25           MR. STUCKE: Right.

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

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

13           MR. SHELANSKI: Gene.

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

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

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

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

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

23 And not just say I -- you know, I appreciate  
24 what Maurice has tried to do, and if I was just  
25 looking at effective competition, I would be really

1 afraid, at least the statutory language he's  
2 proposing, because I've dealt with effective  
3 competition standards that open up markets where  
4 there's absolutely no competition whatsoever, done by  
5 regulatory agencies.

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

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

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



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

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

1 way.

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

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

20 Also, if you remember, the Federal Trade  
21 Commission had not signed onto the Section 2 report.  
22 So, again, to, I believe it was Deb's comment earlier  
23 about international authorities, a lot of people were  
24 looking to the United States and saying you have, you  
25 know, a Section 2 report that's not endorsed by both

1 of your antitrust agencies, what does that mean and  
2 how should we interpret that?

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

14 And we did bring a case, you know, in Texas,  
15 you know, regarding Texas hospitals alleging a Section  
16 2 count. A lot of people have dismissed it as a small  
17 case, but, you know, again, it was an important case,  
18 and I have to say in other cases that we brought  
19 during that time, including the Blue Cross-Blue Shield  
20 case, there was a lot of discussion and discernment  
21 about how to plead that case.

22 And kind of getting back to Gene's point and  
23 the point I was trying to make, one of the reasons why  
24 we didn't include a Section 2 count, just to be clear,  
25 and the thought that went into that is because we were

1 concerned it would diminish the Section 1 count that  
2 we actually felt like we could develop and proceed  
3 with and perhaps move the needle on these kinds of  
4 agreements in healthcare.

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

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

21 So the question is procedurally moving  
22 forward with thinking about the consumer welfare  
23 standard, I fully agree with Gene Kimmelman that this  
24 kind of set of hearings that the FTC is doing are  
25 vital to show that an agency is open to hearing all of

1 these views and to thinking about these questions is  
2 critical.

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

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

23 Gene?

24 MR. KIMMELMAN: Well, it's a great framing,  
25 Howard. I think you do both. I think you need to

1 push the envelope on enforcement in a way that is  
2 structured and principled. I think if we're moving  
3 away from price, which I think makes sense in certain  
4 kinds of cases, certain kinds of markets, you still  
5 have to be precise. You have to have something that  
6 has a limiting principle and you have to have  
7 something that is understandable to all of the key  
8 players and stakeholders in the marketplace so that it  
9 is replicable and it is meaningful. So we need to  
10 work on that. Fiona says we haven't put as much  
11 attention into those things, and maybe that's what we  
12 should, quality and innovation.

13 So that's enforcement, but I think going  
14 back to the public, this has opened up a process that  
15 I think is vital. One of my biggest observations  
16 going into the Department of Justice is that, you  
17 know, the great thing was, it was a law enforcement  
18 institution, the walls are thick and often  
19 impenetrable by politics, I hope still -- they were.

20 But there is a downside to that, too, and  
21 that is that as many consumers called, Sharis, and  
22 consumers we see, we mostly saw expert lawyers and  
23 expert economists come in and got stuck behind those  
24 thick walls, and so getting out with real people who  
25 really have concerns about what is going on in the

1 economy is, I think, critical. So I applaud the FTC  
2 for that.

3 I think we have to continue that, and I  
4 think part of that process is not jettisoning  
5 important principles and concepts. It's getting out  
6 and engaging with the public and explaining how they  
7 work and how they do not work, what they do not do,  
8 but they, not leaving it there, letting people work  
9 with experts to figure out what else would you do if  
10 you weren't doing it through antitrust. What else is  
11 a plausible approach? I think that's the constructive  
12 way of combining the two, Howard.

13 MR. SHELANSKI: So that's very helpful,  
14 Gene. And it actually ties in very closely to a good  
15 question we got from the audience. So there is virtue  
16 to this political insulation to this being off the  
17 radar, but there is the possibility it spills into an  
18 echo chamber of elitist thinking. I think we got some  
19 sense of that from Barry's remarks.

20 So, Tim, I would wonder how you answer that,  
21 Tim Brennan, how you answer that. Is this sort of  
22 lovely environment of intellectual experts shielded by  
23 thick walls, making decisions that affect people  
24 broadly in society, is that ultimately antidemocratic?  
25 Is there a way we can make those walls thinner without

1 being penetrable to the wrong influences?

2 MR. BRENNAN: I do not think it has to do  
3 with the standard, just to get that out there. I  
4 mean, I do think that that's a problem, and the  
5 ultimate arbiter of that is probably judges who have  
6 to be convinced, and that brings to mind an anecdote  
7 which was I used to think, probably going along with  
8 this elitist view, I thought a long time ago that  
9 maybe, you know, we should have specialized antitrust  
10 courts who can -- you know, where the judges can  
11 understand merger simulations and whatnot and all of  
12 that.

13 And I remember going to a session at ABA  
14 spring meetings where I think -- I believe it was  
15 Judge Diane Wood who argued against specialized courts  
16 on the grounds that if any ordinary -- if a federal  
17 judge can't understand an argument, how is an ordinary  
18 businessperson supposed to understand it? And so if  
19 judges feel more comfortable saying, look, I just do  
20 not understand this, this is -- you know, that you  
21 have to basically sell something in a way that is  
22 comprehensive, at least to that level, that might  
23 help.

24 MR. SHELANSKI: I've got Tim, Barry, and  
25 then Jon.



1           MR. WU: Yeah, listen, antitrust has a major  
2 elitism problem. I do not think there's much doubt  
3 about it. You know, let's just stick with merger  
4 review as just one example. You know, these are of  
5 incredibly important consequences for everybody's  
6 lives. You know, the last ten years, you've had  
7 enormous consolidation of industry. The public cares  
8 about economic concentration. They care -- I mean,  
9 they do not articulate it as we would but they care  
10 about big business. They care about inequality that  
11 results from it. And I think that in light of current  
12 economic conditions the answer that we do not need to  
13 do anything is just not an answer at all. In fact,  
14 it's almost embarrassment that we think we have this  
15 sort of all figured out.

16           You know, we love the antitrust law, we love  
17 playing this game, but I think we have to face some of  
18 the realities here, is that if we do not fix these  
19 problems, we have the real possibility of, you know,  
20 more extremist solutions, more intensity. You know,  
21 there's a lesson from the 20th Century, which is if  
22 you do not fight basic economic problems, and if you  
23 do not -- if economic policy fails to serve the  
24 general public, and I just don't mean antitrust, I  
25 mean generally -- the 20th Century showed that it

1 leads in some very dangerous directions.

2 And I think, we're, you know, in our kind of  
3 mini debates over the consumer welfare standard, at  
4 grave danger at arriving at a do-nothing kind of  
5 thing. And if the FTC takes that as a lesson from its  
6 hearings, I think that will be a grave mistake. Thank  
7 you.

8 MR. SHELANSKI: Barry.

9 MR. LYNN: Yeah, I mean, I agree with  
10 everything that Tim just said. I think those are  
11 fantastically important points, and just to put a  
12 little flesh on that, you know, people have been  
13 banging -- the people have been banging on the doors  
14 of this institution and the DOJ and the USDA for a  
15 long time. I mean, I think we could make a pretty  
16 good case that the Obama sort of movement of 2008 had  
17 lots of antimonopoly sentiment within it. Certainly  
18 the Tea Party movement in 2009, 2010 was an  
19 anticoncentrated control movement in its early days  
20 before it was captured. Occupy in 2011. Trump 2016.  
21 He took a lot of this antimonopoly energy and  
22 channeled it. You know, and like how does this  
23 actually sort of play out in the real world?

24 You know, going back to 2007, Candidate  
25 Obama wandered around Iowa, and he told the farmers of

1 Iowa that he was going to fight the great monopolies  
2 that were destroying their livelihoods. And they  
3 voted for him. That's why he's president, because he  
4 won Iowa.

5 And then when he came to power, and the  
6 folks from the DOJ went over and tried to -- initially  
7 were going to work with the USDA to try and do  
8 something for these farmers, after they had five  
9 hearings in which they got everybody all agitated and  
10 upset and ready to fight, they just closed that book.  
11 And even though, and this was not a case in which you  
12 actually -- a lot of those -- a lot of those problems  
13 could have been dealt with just through rulemaking  
14 through the Packers and Stockyards Act. It didn't  
15 have to go to court.

16 So that was a decision, and then when we saw  
17 all of those counties, all of those regions, all  
18 across rural America turning red in November of 2016,  
19 that was in no small part a reaction to that failure.

20 MR. SHELANSKI: We've got just a minute  
21 left, and I've been neglecting a little bit the far  
22 end of the table, so --

23 MR. KIMMELMAN: Can I just respond to that?  
24 I mean, Barry, I wish you had been there with me when  
25 we were trying to help the USDA move forward on the

1 Packers and Stockyard Act. It was a concerted effort  
2 with DOJ, economists and lawyers working with USDA.  
3 And they had some really, I thought, very creative and  
4 good ideas. Their problem was that Congress would not  
5 accept it, and basically with the threat of an  
6 appropriations rider shut down a lot of, I thought,  
7 very good initiatives.

8 And, I mean, yes, there could be other  
9 things that maybe should have been done, going  
10 backwards, we'd like to think about doing, and I could  
11 just say, there was a concerted effort to do this and  
12 this is just the reality of politics on top of  
13 antitrust and regulatory policy. You know, it just --  
14 you have to look at all of them, and the politics  
15 there were the politics of agribusiness, I'm afraid to  
16 say, and to an unfortunate outcome.

17 MR. LYNN: It's the politics of the United  
18 States of America, not the politics of agribusiness.

19 MR. SHELANSKI: Okay, so I'm going to give  
20 the last word on the panel to Deb.

21 MS. GARZA: So then I will say something  
22 positive, and -- but political. I want to talk about  
23 the political isolation, because I think there is good  
24 news that we haven't been politically isolating the  
25 small P. You have to go to generalist courts to make

1 your case. The agencies often give explanations for  
2 why they don't challenge transactions. Personally, I  
3 feel, although it's a burden and I didn't want to do  
4 it when I was there, we should do more of that.  
5 Transparency will be enormously helpful.

6 Why does Makan Delrahim, Joe Simons, others,  
7 why do they travel around the country giving speeches  
8 all the time? It's not because they like to be on a  
9 bus or a plane all the time. It's in particular so  
10 that they get out and talk to the business community,  
11 consumer community, and explain what they're doing and  
12 why. And in those -- having done that, that also  
13 gives the opportunity for people to feedback to them.

14 So I don't think we ought to be in an  
15 ivory tower, I don't think we are, but I applaud  
16 things like these hearings, things like the Antitrust  
17 Modernization Commission, things like enforcers  
18 getting out and talking to the constituencies, both  
19 consumer and business, and having generalist judges.  
20 So while we may be specialists that tend to practice  
21 in antitrust, I don't think that antitrust right now  
22 today is just an elitist institution that's totally  
23 politically isolated.

24 MR. SHELANSKI: Thanks very much. I tell  
25 you, that's a great note to wind up on. A couple of

1 questions were from the audience, we didn't get a  
2 chance to get to. The good news is the next panel  
3 that will come back at 3:30 is going to be very much  
4 on a similar topic with, indeed, some of the similar,  
5 same participants, so I am going to leave these  
6 remaining questions up here for Derek and the next  
7 panel. And with that, I'd really like to thank our  
8 participants for a very interesting afternoon. Thank  
9 you.

10 (Applause.)

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1           PRESENTATIONS:   CONSUMER WELFARE STANDARD

2           MR. MOORE:   We are going to get started for  
3 the last panel of the day.   So the last panel of the  
4 day focuses on the same topic that the prior panel  
5 focused on, and unlike the prior panel, we have a  
6 little bit more space to work with, both physically  
7 and in terms of time.

8           We have two opening presentations.   The  
9 first is going to be by Jon Nuechterlein, who is a  
10 partner and coleader in Sidley Austin's Communications  
11 Regulatory Practice, and he also previously served as  
12 the General Counsel of the FTC and the Deputy General  
13 Counsel of the FCC.

14           Another presentation following Jon's is  
15 going to be by Carl Shapiro, who was introduced  
16 earlier this morning, and I won't read his bio again,  
17 but he is a professor at the University of California  
18 at Berkeley and served as Deputy Assistant Attorney  
19 General, Head of the Economic Analysis Group at the  
20 Department of Justice on two occasions.

21           So Jon will start us off.

22           MR. NUECHTERLEIN:   Thank you, Derek.   I'm  
23 very happy to be here.   I'm going to begin with a  
24 little history lesson and a riddle.   And the riddle is  
25 think of a company -- past or present -- that uses

1 scale, vertical integration, and innovation to  
2 transform retailing, undersells its rivals, puts many  
3 of them out of business, and whose very success  
4 prompts calls for radical changes to the nation's  
5 antitrust laws.

6 The answer to this question is not Amazon.  
7 Amazon actually has only a small fraction of the  
8 retail sales today as Walmart. The answer, instead,  
9 is this company, A&P, which people my age or older  
10 will remember from the 20th Century. It was a  
11 powerhouse supermarket chain that by 1929 had really  
12 come to dominate retailing in America in a way that no  
13 other company had done before.

14 At this point, I'm going to make two  
15 disclosures and a disclaimer. The first disclosure is  
16 that the presentation I'm about to give is based on a  
17 paper that my colleague, Tim Muris, and I wrote that  
18 was funded by Amazon. The second disclosure is I  
19 worked at A&P as a teenager. That little grocery  
20 store, I spent two summers working as a bag boy in the  
21 A&P. The disclaimer is I will not let -- all views I  
22 express here today are my own, not those of any client  
23 or any former employer.

24 So how did A&P do it? How did it come to  
25 dominate retail sales in the early 20th Century?



1 Well, A&P basically had four different strategies.  
2 One was ruthless disintermediation. It went around  
3 wholesalers at the time the grocery business was very  
4 segmented into production, wholesaling, and retail  
5 distribution. A&P went right through wholesalers and  
6 bought directly from suppliers and, therefore, it was  
7 able to undersell its smaller rivals.

8 Second, A&P also spread throughout the  
9 country. It had hundreds of stores. It bought in  
10 bulk from producers. It was able to get enormous  
11 discounts from them.

12 Third is vertical integration. A&P was not  
13 only a distributor, a retail seller of groceries, but  
14 it was a manufacturer of groceries. It made butter;  
15 it made bread; it imported coffee. And it was also a  
16 great innovator. It may come as a surprise to some  
17 people to learn that there was a lot of innovation in  
18 the early 20th Century in retail sales, but, in fact,  
19 there was. A&P learned how to cut costs out of the  
20 distribution system, but it also did something that  
21 foreshadows what internet companies today do, which is  
22 to use consumer data to make its operations more  
23 efficient and more receptive to the actual interests  
24 of consumers.

25 So who benefitted from all this? Well,

1 consumers did. Who didn't benefit? Smaller  
2 competitors and the displaced middlemen that A&P went  
3 around. And so this -- the reason I'm going to talk  
4 about this case today is because it really does  
5 identify sort of an archetypal example of where a  
6 company, through competition reduces the number of  
7 competitors, yet consumers are better off. So if we  
8 had an alternative standard called the competitive  
9 process standard, where would it leave us?

10 Ultimately, I think that the consumer  
11 welfare -- I'm going to defend the consumer welfare  
12 standard because I think it gives us a determinate  
13 objective that a more nebulous term like "competitive  
14 process" doesn't give us.

15 So I'm going to -- there were a number of  
16 quick legislative and prosecutorial reactions to A&P  
17 over the -- throughout the early and mid 20th Century.  
18 I'm going to skip through a few of them just because  
19 we don't have a lot of time. I am just going to  
20 briefly mention them. One is Congress and a variety  
21 of states imposed heavy taxes, not just on A&P, but  
22 also a lot of other large chain stores so that they  
23 could be less successful in underselling smaller mom-  
24 and-pop businesses and other less efficient  
25 businesses.

1           There is also the Robinson-Patman Act whose  
2     mysteries I will not spend a lot of time on today. I  
3     still don't feel like I fully understand it, but one  
4     key to it is the original title of this act, which was  
5     the Wholesale Grocers Protection Act. And that is  
6     exactly what it was. It was designed to protect  
7     wholesalers and smaller retailers against large chain  
8     stores and often against the interests of consumers.

9           All right. So now the main event of my  
10    presentation is the criminal prosecution of A&P by the  
11    Department of Justice. By the way, this is counting  
12    down from two minutes. All right. Good. Okay.  
13    Excellent.

14           All right. So here is the main event. The  
15    main event is a criminal prosecution. People  
16    sometimes forget that the Sherman Act is a criminal  
17    statute and enforcement actions can be criminal.  
18    Today, we confine that to Section 1, but that wasn't  
19    always the case, and DOJ actually went after A&P, the  
20    corporation, and its key executives, including the two  
21    founders of the modern A&P, for criminal violations  
22    and secured felony convictions of them.

23           Well, what was the theory of criminal  
24    liability? Well, one was predatory pricing. The  
25    theory here was that A&P was pricing its goods too low

1 and putting smaller, less efficient businesses out of  
2 the market. But there was never a clear distinction  
3 in DOJ's case between competitive pricing and  
4 predatory pricing. This is a problem that afflicted a  
5 lot of predatory pricing claims back in the early to  
6 mid 20th Century. There were no determinative  
7 standards. It ended up being sort of a "know it when  
8 I see it" standard, but there was definitely not with  
9 anything comparable to what we would now call the  
10 recoupment requirement for plaintiffs.

11 And here is a quote by Morris Adelman,  
12 roughly contemporaneous with his prosecution that  
13 shows that you really kind of need to have a  
14 recoupment requirement in order to show why predatory  
15 pricing is a bad thing. Ultimately, the concern is  
16 that over the long run, consumers will have to pay  
17 more, will be worse off because of short-run price  
18 cuts, but that was never going to be a persuasive  
19 theory in the A&P case because there was no -- because  
20 the entry barriers were sufficiently low, and there  
21 was never a realistic scenario in which A&P was going  
22 to be able to hike its grocery prices to monopoly  
23 levels.

24 Theory number two DOJ brought: a monopsony  
25 theory. Here, the theory was that A&P was getting

1 such good deals from grocery suppliers that the  
2 suppliers got angry and turned around and raised the  
3 rates that they were charging all the independent  
4 grocery stores, the smaller ones. Now, this is  
5 perplexing from an economic perspective because  
6 presumably the suppliers were charging profit-  
7 maximizing rates for the smaller grocery stores in the  
8 first place, and it's unclear how it is that A&P was  
9 going to be -- through its insistence on lower rates  
10 was going to raise the cost of its rivals. DOJ never  
11 really tried to prove that.

12 So instead of analysis, we ultimately had  
13 rhetoric. This is an actual quote from a prosecutor  
14 in the A&P case. It's amazing that you actually had  
15 prosecutors saying these things. "A&P should be  
16 convicted of a criminal offense because it sells foods  
17 cheaply to consumers in its own stores because it is a  
18 gigantic bloodsucker taking its toll from all levels  
19 of the industry." Focus on other competitors in the  
20 industry rather than on the consumer beneficiaries of  
21 A&P's low prices.

22 Third theory of liability was one of  
23 vertical integration. As I mentioned, A&P was an  
24 early vertical integrator, one of the vertically  
25 integrated companies with A&P was a company called

1 ACCO, which was a purchasing agent. And what this  
2 company did is it went around the country and it  
3 bought fresh produce directly from farmers and other  
4 suppliers. Now, sometimes, ACCO, this affiliate of  
5 A&P, bought too much produce and there was some left  
6 over. What did A&P do? It didn't throw the spare  
7 produce out; it sold it to other grocery stores,  
8 unaffiliated grocers. And obviously it was going to  
9 sell the spare produce to those grocers at a profit,  
10 so it was charging them more than it charged itself  
11 when it sold the produce to the A&P retail stores, but  
12 obviously the grocers, these independent grocers,  
13 didn't need to buy anything from the purchasing agent;  
14 they chose to because apparently the rates that ACCO  
15 was charging them were below the market rate.

16 So A&P was effectively allowing its  
17 competitors to share in its economies of scale. But  
18 the linchpin of the case against A&P was that there  
19 was something really unseemly about doing business  
20 with your competitors, having companies that were  
21 simultaneously your competitors and your customers and  
22 not treating them as customers as well as you treat  
23 your own operations.

24 And you can see this in a variety of old  
25 factory metaphors the district court thought were

1 important to stress. It couldn't quite explain what  
2 was wrong about doing this, but it described these  
3 transactions as odious and unjustified.

4 So after DOJ had secured this criminal  
5 conviction of A&P and the -- and its executives, it  
6 tried to break the company up in a civil suit, and it  
7 languished for a few years during a change of  
8 administration in mid 20th Century DOJ. Ultimately,  
9 that case settled. A&P had to spin off these  
10 purchasing agents, but otherwise the company remained  
11 solvent long enough for me to work for it as a bag boy  
12 in the 1980s.

13 All right, I want to turn to a retrospective  
14 on this case that was published in the Yale Law  
15 Journal in 1949, and that's a long time ago, 1949.  
16 Here are some of the quotes from this Yale Law Journal  
17 note. This is an economics professor at Yale who is  
18 getting his law degree at the same time and later went  
19 on to teach elsewhere, and I am going to hold it as a  
20 mystery for a moment who it is. Here are some of the  
21 critiques he raised.

22 The court never drew a clear line between  
23 predatory and competitive price-cutting; implied  
24 nonsensically that vertical integration was illegal,  
25 per se, and no one ever made clear exactly, you know,

1 when vertical integration would be a problem. The  
2 court's analysis also disregarded the dynamic nature  
3 of competition and the fact that competition is brutal  
4 and often puts companies out of business, but that's  
5 all in the interest of a competitive environment. And  
6 ultimately the DOJ's decision to use the Sherman Act  
7 to go after A&P was an indication that there was a  
8 real contradiction in the way DOJ was using the  
9 antitrust laws. In other words, antitrust philosophy  
10 on display in the A&P case was a paradox: policy at  
11 war with itself.

12 So who wrote this 1949 Yale note? And this  
13 is a trick question. It was not Robert Bork. It was  
14 not anybody else from the Chicago School. It was a  
15 very young Don Turner, who ended up coauthoring the  
16 leading treatise with Phil Areeda in antitrust and who  
17 also ended up being the Antitrust Chief in the Lyndon  
18 Johnson Administration, which is not terribly known  
19 for its economic conservatism.

20 This illustrates an important point, which  
21 is that the observations I just raised there about the  
22 need to distinguish between competitive and predatory  
23 price cuts, the need to understand the benefits of  
24 vertical integration, the need to understand that  
25 consumer-friendly competition often puts competitors



1 out of business. Those are not new concepts that  
2 originated with Robert Bork or with the Chicago School  
3 in the '80s. These were well known to anyone who  
4 analyzed antitrust law in mid-century from the  
5 perspective of economics.

6 All right. I have -- and Derek has kindly  
7 told me that I can go a few minutes over. I'm going  
8 to contrast Don Turner's note with a recent -- more  
9 recent note that appeared in the Yale Law Journal by  
10 Lina Kahn, who is a very bright, rising star in  
11 antitrust circles and is viewed properly as a leading  
12 light of the populist movement in antitrust.

13 I am going to express severe disagreement  
14 with her position on this set of issues. So Lina Khan  
15 in attacking internet giants claims that we should  
16 dispense with the sort of the Brooke Group-oriented  
17 final distinction between competitive and predatory  
18 price-cutting, and in particular we should dispense  
19 with recoupment requirements for what she calls large  
20 platform providers. Instead we should look at, you  
21 know, whether companies exploit their size, and we  
22 should look at the rich set of concerns that animated  
23 earlier critics of predation.

24 Well, we looked at those rich set of  
25 concerns in the A&P case, and what we got instead of

1 an analysis and a set of rules that companies know how  
2 to follow is rhetoric from a prosecutor, and my  
3 concern is that we're likely to see the same sort of  
4 rhetoric if we dispense with the consumer welfare  
5 orientation of antitrust today.

6 In addition, Lina Kahn takes issue with  
7 Amazon's creation of a logistics empire to reduce  
8 delivery times. If you are able to get quick delivery  
9 from Amazon, it's in part because Amazon has built out  
10 a whole infrastructure of warehouses, but it doesn't  
11 hoard the scale economies of the warehouses to itself;  
12 it allows third-party merchants to avail themselves of  
13 those scaled economies as well, and it actually  
14 reduces their costs.

15 The third-party merchants who participate in  
16 the marketplace are able to reduce their shipping  
17 costs more than they would if they were trying -- if  
18 they sought to deal with UPS and FedEx directly. So  
19 what's the problem? The problem is, according to this  
20 note, the conflicts of interests, tarnished  
21 neutrality. Now, to me, those are words that outside  
22 the context of a fiduciary relationship aren't  
23 particularly persuasive.

24 To me, the question is, is this the sort of  
25 behavior that makes consumers better off or worse off

1 over the long run, and I've never heard -- I've heard  
2 Carl and others give expositions of the raising  
3 rivals' cost theory of antitrust. I've never heard a  
4 clear exposition of how lowering rivals' costs is a  
5 basis for antitrust liability or why it should be.

6 This reminds me also of the attack on A&P's  
7 own purchasing agent, the theory that there is just  
8 something unseemly about doing business with your  
9 rivals. Okay. So imagine that Congress enacted a  
10 more populist vision of antitrust, and your job, like  
11 mine, is to answer calls from clients asking, well,  
12 what should we do about particular practices that we  
13 are considering?

14 So suppose that you get a call from Apple  
15 back ten years ago that said, you know, we have this  
16 really neat new device called the iPod and application  
17 called the iTunes music store. We liked it, we'd like  
18 to launch it at a low price, but we are a little  
19 concerned that we're going to be so popular that we  
20 put Olson's Books and Records and other record stores  
21 out of business. In fact, they did. Should we launch  
22 it? Should we price the songs at a higher level that  
23 we view as profit-maximizing because we want to cut  
24 Olson's Books and Records a break?

25 Or what about Netflix? Netflix put Potomac

1 Video out of business when it made use of more  
2 efficient distribution mechanisms to compete with  
3 local video stores. Amazon had a way to keep people,  
4 if they didn't want to buy physical books anymore,  
5 they didn't have to. They could buy a Kindle, they  
6 could download books at a very low price onto the  
7 Kindle. That also is very bad for Olson's Books and  
8 Records, which, by the way, no longer exists, even  
9 though I liked it. And yet all of these are practices  
10 that we -- I think we celebrate as a country, because  
11 these are the source of disruptive economic  
12 developments that are extremely good for consumers  
13 that make America a global leader.

14 So I am going to skip right through this  
15 slide to go to one issue in particular that has been  
16 raised in some of the discussions, which is, if we  
17 augment antitrust analysis beyond consumer welfare to  
18 look at other values, well, one of those other values,  
19 among a constellation of others like labor rights and  
20 campaign finance reform, should be whether antitrust  
21 enforcers should look at the political implications  
22 and particular conduct for political deals.

23 So Tim Wu in the materials that were  
24 circulated before this conference has an interesting  
25 article in which he says, you know, does -- the

1 enforcer should look at whether the complained-of  
2 conduct or merger tend to implicate important  
3 noneconomic values, particularly political values. So  
4 might it tend to bring about a longstanding,  
5 politically influential oligopoly? These are not  
6 issues today that are recognized under antitrust.

7           What could go wrong if we added these to the  
8 antitrust analysis? Well, a president could go wrong.  
9 These are actual tweets or campaign statements by our  
10 nation's chief executive who views antitrust as a  
11 weapon to punish his political enemies and reward his  
12 political friends. He is very explicit about saying  
13 that he would block the NBC-Comcast merger mainly  
14 because NBC is liberal, but he would approve the  
15 Sinclair merger with Tribune because they are  
16 conservative and America needs more conservative  
17 voices.

18           Now, the question is, do we want that sort  
19 of analysis explicit or even implicit in antitrust  
20 law? The consumer welfare standard with its precise  
21 focus on standards and economics insulates us from  
22 this sort of political influence.

23           All right, I'm going to close now by noting  
24 that the first panel addressed really two quite  
25 distinct sets of issues which are often conflated, and

1 I think Fiona pointed this out. There are -- one set  
2 of issues is, how can we improve antitrust to make  
3 consumers better off than the current enforcement  
4 environment does? So are there particular issues  
5 within antitrust like how to assess error costs? When  
6 do you use bright-line rules versus the rule of  
7 reason? When should we deploy concentration  
8 presumptions or should we change them in the  
9 horizontal merger contest? How should we think about  
10 vertical integration? Heard about that this morning.  
11 When should we supplement antitrust with sector-  
12 specific regulation like FCC rules about horizontal  
13 concentration in media industries?

14 Those are all useful questions -- debates  
15 for us to have. They are all within the rubric of the  
16 consumer welfare standard. And the populist movement  
17 that we see today is helpful in that it, I think,  
18 helps us think of new perspectives on this set of  
19 issues. What is not helpful is a request to move  
20 antitrust beyond what I think these three principles  
21 are in antitrust current consensus, which is how do we  
22 use rigorous economic analysis to advance the  
23 interests of consumers in virtually all market  
24 settings except for natural monopoly markets where you  
25 might want some degree of sector-specific regulation.

1 Thank you.

2 (Applause.)

3 MR. MOORE: Carl, you're up.

4 MR. SHAPIRO: Good afternoon, everybody.

5 Let's keep going here, maybe shake a little bit and  
6 keep moving. I want to first thank Chairman Simons,  
7 really, for bringing in such a diverse set of voices  
8 into this debate. I just think what we saw this  
9 afternoon was impressive in that respect. And as an  
10 academic, I might be tempted to kind of get into some  
11 of these arcane or philosophical or historical  
12 debates, but actually, I'm a practitioner, too, so I  
13 want to be very pragmatic.

14 And the question is, how do we move forward  
15 to make antitrust more effective and stronger? And  
16 actually we just heard and we heard on the earlier  
17 panel, let's distinguish making antitrust more  
18 effective and stronger on the one hand from what the  
19 standard should be. Now, they're related, but they're  
20 separate questions.

21 Okay, now, I was asked -- I guess just the  
22 two of us are supposed to be defending the consumer  
23 welfare standard. Well, I have a weird way of doing  
24 that, which is by proposing the protecting competition  
25 standard, okay? Now, and by the way, that little

1 copyright here is a joke. Just to be clear, my point,  
2 and you will see this for the next few minutes, is  
3 that the consumer welfare standard, I think, as  
4 somebody said earlier, maybe it was Tim Wu, has been  
5 tainted and misused, in my view, to -- was it Fiona?  
6 She's looking at me, Fiona Scott Morton -- tainted and  
7 misused to shrink back antitrust enforcement, and it  
8 has become confusing.

9           So I think that we should jettison that  
10 language but basically work with the fundamental idea,  
11 and that's what I'm doing here with being a little  
12 cute with the trademark, which is a fake, which is a  
13 joke, but protecting competition standard. As I head  
14 into that, I want to align myself -- since we've  
15 already heard quite a bit on this, I want to align  
16 myself quite closely particularly with Gene Kimmelman  
17 and Fiona Scott Morton from the earlier conversations.  
18 And to a considerable extent, that surprises me  
19 actually, in some respects with Tim Wu as well,  
20 although not as wholly with him. Okay.

21           I think the fundamental issue is that the  
22 case law has gotten out of whack using a kind of a  
23 improper notion of consumer welfare standard and what  
24 that means and we need to fix that, but not to  
25 fundamentally change the standard we use in antitrust.



1 Okay. So what do I mean by the protecting competition  
2 standard? Just so it's clear, with the subtitle here,  
3 this is -- what I'm talking about here is in many  
4 ways, what some people, including myself in the past,  
5 would call the consumer welfare standard, but in my  
6 view done right and rebranded because it is tainted  
7 and confusing.

8 Okay, so what do I mean by this? And this  
9 will echo my testimony in front of the Senate  
10 Subcommittee on Antitrust last December. So I'm just  
11 going to read it because this is important to  
12 everything that follows, a business practice is judged  
13 to be anticompetitive if it harms trading parties on  
14 the other side of the market as a result of disruptive  
15 and competitive process. And I want to put a lot of  
16 weight on disrupting the competitive process, okay,  
17 but that's a little bit unclear what that means, and  
18 it could be vague. So we really want to talk about  
19 harming the trading parties on the other side.

20 Now, what are those trading parties? And by  
21 the way, Jon Sallet, I think earlier, had a very  
22 similar formulation and discussed some of these  
23 trading parties. So, look, in the traditional cartel  
24 case, you've got gas stations colluding to raise the  
25 price of gas sold to motorists. That's consumers of

1 the trading parties. We think about that, and that's  
2 fine. But if we have jet fuel -- if the suppliers of  
3 jet fuel are colluding to raise the price, well, the  
4 immediately injured parties are the airlines who buy  
5 the jet fuel. They're re not consumers, okay? And to  
6 call them consumers would be confusing, okay?

7 And nor should we have to ask, well, did the  
8 airlines pass it on, the jet fuel increase to  
9 consumers in order to decide whether that price fixing  
10 was bad or some other conduct? No, no, we don't. So  
11 if you -- so you don't need to trace it to the final  
12 consumers. In that case, the trading parties are the  
13 customers, in the traditional formulation we have.

14 Same with horizontal merger, right, if the  
15 airlines merge, we have the passengers, we understand  
16 that. If railroads merge, maybe they charge more for  
17 their passengers, but maybe they charge more for the  
18 farmers to move their produce, obviously, particularly  
19 a late 19th Century concern. In that case, we would  
20 think of the railroads as basically or somebody --  
21 it's really akin to a monopsony power, right? The  
22 farmers only have one way to get their product to  
23 market, okay? So we want to look upstream as well,  
24 and we have the no-poach cases involving the workers  
25 where the DOJ, you know, went after that.

1           So it's very clear, I think, from the actual  
2 case law and the enforcement and economics that the  
3 trading parties could be upstream or downstream, okay?  
4 Now it's true the focus has been more downstream, and  
5 that doesn't need to stay the case, but to fix that  
6 doesn't mean changing the standard, it just means  
7 bringing the cases if workers are hurt, okay, or  
8 farmers are hurt. And so that -- and so that is --  
9 we're good on that, okay? Again, the consumer welfare  
10 language is confusing, but in terms of the underlying  
11 economics, as Fiona Scott Morton said, we understand  
12 monopsony, that's fine. Okay.

13           Now, I think here is where we get -- start  
14 to engage a little bit with some of the things on the  
15 previous panel. In my view and what I am putting  
16 forward, the goal of antitrust law and policy -- as an  
17 economist, I don't like to talk about, you know,  
18 what's the law or not, but I kind of stray into that,  
19 but the policy or the economic goal is to protect  
20 competition. Okay, now, when I say protecting  
21 competition, it means safeguarding the competitive  
22 process.

23           Now, we have to unpack that, what does that  
24 mean? Okay. And I would say it means that we can --  
25 if firms are competing legitimately we have to define

1 that, we accept the results of that process. Okay?  
2 And if we think the outcome is not acceptable, there  
3 is a monopoly that's durable and we just can't live  
4 with, but that firm got there through merits, then we  
5 need some sort of sector-specific regulation. Okay?

6 Now, this is not a Chicago School view.  
7 This is not a -- does not have to do -- not about the  
8 consumer welfare standard. I am going to take  
9 whatever it is, one minute of my time, to read from  
10 what Judge Learned Hand said in the Alcoa case in the  
11 '40s, because I think it says it so well, and I just  
12 really don't think we want to depart from this. He  
13 said, "A single producer may be the survivor out of a  
14 group of active competitors, merely by virtue of his  
15 superior skill, foresight and industry. In such cases  
16 a strong argument can be made that, although, the  
17 result may expose the public to the evils of monopoly,  
18 the Act" -- the Sherman Act he's referring to -- "does  
19 not mean to condemn the resultant of those very forces  
20 which it is its prime object to foster: finis opus  
21 coronat." You can figure out the Latin.

22 "The successful competitor, having been  
23 urged to compete, must not be turned upon when he  
24 wins," and I think you're a&P case, of course, is very  
25 much as you have described it along those lines.

1 Okay. So I really don't think it is a good idea. I  
2 think there would be very limited support for the idea  
3 of abandoning that principle. Okay.

4 Now, I think what you're hearing from  
5 Maurice Stucke, for example, his lead bullet there was  
6 preservation of competitive market structures. Okay?  
7 Now, if you have a single firm that gets big and gains  
8 a lot of share, maybe a monopoly position through this  
9 process, without any question that they did it  
10 legitimately, you would not have a competitive market  
11 structure, as you measured market shares.

12 So that is a departure. That's a  
13 significant difference. I don't think we want to go  
14 there, but that's one of the issues potentially on the  
15 table. I think we want to live with the results of  
16 competition and then, of course, enforce the antitrust  
17 laws vigorously against to constrain such a monopolist  
18 but not to break them up just because the market  
19 structure looks concentrated or is concentrated.

20 Okay, now, when we follow this approach, the  
21 structure to the inquiry we ask -- so I said whether  
22 trading partners have been harmed as a result of  
23 conduct that disrupts the competitive process. So  
24 we're thinking about the trading parties; we're not  
25 particularly concerned, per se, if the competitors are

1 injured, and that's become a mantra, and we're not  
2 saying there's anything wrong with being big, okay?

3 Now, if you don't agree with that, then  
4 you're in a different space, then you're not  
5 protecting competition, you're doing some other social  
6 policy. I don't think that should be antitrust's  
7 role, but that's potentially one of the things  
8 potentially at the end of the debate. I think this  
9 gives coherence to what we're talking about. And how  
10 would I illustrate that?

11 So let's just go through a few examples.  
12 And I think, by the way, we all want to move this  
13 debate forward, and I certainly hope the FTC, as they  
14 take all of this on board, is instead of talking about  
15 disruptive, competitive process, let's talk about  
16 specific fact patterns to see where there's a  
17 difference between what different people are saying.

18 So take horizontal price fixing, okay, that  
19 disrupts the competitive process, they raise price,  
20 they're not competing, and it harms the customer is  
21 clear. What about standard-setting? It's an  
22 agreement among competitors, they agree to only -- to  
23 produce products that meet a certain standard. People  
24 who produce noncompliant products, it's not going to  
25 be commercially attractive, it reduces choice. How do

1 we choose between those two? I mean, why is standard-  
2 setting not per se illegal? Right, it's an agreement,  
3 it has all these -- it sounds like it disrupts the  
4 competitive process. They don't compete with all of  
5 these incompatible products.

6 Well, how do we tell? We say, well, we  
7 actually think in most cases the standard-setting  
8 leads to consumer benefits, a larger market, lower  
9 prices, you know, other benefits of compatibility so  
10 that's how we tell. Okay, we tell by looking at how  
11 does it affect the trading parties, not through just  
12 some notion of the process.

13 Likewise for horizontal mergers, we don't  
14 think just because two firms or competitors merge in  
15 the end they don't compete anymore. The market is  
16 more concentrated, but we don't say that's per se  
17 illegal because we understand there may be some  
18 efficiencies associated with that. How do we judge?  
19 Well, we ultimately look at the effect on -- usually  
20 on the consumers, on the customers in any event for  
21 the normal downstream posture. And likewise for  
22 predatory pricing as has been explained, we need a  
23 boundary between what's legitimate price competition  
24 that we welcome and some sort of predatory or  
25 exclusionary price fixing.

1           Now, the courts have come up with a standard  
2 through Brooke Group, and it involves below cost and  
3 recoupment. I tend to think that recoupment piece is  
4 overstated, and I think that could be worked on and  
5 probably should be worked on, but the notion that we  
6 need a boundary and ultimately it's really about do we  
7 think this is going to harm the customers. You know,  
8 from ultimately high prices later or less innovation  
9 or not? And I don't really want to not do that step.  
10 Okay? Otherwise, I don't know how I'm going to have a  
11 boundary between legitimate pricing and not.

12           The Microsoft case we heard about is a very  
13 good case. There was discussion about it earlier.  
14 Again, the reason -- we evaluate that based on do we  
15 think that was going to reduce innovation. Believe  
16 me, that's not about price effects, and it's never  
17 really about price effects, and you couldn't do price  
18 effects for some product that wasn't going to be out  
19 there for a few years but it came out in a good way,  
20 okay.

21           So I think this trading parties and  
22 disrupting the creative process, both of those pieces  
23 are needed with whatever you call the standard. I'm  
24 calling that the protecting competition standard.  
25 Okay, so let's then compare that with some of the



1 attacks on the consumer welfare standard which we've  
2 just heard, okay. And, again, I want to --  
3 particularly Tim Wu, I thought, said very eloquently,  
4 look, the way the court cases have evolved over the  
5 last 20, 30, 40 years has shrunken antitrust  
6 enforcement and it's a problem. And Fiona Scott  
7 Morton said we have more issues about market power.

8 I agree with both of those statements, but I  
9 do not think it means we need to abandon this mode of  
10 analysis. In fact, I think we should not.

11 So what are the criticisms? First, some of  
12 them are based on misconceptions. It's not -- the  
13 consumer welfare standard is not just about price or  
14 short runs. And it doesn't ignore the suppliers. We  
15 have the no-poach cases in some of the case law. It's  
16 just a misconception. Now, there's a reason that  
17 misconception has taken root because the word  
18 "consumer welfare standard" sounds like it's about  
19 consumers. It gets people confused.

20 That's why I think we need to change the  
21 language, okay. You can't expect the people -- the  
22 community at large to know that somehow when you say  
23 "consumer welfare" you include the workers who didn't  
24 have a good chance to get competition for employment  
25 opportunities. It sure doesn't sound like it handles

1 that. Why would we think people should know that? So  
2 there's a real problem there with just the words and  
3 the branding, if you will.

4 Some criticisms -- most of the criticisms,  
5 actually -- relate to excessive burdens of proof on  
6 plaintiffs. So, you know, in every area, and a lot of  
7 what Maurice Stucke is putting forward with some  
8 proposed legislative changes, I think basically all of  
9 those -- or almost all of those -- the ones that work  
10 for me are -- they're excessive burdens on the  
11 plaintiffs.

12 Look, you cannot -- and if it means the  
13 economists are coming into court and have to prove the  
14 measure of these price effects and sometimes in the  
15 future or new price, that's very hard. Believe me,  
16 I'm been cross examined on those things. You can't --  
17 we're not able to do that a lot of the time, okay? So  
18 if inability to do that means the plaintiff loses,  
19 we're not in the right place.

20 So we can do a lot with shifting the burdens  
21 of proof and the presumptions, and I'm going to talk  
22 about that in a moment. So that's a legitimate -- I  
23 think a very important concern about the evolution of  
24 case law, but it's not about the standard. Okay, take  
25 the standard, rebrand it, give it a name that people

1 understand, and tighten things up. Now, whether the  
2 current courts are going to do that, I'm not so  
3 confident, but that's what hopefully the FTC based on  
4 these hearings can help push us in that direction.

5           Okay. All right. So the same point a  
6 different way. Even if -- look, I think most people  
7 who are informed would say that antitrust was not in  
8 good balance in the '60s, okay, the economics was not  
9 that sound, and there was a bunch of cases that -- and  
10 A&P in the '50s, I guess, as well.

11           So there were needed corrections, and it's  
12 true it came around the same time, some of it, as this  
13 upsurge in some of the consumer welfare standard. And  
14 I think the courts overshot, like I said, but to fix  
15 that, we should -- we should fix that with, you know,  
16 through the approaches I've described, not by throwing  
17 out the standard and doing something either vague or  
18 that doesn't have the elements I described, which is  
19 disrupting the competitive process, harming trading  
20 parties.

21           Also, economics, some people who are  
22 attacking the consumer welfare standard are basically,  
23 well, it's a plot by the -- these economists love to  
24 measure things and it's kind of these experts who  
25 missed the point. Look, economics is just a tool, and

1 if anybody thinks you can do antitrust without  
2 economics, come talk to me later. Okay.

3           So, all right, so what does it mean going  
4 forward? I think there's a lot of work in economics  
5 going on right now, the last couple years and I'm sure  
6 the next several years. In my field, industrial  
7 organization economics, in academics, researchers and  
8 elsewhere, that is indeed showing. I would say  
9 generally that larger companies have a bigger share of  
10 the economy. Firm size has gone up. A bunch of  
11 markets have become more concentrated. It's hard to  
12 measure that systematically, but that seems to be the  
13 case. Some very efficient superstar firms, they're  
14 called in some of the literature, are taking share  
15 from other firms. They're becoming geographically  
16 broader. Globalization is part of this. That is a  
17 process that has been going on for some time and  
18 probably will continue unless it's stopped through  
19 some public policies.

20           So what does that mean? Does that mean that  
21 antitrust has failed us? No, I don't think so. A lot  
22 of that -- and Amazon is a good example -- sure looks  
23 to be the competitive process at work. Not all of it,  
24 you have to go case by case, but a lot of -- those  
25 trends are broad and they reflect scale economies,

1 information technology. And one of the things that  
2 industrial organization economists have learned in the  
3 last 10 or 15 years that many of you may not know is  
4 there's this tremendous evidence that in a given  
5 industry there's enormous variation in the efficiency  
6 of the firms, okay.

7           So if you have this model about, oh, all the  
8 firms compete and they're winning and they all end up  
9 roughly comparable, that is not what happens in the  
10 real world. You get enormous variation, and that  
11 persists. And the larger -- the more efficient firms  
12 tend to get bigger, and that's just an ongoing  
13 process. So that process means when we get some  
14 markets that are more concentrated through that  
15 competitive process, we're going to also be getting --  
16 that is, in fact, benefitting consumers, and we want  
17 to encourage it actually, okay, although it's tough on  
18 the people who -- on the firms who are less efficient,  
19 to be sure.

20           So all that's happening. That means we need  
21 antitrust more. Okay, the fact is it means there's  
22 more market power in the economy. That's what the  
23 evidence is showing. Higher margins, we can debate  
24 about how to measure that. More concentrated markets,  
25 entry barriers can be very difficult. If you're

1 trying to enter a market where there are three or four  
2 big players who've been in there for a long time and  
3 they're very efficient, that's pretty tough. You're  
4 small, you haven't done it, that's tough, okay?

5 So the notion that entry barriers are  
6 somehow generally low, I don't think that's a valid  
7 assumption. So we need antitrust more, okay? But  
8 that doesn't mean we need a new standard. It means we  
9 need antitrust more. So how should we do that? So,  
10 of course, I'm suggesting the protecting competition  
11 standard. And, again, it's the consumer welfare  
12 standard done right with a better name.

13 And I think the FTC can play a big role in  
14 this, okay, and I hope that's the lesson they will  
15 take from these hearings is that we need antitrust  
16 more. An overly narrow reading of consumer welfare  
17 and excessive burdens on plaintiffs have shrunken  
18 antitrust in a way that's not been helpful for  
19 consumers or other parties who are suffering from  
20 market power on the other side of the market.

21 In horizontal mergers, we can do this by  
22 making sure we keep and strengthen the Philadelphia  
23 National Bank structural presumption, and plus a few  
24 other things. Mergers, it's a predictive exercise.  
25 If the consumer welfare standard is supposed to mean

1 that you have to go in and precisely predict exactly  
2 what the price effects will be, well, that's not going  
3 to be very good for effective enforcement, but that's  
4 not what the standard should mean.

5           The standard should mean you're looking at  
6 is it likely that there will be harm to competition  
7 and the customers in the normal case will be hurt. Is  
8 it likely based on the best you can tell? Maybe it  
9 will be fewer products offered; maybe it will be  
10 higher prices; maybe it will be something else; maybe  
11 it will be less privacy protection; you know, whatever  
12 it is.

13           So you don't -- you can't predict things  
14 precisely. We can use some other metrics to gauge  
15 things, not just Herfindahls, and I think we should be  
16 quite demanding on an entry defense because, a lot  
17 markets, entry is not easy and we shouldn't just think  
18 it is.

19           Okay, so that should be really a burden on  
20 the defense, unless it's very clear to show that  
21 entry's easy. Okay, and we've had that debate for a  
22 while, and I think we've moved things in that  
23 direction. That's all within the consumer welfare or  
24 protecting competition standard.

25           Exclusionary conduct. Again, the courts,

1 you know, have trimmed it back so much. These pay-  
2 for-delay cases should not be so hard. Okay, the  
3 economics is not that complicated. So something's  
4 gone wrong that it's been 20 years and it's still  
5 working its way through and the courts are struggling  
6 with it, and, you know, I've talked to a number of  
7 federal judges about this, and it's hard -- you know,  
8 the agencies need to help them; the economists need to  
9 help them, but it's not about a different standard.  
10 And we could similarly talk about what to do for  
11 exclusive dealing.

12 Okay, so I think that's really -- that's  
13 what I'm encouraging the FTC to take away from this  
14 session and these hearings today at least, this  
15 afternoon at least, that don't blow up what we've  
16 learned, including the A&P case, including a lot of  
17 other things. Don't blow that up. Build on that and  
18 do more because we need to do more now, but use the  
19 protecting competition standard. Thank you.

20 (Applause.)

21 MR. MOORE: Thank you, Carl.

22

23

24

25



1 THE CONSUMER WELFARE STANDARD IN ANTITRUST LAW

2 (SESSION 2)

3 MR. MOORE: I'd like to invite the other  
4 panelists to come up to the stage. Three of our  
5 panelists are veterans from the prior panel -- Fiona  
6 Scott Morton, Maurice Stucke, and Barry Lynn -- so I  
7 won't introduce them. Our final panelist is Geoff  
8 Manne, who has the same job as Barry but for a  
9 different organization. He's the Founder and  
10 Executive Director of the International Center for Law  
11 and Economics. And each panelist, each discussant has  
12 five minutes to respond to the opening presentations,  
13 and we'll go in order in which they are sitting on the  
14 table, and we'll start with Barry.

15 MR. LYNN: I'm going to mainly -- well,  
16 first, I'll start off by saying I greatly appreciated  
17 Carl's presentation. It's really good to see Carl  
18 moving towards Tim and Gene. I'd say it's important  
19 that we -- the idea that Carl is moving towards it,  
20 actually setting aside the consumer, the term  
21 "consumer" is, as I made clear in my own presentation,  
22 I believe that's of fundamental importance just so  
23 that we begin to get back to understanding the prime  
24 purpose of what our antimonopoly laws were created  
25 for. I'm going to just focus -- what I'm mainly going

1 to do is focus -- so actually what I want to say with  
2 Carl is I think there's a lot of opportunity for us to  
3 continue this conversation and move towards getting to  
4 a real understanding.

5 With Jon, I actually have a number of  
6 questions for Jon, a whole, you know -- in your  
7 presentation, you said that consumers benefitted, and  
8 I would just say, like, for how long would they  
9 benefit from this system in which you have this really  
10 massive single retailer, for the controlling thing.  
11 You know, do they benefit on price, do they benefit in  
12 terms of quality, do they benefit in terms of variety?  
13 You know, are we talking about the physical goods that  
14 are sold in this store? Are we talking about the  
15 retail services, you know? I mean, what is the effect  
16 on suppliers of this kind of consolidation?

17 You know, what is this -- you know,  
18 obviously we know what the effect is on horizontal  
19 competitors, you know, but there's a lot of evidence  
20 after all that monopsony drives consolidation amongst  
21 suppliers. I mean, we saw this with the P&G and  
22 Gillette merger. You know, is that a good thing? You  
23 know, with the A&P, when the A&P drove that kind of  
24 consolidation, is that a good thing? You know, it's a  
25 question that we have to answer.

1           You know, you say that A&P created customer  
2 value by studying how people like their butter, you  
3 know, innovation. Are you saying that independent  
4 grocers were not able to do the same thing?

5           You said that A&P cut out the middlemen.  
6 Are you saying that A&P is not, as a retailer, simply  
7 another middleman, just bigger and more powerful?

8           Speaking of middlemen, you mentioned how A&P  
9 is vertically integrated. And we had a lot of  
10 conversations earlier about vertical integration. Do  
11 you see a difference between when, say, Jill's Grocery  
12 vertically integrates into selling jam at the corner  
13 of Pine Street and Main Street? And when Amazon  
14 vertically integrates into publishing, say, books when  
15 it controls 50 or 60 or 70 or 80 percent of the market  
16 for different lines in book selling?

17           You know, you made a bunch of comments on  
18 predatory pricing. Are you saying that a large  
19 retailer that engages in predatory pricing cannot  
20 recoup its losses after knocking out its rivals? Are  
21 you saying that Wall Street does not routinely in the  
22 periods when it is legal provide capital to certain  
23 corporations specifically to undersell, bankrupt, and  
24 replace their rivals, you know? I mean, J.P. Morgan  
25 did this with the AT&T. Bain Capital did this with

1 Staples.

2 Are you saying that foreign mercantilist  
3 states -- China, Brazil -- don't sometimes provide  
4 capital for certain industries precisely to undersell  
5 their rivals in ways that drive out American  
6 businesses, American manufacturers?

7 You know, did you know that sort of  
8 Anheuser-Busch, InBev, Heinz, Kraft, Pilgrim's Pride,  
9 Swift are all owned, all run by a set of, like,  
10 capitalists that receive funding from the Brazilian  
11 State to expand and to bankrupt their rivals?

12 You say that consolidation such as we saw by  
13 A&P leads to lower prices. Is that always true? Are  
14 you saying that you don't believe that Smithian  
15 systems of competition work?

16 Do you know where your thoughts originated?  
17 You mentioned Don Turner in 1949. You know, I would  
18 actually turn everybody -- I think everyone should go  
19 study Bill Kovacic's paper from a few years back on  
20 the double helix of modern antitrust. Yes, Turner and  
21 Areeda and Breyer and Alfred Kahn agreed with the  
22 Chicago Schoolers in many fundamental ways, but -- and  
23 this is really key -- it's really important for the  
24 folks in this community to understand it, where did  
25 Turner and Areeda and Breyer and Alfred Kahn get a lot

1 of their basic thinking? It came from John Kenneth  
2 Galbraith, who was a command-and-control socialist who  
3 relied Thorstein Veblen for his intellectual guidance.  
4 Thorstein Veblen, as some of you know, relied on -- he  
5 was a representative of the new nationalism of Teddy  
6 Roosevelt at the time when Teddy Roosevelt was  
7 promoting corporatism, even a sort of fascism.

8 Can you describe the ultimate outcome of  
9 your vision of competition? Where does -- when you  
10 just let the A&P system continue on and on unstopped,  
11 where does that go?

12 Where does the Walmart system go if you  
13 don't stop it? Where does the Amazon system lead? Do  
14 we really just want one corporation selling  
15 everything? I mean, didn't the Soviet Union try that  
16 and it didn't work all that well? I mean, I have some  
17 others, but I think that's sufficient.

18 MR. MOORE: So we're going to let all of the  
19 panelists give their five-minute presentations, and  
20 then Carl and Jon will have a chance to respond.

21 Barry did most of my job for me by posing a  
22 number of questions for Jon, so we'll move on to  
23 Maurice.

24 MR. STUCKE: All right. Well, thank you.  
25 So, so far, we've been talking now how effective has

1 the consumer welfare standard been in the past 35  
2 years. And while that's interesting and, you know, we  
3 have evidence that suggests that it may not have been  
4 as successful as some have claimed, the real issue is  
5 where are we going forward in the data-driven economy.  
6 And, here, what I see is a growing divide between the  
7 EU, Australia, and other jurisdictions in the U.S.,  
8 and there's a greater concern over these giant tech  
9 platforms -- dataopolies -- and the risks that they  
10 impose.

11 Now, if you look at it strictly from a  
12 consumer welfare standard, they may not necessarily be  
13 that bad because price is going down, quality, because  
14 of network effects, are going up. And you might  
15 think, well, that's a good thing. But what the market  
16 inquiries that the Europeans are undertaking is that  
17 there are potential risks. The ACCC, for example, is  
18 doing a platform inquiry on the power of these  
19 platforms.

20 And, so, three points here that are  
21 relevant. First, when companies -- when these  
22 dataopolies vertically integrate, their incentives can  
23 change, and they have various tools that can then make  
24 it harder to compete. So that's why the European  
25 Commission is now looking at Amazon in a preliminary

1 inquiry on its use of data to thwart rivals.

2           Second, we hear about, oh, if you open up  
3 the boogie man, you know, like political issues and  
4 whatever. Antitrust has always had a political  
5 component. I mean, it was always the concern about  
6 how economic power can translate into political power.  
7 And the issue with these dataopolies now is that they  
8 even post even greater concerns than some of the  
9 monopolies in the past because of the way they  
10 interact with consumers, their gatekeeper function,  
11 and the like.

12           And then the third is, you know, no-fault  
13 monopolies. No, we're not arguing no-fault  
14 monopolies. And impact on trading parties, that's a  
15 step in the right direction. But I would still then  
16 ask, Carl, how would you then handle Klor's? How  
17 would you handle, then, when a powerful firm acquires  
18 a nascent competitive threat? How would you deal with  
19 sort of exclusionary practices where you can't  
20 necessarily determine what impact it's going to have,  
21 let's say on something that's quantifiable?

22           And, so, you know, in our book Big Data and  
23 Competition Policy, we point out Google-Waze, and the  
24 struggle that the predecessor to the CMA had in trying  
25 to identify how is Google's acquisition of Waze likely

1 to harm consumers. And that's very difficult. And it  
2 used to be that Alcoa and Rome, that you didn't have  
3 to show that. You can show that there was an effect.

4 Now, Carl raises a fair point: What if the  
5 market naturally tends towards a monopoly on the  
6 goodness of the heart of the monopolists? Yeah, that  
7 might be a problem. And then the other point I think  
8 that's key here, and I don't want anyone to confuse  
9 it, is we never argue that antitrust is the elixir.  
10 What we argue in the data-driven economy, you need  
11 greater coordination among the competition officials,  
12 the privacy officials, the consumer protection  
13 officials, and you need greater coordination among the  
14 jurisdictions. So I'll just leave it at that.

15 MR. MOORE: Thanks, Maurice.

16 Geoff, it's your turn.

17 MR. MANNE: Thanks, Derek, and thanks to the  
18 FTC for having me. So I thought I would just start by  
19 adding to the many quotes from Brandeis that we've  
20 already heard. I can't really have too many Brandeis  
21 quotes. This one goes something along the lines of  
22 consumers are, "servile, self-indulgent, indolent, and  
23 ignorant." And as we did already hear, actually,  
24 Brandeis also was no fan of low prices. In fact, he  
25 thought they were pernicious.



1           My point in mentioning these is just to draw  
2 attention to the problems of expanding the conception  
3 of the consumer welfare standard or of the purpose of  
4 antitrust when you may not like where the expansion  
5 takes you. Even the standard-bearer of this process  
6 is someone who absolutely had ideas that I think most  
7 of us would disagree strenuously with.

8           I think it's interesting -- I think someone  
9 mentioned this before -- that we're talking about the  
10 consumer welfare standard. I don't think we're really  
11 talking about the consumer welfare standard. I think  
12 that for at least two reasons. I'll start with two.  
13 I'll probably come up with some more.

14           The first reason is that I think what we're  
15 really talking about here -- and Maurice's comments  
16 just brought this home to me -- is whether we start  
17 with a presumption, we start with the basic  
18 presumption of antitrust as one that is inhospitable  
19 to un-understood business practices or one that is  
20 relatively inhospitable to their condemnation.

21           That's fundamentally what we're talking  
22 about here. We are talking about the future of data  
23 and large platforms and where it leads us; the sense,  
24 the feeling, that there is something wrong; and the  
25 question whether we should greet these relatively new

1 structures, the consequences of which we don't  
2 perfectly understand, with relative skepticism or  
3 relative approval unless and until it's demonstrated  
4 that there's actually something problematic there.

5           This is not the consumer welfare standard.  
6 Neither of those views is consistent with the consumer  
7 welfare standard, but I think that's actually what  
8 we're talking about. We're actually talking about --  
9 and this gets us to the second reason that we're not  
10 really talking about the consumer welfare standard --  
11 we are, in fact, talking about the achievement of  
12 social and political objectives mostly that are  
13 focused on restraints on business conduct that  
14 proponents haven't been able to achieve and fear they  
15 can't achieve through direct legislative means.

16           I learned from the last panel that this is  
17 actually a discussion about the structure of our  
18 government. I learned that antitrust judges are  
19 fools, that we should do antitrust by plebiscite, or  
20 maybe we should do it by locking experts in a room and  
21 having them come up with the right answers. I also  
22 learned that political influence seems to only go one  
23 direction.

24           All of that could possibly be true, but I  
25 don't really understand what it has to do with

1 antitrust or the consumer welfare standard. The  
2 stated aim -- preserving competition, protecting  
3 competition promoting competition, however you defined  
4 it -- is perfectly commensurate with the consumer  
5 welfare standard. Carl is exactly right about this.  
6 There is nothing -- you know, I've said that actually  
7 before, but, you know, I'm glad to get to say it  
8 again.

9 MR. SHAPIRO: Thank you.

10 MR. MANNE: There's nothing in the  
11 consumer welfare standard that says you can't fiddle  
12 with the specific levers, the specific doctrines by  
13 which cases are decided. And, in fact, this would be  
14 my third reason why we're not really talking about  
15 the consumer welfare standard is because the consumer  
16 welfare standard isn't operable. What matters -- and  
17 I think, Carl, you essentially said this -- is the  
18 presumptions, the burden-shifting, the standards of  
19 proof, the actually process by which we decide  
20 antitrust cases.

21 Those are the mechanisms by which any of  
22 this will actually change, if it changes at all, and  
23 those are the conversations that we should be having.  
24 Now, my problem with the presumption coming in from  
25 Barry and Maurice and actually also Carl is that

1 usually before we move from a status quo to a new  
2 position, especially one that effectively imposes ex  
3 ante remedies, right, let's say this isn't driving  
4 Carl with this, but let's say you start with a sort of  
5 structural approach, basically in particular one that  
6 says even more obviously let's break up some existing  
7 companies because they've exceeded whatever threshold  
8 we've decided. You're imposing a remedy, and usually  
9 we require proof before you impose a remedy -- proof  
10 of a harm and proof of the connection between the  
11 remedy and the harm that it will actually solve the  
12 harm.

13 We have some evidence in this regard. We've  
14 talked about it a little bit. Everyone's probably  
15 familiar with the papers that are out there; no doubt  
16 there will be more. It is impossible to say that any  
17 of them have demonstrated all of the things that you  
18 need to demonstrate to make a transformation of  
19 antitrust, which means the increase in concentration  
20 that people have pointed to.

21 It's not so clear that that actually has  
22 happened. That it is a costly one, that it is a  
23 problematic one, not one that is not being caused by  
24 increases in inefficiency or scale effects and the  
25 like, that it is caused by some defect in not just the

1 manner or the amount of enforcement -- of antitrust  
2 enforcement but also these mechanisms that we've been  
3 using to do it; and that indeed changing it in these  
4 particular ways, especially the ones that would impose  
5 structural and other presumptions ex ante, would solve  
6 the purported problems.

7           None of that has actually been demonstrated.  
8 We have a little bit of evidence to suggest it's  
9 something we should look at, and that's why, as others  
10 have said, I will second that this process is great,  
11 I'm delighted that the FTC is doing this, and I think  
12 we should continue to do this and talk about it, but I  
13 think we need a lot more proof before we actually  
14 impose that kind of a remedy.

15           MR. MOORE: Fiona.

16           MS. MORTON: So thank you for the invitation  
17 to be on this panel and the previous one. I'll start  
18 with an apology. On the first day of these hearings,  
19 the one that did happen despite the hurricane, Jason  
20 Furman left in the middle of his panel for another  
21 meritorious engagement, and I'm afraid I have to do  
22 the same thing today, so I have Derek's permission for  
23 that, and I apologize in advance. When I get up and  
24 leave, it's not because of what somebody is saying.

25           I wanted to comment on Carl's protecting

1 competition standard, which I think is really  
2 terrific. I also teach in a business school, and we  
3 have a marketing department. It turns out people hire  
4 those students, and so we can rebrand, and if we're  
5 trying to convince both the public and the judiciary  
6 that something has changed, I think the renaming is  
7 critical.

8 I think emphasis on trading parties is more  
9 comprehensive, it's more clear. I think that the "as  
10 a result" portion of Carl's standard protects  
11 competition and not competitors who are exiting or  
12 having trouble for some other reason. I think  
13 disrupting the competitive process again goes back to  
14 this idea of proof and burden. Does the plaintiff  
15 have to have precision about anticompetitive effects  
16 that are going to occur in an unseen but-for world, a  
17 world that doesn't happen because the competitor's  
18 excluded, a world that doesn't happen because the  
19 merger has not yet occurred?

20 And I think Geoff's point just a second ago  
21 was exactly a demonstration of why we need this. That  
22 is to say if you're going to tell me we don't have  
23 enough proof and you've got to articulate exactly all  
24 the reasons that the economy's going to go to hell in  
25 a handbasket if we don't change this standard before

1 we change it, that's exactly the kind of high burden  
2 that stops us from acting appropriately in balancing  
3 the error cost of what do we know about the harms from  
4 underenforcement compared to the harms from  
5 overenforcement.

6 Turning to Carl's standard and how it  
7 relates to what Maurice had said, let me note that in  
8 contrast to what Geoff just remarked, Carl said  
9 nothing about market structure. Or, rather, he said  
10 you take the market structure you get from the  
11 competitive process, okay.

12 MR. MANNE: I took him out of that. I said  
13 --

14 MS. MORTON: Okay, and that's -- oh, I see,  
15 okay, you omitted. Excuse me, I misheard. Geoff  
16 omitted Carl from that point, which is correct.

17 So we take the result we get from  
18 competition and the competitive process, but we need  
19 to keep up the enforcement pressure on that entity  
20 regardless. So, for example, let's imagine that  
21 Amazon obtained the market power and the market share  
22 that it has through the competitive process, and I'm  
23 certainly an enthusiastic customer. Does Amazon now  
24 get a free pass under the antitrust laws because they  
25 acquired that market share on the merits? No, of

1 course. We keep up the enforcement pressure, and,  
2 indeed, as Carl pointed out, when we have concentrated  
3 markets, this is even more necessary than usual  
4 because there isn't another competitor there who is  
5 strong to be keeping up the competitive pressure.

6 So that means we need to be doing much more  
7 on potential competition theories, on exclusionary  
8 conduct as disrupting the competitive process, keeping  
9 a competitor out of the market, on facilitating  
10 practices that might be enabling coordinated effects  
11 in the market because we're not having as many  
12 competitors as we otherwise would, and, in general, on  
13 protecting small players perhaps with data  
14 portability, perhaps with other kinds of techniques,  
15 but also with antitrust enforcement because though  
16 small players are the only thing that stands between  
17 the consumer and, let's say, a monopolist or a very  
18 concentrated market structure because somebody has  
19 grown, as Carl said -- we have more IT, we have more  
20 globalization -- that the efficient size of a firm  
21 looks like it's getting bigger.

22 And that's good for consumers, provided that  
23 the large firm continues to feel the heat of  
24 competitive pressure and performs to benefit  
25 consumers.



1           So I think this is exactly the right way to  
2 go: rebrand, rename, be more clear, change  
3 presumptions and burdens to make it clear that the  
4 plaintiff does not have to specify all sorts of but-  
5 for specifics, and shift the whole system, tighten it  
6 up and shift it so that we're getting a little bit  
7 more enforcement. And that protects us both in terms  
8 of mistakes we now understand that we've been making  
9 for the last 10 or 20 years, but also to create a  
10 level of competitive pressure that helps the consumer  
11 in the inevitable situation of more concentrated  
12 markets, which are due to forces outside our control,  
13 exogenous forces having to do with technological  
14 change and globalization and so on. So that's --  
15 that's, I think, really the sensible middle ground  
16 here.

17           MR. MOORE: Thank you, Fiona. We are now  
18 beginning the Q&A portion of the panel. I'd like  
19 to -- that's going to be question number one.

20           I'd like to remind everyone in the audience  
21 that my colleagues will be passing out note cards. If  
22 you write your question down on a note card, it will  
23 be passed up to me, and I will ask the question if  
24 there is time.

25           One way I'd like to differentiate this panel

1 from the prior panel is I'd like to get a little bit  
2 more specific and think about how the various legal  
3 standards might apply to specific examples. But,  
4 first, I'd like to give Jon first and then Carl an  
5 opportunity to respond to some of the comments and  
6 questions that were posed to them.

7 MR. NUECHTERLEIN: Sure. A couple things.  
8 One is I'm also a fan of Carl's rebranding. Consumer  
9 welfare standard has always been sort of the awkward  
10 shorthand to describe a standard that embraces a  
11 variety of other things, but ultimately, in any given  
12 case, this is a standard rather than competing values  
13 and unclear objectives. And I think Carl and I are on  
14 the same page with respect to that.

15 I want to say a quick word about burden-  
16 shifting in the modern world. I think we are  
17 overlooking that there are some pro-plaintiff, burden-  
18 shifting mechanisms already in place. So I'm going to  
19 take Microsoft and McWane as examples of Section 2  
20 cases where once the Government shows anticompetitive  
21 conduct by a monopolist then the burden actually  
22 shifts to the monopolist to prove that the but-for  
23 world wouldn't have been any better anyways.

24 The Government doesn't actually have to  
25 prove anything about the but-for world in that

1 context. We can talk a little bit more later about  
2 burden-shifting and HHIs, but HHI is for another  
3 context, and we may very well believe that the line is  
4 drawn in the wrong place right now for horizontal  
5 mergers. That's another context in which you do have  
6 effective burden-shifting that favors plaintiffs.

7 Okay. Barry asked a variety of questions  
8 about the A&P case. I'm happy to field them very  
9 briefly. His various questions actually reminded me a  
10 little bit of the sort of questions that I would get  
11 from Stephen Breyer when I would argue in the Supreme  
12 Court. It came in -- I think it was like a seven-part  
13 question, and I was always a little concerned that I  
14 wasn't going to get to all of them, and I may not get  
15 to all of them here, but you'll remind me if I don't.

16 And that, by the way is I think the only  
17 thing that Barry has in common with Stephen Breyer.  
18 Stephen Breyer, of course, is the author of the Barry  
19 Wright predatory pricing case which previewed  
20 essentially what ended up being the Brooke Group  
21 decision by the Supreme Court.

22 Okay, one is did consumers benefit from  
23 A&P's activities. Yeah, they paid much lower prices  
24 and they got access to stores with an enormous variety  
25 of produce and other grocery goods in them.

1           Did they sustain those benefits for a long  
2 time? Yes, they sure did. A&P was in business when I  
3 was in high school, and they continued to sell at  
4 prices -- their goods at very low prices. There was  
5 never any period in which A&P disserved consumers by  
6 excluding competition and then jacking up its rates.  
7 There are no consumer victims in the A&P story.

8           There are wholesaler victims. Barry points  
9 out that, well, A&P was kind of a wholesale purchaser.  
10 Sure, it was. It bought directly from suppliers, but  
11 that ended up benefitting consumers as well because in  
12 the process it eliminated the double marginalization.  
13 It was able to undersell retail stores that were  
14 dependent on intermediaries who were profit-taking,  
15 and the result, again, was the consumers were better  
16 off.

17           Barry asks, well, you know, this whole A&P  
18 system, where does it go? If we allow companies like  
19 A&P to prosper, don't we just end up with natural  
20 monopolies in all these industries? No, not really.  
21 As someone who worked for a struggling A&P store in  
22 the '80s can tell you, there's a lot of competition  
23 for groceries out there. Kroger cropped up, and it's  
24 now the number two retailer today after Walmart.  
25 Safeway is out there; Giant is out there. All these

1 companies were selling groceries at very, very, very  
2 low prices, and there was never anything that could  
3 remotely be called a recoupment period.

4 Finally, Barry asked about what -- oh, Barry  
5 asked what -- do I think the vertical integration is  
6 different in kind if it's undertaken by a dominant  
7 company. Well, let's think about Netflix for example.  
8 Netflix is a dominant provider of streaming video  
9 services in this country. It recently vertically  
10 integrated into video content production. I don't  
11 know anyone who thinks that's a bad thing, even though  
12 Netflix obviously has market power in the streaming  
13 video market.

14 Finally, Barry asked whether I'm okay with  
15 foreign states like Brazil driving rivals out by  
16 subsidizing products that are exported to the United  
17 States. I'm really against that, actually. And part  
18 of the reason is that's not competition; that's the  
19 Government using its coercive authority to extract  
20 taxes from its own citizens so as to drive out market-  
21 based companies not on the merits.

22 MR. MOORE: Carl.

23 MR. SHAPIRO: Thanks. Let me first respond  
24 to some things that Maurice said. I think we're in  
25 agreement that we should be realistic about and think

1 about how antitrust fits in with a range of other  
2 policies such as issues having to do with data  
3 security, data privacy, consumer protection, et  
4 cetera.

5           So, you know, obviously, that brings in  
6 something like Facebook. From what everything I know,  
7 Facebook seems like they've had many serious missteps,  
8 but I haven't heard any clear antitrust elements.  
9 Maybe there's a case I haven't heard of, okay, I'm not  
10 saying, but the point is we shouldn't be expecting  
11 antitrust to do all those things. We should be  
12 looking to sector-specific regulations. Gene  
13 Kimmelman emphasized this point.

14           I kind of doubt the current FCC or FTC.  
15 Maybe they need -- I don't know whether they have the  
16 statutory authorities, you know, probably not in some  
17 of these areas, and maybe that is a place we can look  
18 to Europe, but that, to me, is not about the  
19 competitive process in antitrust; it's about other  
20 areas where we need to have regulations to control  
21 some of these companies that are having such a  
22 powerful impact on our society and our citizens.  
23 Okay, so that's the first point. I think we both  
24 agree.

25           Second, you raised the point where you said

1 about nascent competitive threats and it's hard to  
2 tell what's going to happen in those cases. I  
3 couldn't agree more. I think it's -- and there's a  
4 separate hearing the FTC's holding on some of those  
5 issues. I think it's a very hard area to know exactly  
6 what to do, but I certainly -- I guess I'm generally  
7 quite open at this moment to saying if the FTC, DOJ,  
8 hopefully the courts then, would widen the aperture in  
9 terms of how we think about potential competition  
10 cases, okay, particularly if it's a dominant firm and  
11 the acquired firm is a possible, maybe likely,  
12 adjacent, could-become-a-threat-in-the-future, you  
13 know, I can't totally formulate that now in two  
14 minutes, but that can be handled -- and it seems like  
15 the Clayton Act's incipency standard leaves some  
16 running room for that, serious running room.

17 I see no reason to change this standard  
18 we're using. I mean, why wouldn't the protecting  
19 competition standard work fine for that? That's a  
20 completely separate issue about how do we handle those  
21 cases where it's going to be hard to know what's going  
22 to happen. And that relates somewhat to Geoff's  
23 point, too.

24 Those are the two main things, although  
25 there's a side point. You mentioned the firm that

1 gains the dominant position, I think you said through  
2 the goodness of their heart. Well, that really wasn't  
3 what I was counting on actually. I was thinking about  
4 pure selfish pursuit of profits, which is why we need  
5 to control these forces. Okay.

6 And then, Geoff, I want to respond to some  
7 of things you said. I agree that a good question to  
8 ask is how do we react to novel business strategies,  
9 which often are brought about by changing technology  
10 and business forms, okay. I think it's true that  
11 there was a time 50 years ago where there was a  
12 tendency to be hostile towards them, okay, of  
13 antitrust authorities or courts, like, oh, we haven't  
14 seen this before, it looks suspicious.

15 I think that time's long passed. And, you  
16 know, I did work -- a lot of work on network effects  
17 and understanding, you know, how that works. The work  
18 goes back 30 years now. And, so, no, that was not --  
19 it was recognized, the importance of those, and it's a  
20 form of scale economy. It's not inhospitable to them  
21 where things companies might do to foster  
22 interoperability or grow -- so I just don't think that  
23 is -- it's something to be aware of, for sure, but I  
24 don't think it's driving things now and leading to,  
25 you know, false positive antitrust enforcement.



1           MR. MANNE: I wasn't talking about the  
2 status quo. I was talking about the movement away  
3 from the status quo.

4           MR. SHAPIRO: Oh, I see, okay. So, then,  
5 maybe we're -- thanks. That's helpful clarification.  
6 So I think we need to continue to be, I guess I would  
7 say, open and fairly neutral regarding a new practice  
8 but apply the approach that I've described and not  
9 think because it's new it's bad or because it's new  
10 it's necessarily good, but we need to understand it.  
11 So maybe we're just in agreement with that maybe.  
12 Thank you.

13           The other thing, and this is my last point,  
14 Geoff, you said if we're going to -- I don't know  
15 quite how you put it. We're going to need a lot more  
16 proof to make certain changes. And since I'm not  
17 advocating throwing out the basic standard but I am  
18 suggesting we tighten things up, I would turn that  
19 around on you actually and put it this way.

20           Over the past 30, 40 years, 20, 30, 40 years  
21 we've had, I think by -- all who follow this would  
22 agree, a substantial shrinking of the cases the  
23 plaintiffs can win, additional burdens and all that  
24 we've talked -- the Supreme Court has led that,  
25 primarily in Sherman Act cases, and we've also

1 certainly had a reduction in merger enforcement from  
2 1968 to today.

3           That's been a very substantial change. A  
4 lot of that has come without an empirical basis.  
5 Okay, a lot of that the courts have just decided they  
6 wanted to do things and they've done it. So I would  
7 turn that around and say wait a moment, we had all  
8 this shift without a lot of proof, and so maybe we  
9 should back up a little bit back to where we were, not  
10 -- although I don't want to go back to 1968, don't get  
11 me wrong -- well, not in the guidelines, in some other  
12 cases I would, but in other respects it was a good  
13 year -- actually, it was a very bad year in most  
14 respects.

15           MR. MANNE: The music was good.

16           MR. SHAPIRO: Music, thank you. So, no, I  
17 think the problem is that the shrinking of antitrust  
18 has occurred without an empirical basis and proof and  
19 that's part of the problem.

20           MR. MOORE: Okay, thank you.

21           We'll now move on to more specific  
22 questions, and I'd like to start with Carl's helpful  
23 framing about some -- what he calls misconceptions  
24 with respect to the consumer welfare standard as  
25 renamed by Carl. So one of the misconceptions that

1 Carl identifies is the idea that the standard, however  
2 named, ignores harm to suppliers.

3 So let's think about a pure merger to  
4 monopoly that affects a labor market. And there are  
5 no plausible effects on the downstream market. So an  
6 example of such a case might be a merger between the  
7 only two coal mines in a geographic area in West  
8 Virginia, and assuming there is strong evidence on  
9 effects on workers, both quantitative and qualitative,  
10 that the merged firm will decrease the quantity of  
11 jobs that are available and put downward pressure on  
12 wages.

13 So this dovetails quite nicely with a  
14 question from the audience which is what if lower  
15 marginal cost as a result of a merger is caused by  
16 monopsony power. So the question that I'm going to  
17 pose to Geoff is, do you have a concern that the  
18 consumer welfare standard as currently applied in  
19 courts would not capture that sort of case, would  
20 say -- that harm doesn't count.

21 MR. MANNE: Yeah, well you made it as easy  
22 as possible. There's no question that it would be  
23 captured. I'll just read you some of the language  
24 from the Horizontal Merger Guidelines for example.  
25 "Mergers of competing buyers can enhance market power

1 on the buying side of the market just as mergers of  
2 competing sellers can enhance market power on the  
3 selling side of the market. Agencies may conclude  
4 that the merger of competing buyers is likely to  
5 lessen competition in a manner harmful to sellers."

6 I don't think there's any question that it  
7 comes under the expectations of the agencies and that  
8 it would be upheld by courts. I don't recall it  
9 having happened in a merger context, but certainly the  
10 agencies have applied labor market monopsony sort of  
11 theories in the Section 2 context, and that doesn't  
12 seem to have been problematic.

13 What I do think is problematic, and I'll  
14 just toss out there, is that in some of the arguments  
15 about sort of connecting social ills to increase  
16 concentration, and maybe it's just being a little bit  
17 too lax or speaking in slogans, but there is, to me,  
18 an implication that monopoly power in a product market  
19 has a relationship and can or does cause monopsony  
20 power in the labor market.

21 And to my understanding, there is absolutely  
22 no connection there at all, right? But when we talk  
23 about concentration in the economy and look at this  
24 and say it's a problem, we're talking about product  
25 markets, I think. And so when we then in the next

1 breath say, and this increasing concentration has  
2 caused real problems for labor, I just don't think,  
3 and we can talk about the appropriate standard of  
4 proof, but that certainly hasn't been demonstrated,  
5 and it certainly isn't theoretically required or even  
6 likely to be the case. So, I mean, I have more to say  
7 on this, but I think it's very clear, given the  
8 hypothetical.

9 MR. MOORE: Does anybody on the panel  
10 disagree that it's clear?

11 MR. STUCKE: Well, I mean, it's nice in  
12 theory, but in reality, the antitrust agencies rarely  
13 look at what impact that a merger will have on labor.  
14 I think there was this recent no-poaching agreement  
15 among three rival equipment manufacturers, and then  
16 two of them merged. The interesting thing is if they  
17 were looking downward, and you would see evidence of  
18 actual collusion, that would then suggest that the  
19 merger might actually make things worse. It could  
20 make things better, but it could make things worse.

21 Because they failed to look upward, they  
22 never really saw that there was this no-poaching  
23 agreement, and nor did they consider then what sort of  
24 impact then that the merger might have had now because  
25 now instead of having three competitors you just have

1 two. So I think this is a major blind spot. I mean,  
2 you've got --

3 MR. MANNE: Do we think that they don't know  
4 about it? I mean, you have a large staff of very  
5 smart and dedicated people who are pouring over  
6 millions and millions of documents. I'm certain that  
7 they know. I'm certain that everyone who has anything  
8 to gain by making sure they know makes sure they know.

9 And I'm pretty confident -- I mean, you  
10 know, Deb and Sharis were getting, I think, a little  
11 bit upset on the last panel because I think there was  
12 definitely an implication that the agencies are really  
13 not doing their job. And, of course, I think they're  
14 doing their job too well and they should really just  
15 knock off for a couple years.

16 MR. STUCKE: No.

17 MR. MANNE: Not really, but this is -- this  
18 kind of thing that you're mentioning, I'm pretty sure  
19 they would notice and they would look at it.

20 MR. STUCKE: No, I mean, all my time at the  
21 -- when I was at the agency, we did a lot of mergers.  
22 I mean, we focused primarily on downstream effects.  
23 And there were occasionally that we would look  
24 upstream but mostly downstream. We never really  
25 considered impact on labor. Sometimes they said that

1 that's irrelevant.

2           And then the other thing is is that  
3 invariably, even where, you know, we went to what was  
4 quantifiable. I remember one time we had this case  
5 involving white bread, and the beauty of that case was  
6 having the unilateral effects theory. I think, Carl,  
7 you were there with Continental and Interstate  
8 Bakeries, and it was a breakthrough, but in a way it  
9 was sort of a curse because now with the scan data we  
10 can precisely predict what the likely price effects --  
11 and that became the sort of trigger towards unilateral  
12 effects, and I think that even had a diminishment on  
13 coordinated effects, even downstream.

14           I mean, Carl, do you remember a specific  
15 case where the focus was upstream on labor in all your  
16 time at the agency?

17           MR. SHAPIRO: Well, I think we can -- the  
18 FTC -- the case just this last summer, was it BioFilm  
19 -- somebody help me out with that -- which involved --  
20 one of the counts was monopsony power in several  
21 cities in acquiring human plasma, that the donors  
22 would not have the opportunity to get a competitive  
23 rate for donating their plasma. These, I think, are  
24 generally people that have very little money. So that  
25 was in there.

1           Now, those aren't exactly -- they're not  
2 employees, but they are individuals. It's very  
3 similar. They're looking upstream. But I agree it's  
4 not very common. Okay, I mean, the DOJ has looked at  
5 it. We've done -- we, they, have done it in  
6 agricultural markets sometimes involving farmers.  
7 There was a chicken-processing merger case, for  
8 example.

9           So, to me, it's just an open question. Are  
10 there more mergers? Are there many mergers where  
11 there is -- let's just start with the obvious, is a  
12 significant increase in concentration caused by the  
13 merger in a relevant labor market, which would  
14 typically be an occupation in a really narrow  
15 geography, say? I don't know the answer to that.

16           We have some data now coming out on what  
17 concentration in these labor markets might look like.  
18 I'm sure some are highly concentrated -- certain  
19 specialties, particularly in certain areas. I think  
20 that's not a bad thing for the agencies to look at. I  
21 think it has not been routine so far as I know to do  
22 so. It's just a question of whether that would -- you  
23 don't want too many resources spending on that if it's  
24 mostly going to be nothing going on, but in principle,  
25 that is worth looking at.



1           MR. LYNN: I think there's another way of  
2 looking at that, which is it's not necessarily -- and,  
3 actually, what I'm about to say doesn't imply there's  
4 a necessary connection between the concept of consumer  
5 welfare and the actions of the agencies, but what we  
6 can look at is the actions of the agencies in recent  
7 years, especially the FTC.

8           We actually have -- my team -- Phil Longman  
9 from my team put out an article just earlier this week  
10 in the Washington Monthly. I'd encourage you all to  
11 read it. And it's looking at sort of the FTC's  
12 enforcement actions against labor union -- individuals  
13 trying to form labor unions, individuals trying to  
14 form trade associations, you know. And he starts off  
15 with a story about the move against church organists.

16           You know, I know it's a -- those of you who  
17 do go to church, I know that the organist cartel is  
18 one of the great threats to our republic, but they did  
19 take on -- you know, they did devote taxpayer  
20 resources to taking on the church organists. They've  
21 also, in recent years, targeted ice-skating  
22 instructors, animal breeders, music teachers, public  
23 defenders, doctors and dentists in private practice,  
24 home health aides, truck and Uber drivers.

25           MR. SHAPIRO: You're saying that you -- I

1 think you're saying, and I want to understand, that  
2 those sort of collective actions by certain classes of  
3 workers or professionals you think should be given  
4 more running room under the antitrust law, even if,  
5 let's say, it looked like a cartel type of arrangement  
6 like a union? Is that what you're -- is that the  
7 direction you're going in?

8 MR. LYNN: A union is a cartel.

9 MR. SHAPIRO: Well, I'm just asking which  
10 direction you're going in.

11 MR. LYNN: Yeah, I would say -- I mean,  
12 that's exactly what we were saying --

13 MR. SHAPIRO: Okay.

14 MR. LYNN: -- is that the FTC should  
15 probably never or extremely rarely be targeting people  
16 like church organists and ice-skating instructors.  
17 And certainly --

18 MR. SHAPIRO: Because competition among them  
19 needs to be reduced for some reason.

20 MR. LYNN: If these people choose -- this is  
21 actually going back to -- you know, we can take this  
22 back to, you know, 200 years. I mean, I'm sure you  
23 don't me want to go into another lecture about that.

24 MR. SHAPIRO: That's why --

25 MR. LYNN: You know, it's been one of the

1 great freedoms in the United States is that if you  
2 were an independent actor you can get together with  
3 your fellow workers, you can get together with your  
4 fellow farmers, you can get together if you were an  
5 independent businessperson with your fellow  
6 independent businesspeople and create unions and  
7 cooperatives and trade associations to promote your  
8 joint interests.

9 MR. MOORE: To real estate agents for  
10 example? Should they be able collude on --

11 MR. NEUCHTERLEIN: All different types of  
12 trade associations.

13 MR. LYNN: Actually, if you guys want to  
14 look at Zillow -- if you guys want to look at Zillow,  
15 I mean, if the FTC would look at Zillow, that would  
16 actually be probably pretty useful right now.

17 MR. MOORE: Can you draw a distinction  
18 between trade associations that deserve scrutiny and  
19 trade associations that don't deserve scrutiny? I  
20 just want to be clear about what these cases are  
21 about. They're not lawsuits against individuals; they  
22 are lawsuits against trade associations, sometimes  
23 that had many thousands of members. And I'd like to  
24 be clear about particularly the content of the consent  
25 agreements that the FTC has reached with those trade

1 associations.

2           So I'm just going to read the aid to -- the  
3 analysis for public comment in the case against the  
4 professional skaters. These are teachers of ice  
5 skating. And the case involved the code of ethics of  
6 the trade association, and the code of ethics states  
7 that no member shall solicit pupils of another member,  
8 and prior to acting as a coach, the member shall  
9 determine the nature and extent of any earlier  
10 teaching relationship with that skater and other  
11 members.

12           The association enforced its code of ethics  
13 through a grievance process, which resulted in varying  
14 penalties, including suspended membership and  
15 probation. The association sanctioned coaches for  
16 soliciting students of other members, even when the  
17 students and their parents want to switch coaches.  
18 And being a member of the Professional Skaters  
19 Association was required to participate in  
20 competitions like the U.S. Skating Federation and to  
21 be a member of Team USA.

22           So the question is do you think that conduct  
23 should be legal and why?

24           MR. LYNN: It sounds a lot like the NFL.  
25 And if you -- you actually -- if you have like a

1 limited amount of resources, maybe you could actually  
2 target the NFL for keeping Colin Kaepernick off of the  
3 --

4 MR. SHAPIRO: But that's not answering the  
5 question.

6 MR. LYNN: No, this is answering the  
7 question.

8 MR. SHAPIRO: No, no, that's an analogy  
9 that's not a very good analogy. I think the question  
10 was well posed.

11 MR. LYNN: It is a very good analogy. It is  
12 a direct analogy.

13 MR. SHAPIRO: Okay, fine, whether -- let's  
14 not argue about that. The skating fact pattern --  
15 look, it seems to me -- I just want to understand what  
16 you're saying. It seems to me you're saying this  
17 group should -- you welcome their not competing  
18 against each other in order to get a presumably higher  
19 rate and have a better life, right, because of a  
20 higher income, and that should be that -- you welcome  
21 that. That's what we're talking about, right? Is  
22 that right?

23 MR. MOORE: And one point of clarification  
24 --

25 MR. LYNN: I'm going to say this again.

1 We're dealing with -- there's limited resources in  
2 this agency. There's limited resources -- I hear you  
3 guys all the time at the FTC, we need more funds; at  
4 the DOJ, we need more funds. We need to pay more --  
5 you know

6 MR. NUECHTERLEIN: I've never said that.

7 MR. LYNN: So it's like, with the limited  
8 resources that you have, I look around and I see many  
9 targets. I mean, we could talk about Google and  
10 Facebook monopolizing the advertising industry.  
11 Stripping advertising -- you know, it's like you got a  
12 limited number of people in the FTC and a limited --  
13 so use those people carefully. Use the taxpayers'  
14 dollars wisely.

15 MR. SHAPIRO: Okay, so if they use the  
16 taxpayers' dollars wisely and issue a statement about  
17 what they think should be allowed and not, okay, and  
18 then maybe there would be private enforcement. It's  
19 not about government resources, I just want to know,  
20 this conduct that you welcome, because you seem like  
21 you welcome it, but then you say, well, I just don't  
22 want them to go after it. So I just want to  
23 understand whether this cartel-like behavior is  
24 something you welcome or you just think it's not that  
25 bad so they shouldn't bother.

1           MR. MOORE: And I'd like to make one point  
2 about the resources that it took for all of these  
3 cases. I actually checked with the Anticompetitive  
4 Practices Division that worked on these cases, and one  
5 attorney and no economists worked on these cases, and  
6 they weren't full-time on any of these cases. They  
7 weren't litigated; they all reached a settlement that  
8 the only penalty --

9           MR. LYNN: If you're a church organist  
10 cartel, and the FTC comes after you, you're going to  
11 give up real fast.

12           MR. MOORE: So the idea is that there would  
13 be a deterrent effect that other trade associations,  
14 perhaps trade associations that affect a larger amount  
15 of economic commerce in the United States, might be  
16 deterred by engaging in similar conduct.

17           MR. SHAPIRO: But Congress has various  
18 statutory provisions, such as particularly in the  
19 agricultural area where farmers are allowed to form  
20 cooperatives. So Congress has made a decision that  
21 that's allowed. Okay, and we -- okay, I'm just  
22 saying, you think -- you would go for the same type of  
23 approach for the skater -- for the skating coaches. I  
24 think that's what you're saying, and I don't know why  
25 you're struggling, either yes or no.

1 MR. LYNN: Oh, there's no struggling here.

2 MR. SHAPIRO: Okay, so is it yes or no?

3 MR. LYNN: Of course. Whatever is good --  
4 whatever rules govern the ability of farmers to come  
5 together, whatever rules govern the ability of workers  
6 to come together, any small enterprise that wants --

7 MR. STUCKE: I just -- I mean, first --

8 MR. SHAPIRO: Thank you. That's clear now.

9 MR. STUCKE: I mean, first to Barry's point,  
10 I mean, there is scholarship in -- you know, academic  
11 scholarship. Jack Kirkwood talked about at times when  
12 small sellers should be able to get together when  
13 they're dealing with a monopsony, and so he raises  
14 that. I mean, that was one of the concerns.

15 So, I mean, it's not -- there is literature  
16 -- academic literature that supports Barry's point. I  
17 think Barry's larger point, though, is when you're  
18 looking at press resources and you look at potential  
19 harm and you look at the European Commission and what  
20 it's doing, and Carl said, I don't see any antitrust  
21 case against Facebook. Well, the point is cartel  
22 or -- we can talk about that at other points. But you  
23 do see then these other competition agencies that are  
24 engaged with these giant tech platforms and are  
25 opening up inquiries. And you see the FTC and the DOJ



1 do basically nothing when it comes to these powerful  
2 tech platforms that when you have one DOJ case since  
3 2000, that's this abdication.

4 And, so, when you're saying we need more  
5 resources and the like, I think you have to then  
6 justify how you're using your resources and why aren't  
7 you bringing the type of cases -- like when Carl and I  
8 were back at the Division bringing the Microsoft case  
9 was intensive. But that did a lot --

10 MR. MANNE: Are you suggesting it's because  
11 they think they can't win in court? I mean, that's  
12 what this is about, right? If all this comes down to  
13 is a different preference for prosecutorial  
14 discretion, we don't really have to have a panel about  
15 that.

16 I mean, there are important questions here  
17 as we were discussing a little bit earlier with  
18 respect to the sort of presumptions and where they  
19 should be drawn. But the panel is about -- I mean,  
20 that would apply to this panel if what you're saying  
21 is the way the law has developed, they don't bring  
22 those cases because they can't win them and they are  
23 relegated to bringing cases against poor struggling  
24 skating coaches because that's really where the law  
25 has left us.

1           And maybe that is what you're saying, but  
2   that's a very different thing than are they -- you  
3   know, do they have enough resources.

4           MR. MOORE:   Jon.

5           MR. NUECHTERLEIN:   So I'm just going to echo  
6   what other enforcers in the prior administration  
7   remember, which is that we did bring close cases.  I  
8   personally argued the McWane case in the 11th Circuit  
9   over a fierce dissent by Josh Wright.  I can't count  
10  how many pay-for-delay cases the FTC brought over the  
11  years.  These also were close cases.  It actually  
12  weathered a number of judicial defeats before it  
13  doubled down.  Hospital merger cases that were deemed  
14  a dead letter back in the '90s, the FTC got around and  
15  reformed its economic analysis and came up with a  
16  winning strategy to oppose anticompetitive hospital  
17  mergers.

18           I don't think the FTC has been asleep at the  
19  switch.  I'm sure that if they had more resources it  
20  would go after more anticompetitive conduct, but I  
21  don't see the FTC cutting very many facets of industry  
22  in its slack.

23           MR. MOORE:   And I'd also like to point out  
24  that if you took all of the resources that were  
25  applied to the trade association cases you wouldn't

1 get very far if you're going to bring another case  
2 like Microsoft with those resources.

3           So I would like to move on to market  
4 structure and the 1968 Merger Guidelines, which Barry  
5 spoke about in the last panel and has spoken about a  
6 number of times before. First point out that one of  
7 the primary authors of the 1968 Merger Guidelines was  
8 Don Turner, and Mark Niefer has an article in a past  
9 issue of Antitrust magazine that talks about the  
10 formation of the 1968 Merger Guidelines and how they  
11 were developed, and I would recommend that to  
12 everybody.

13           So the '68 Merger Guidelines have strict  
14 structural presumptions and essentially say that if  
15 the market is concentrated at a certain level, a firm  
16 with X share can't buy a firm that has Y share, and  
17 it's quite specific. And I gather that part of  
18 Barry's admiration for the '68 guidelines is because  
19 it removes some discretion from the process. It makes  
20 it predictable, which I think we can all agree  
21 predictability is generally good.

22           The question that I want to focus on relates  
23 to the specific presumptions and market share  
24 requirements that are in the 1968 guidelines. And I  
25 want to frame that against the idea that there's quite

1 a bit of heterogeneity in terms of how markets are  
2 structured. Economies of scale might be far more  
3 significant in one market compared to another, which  
4 would mean that minimum efficient scale would be  
5 different in one market compared to another. And if  
6 minimum efficient scale is higher, you would expect to  
7 have fewer firms.

8           And in addition to that, competition might  
9 look different in one market compared to another. The  
10 vertical merger panels this morning talked about the  
11 Cournot model and the Bertrand model. They're very  
12 old models and very simple, and I learned about them  
13 in Econ 101, and I think they've been developed since  
14 they were first developed and they're much more  
15 complicated now. But the simple Cournot model of  
16 duopoly, producers choose quantity. In equilibrium,  
17 price is above marginal cost; industry output is below  
18 the level that would occur under perfect competition;  
19 and there's a deadweight loss.

20           In the Bertrand model, firms compete on  
21 price and the basic equilibrium result is that price  
22 equals marginal cost; output is at the competitive  
23 level; and there's no deadweight loss. So you have  
24 two identical structures, and the outcomes are  
25 different. So given the heterogeneity and perhaps

1 depending on the circumstances, somewhat limited  
2 signal that structure provides -- this is to both  
3 Barry and Maurice -- I'm curious why we should focus  
4 more on structure.

5 MR. LYNN: No, it's a great question. If  
6 you don't focus on structure, if you don't have some  
7 basic goal, you end up in a winner-take-all situation.  
8 One of the weaknesses, as far as I understand it, of  
9 Carl's new proposal, and I haven't looked at it  
10 carefully and maybe it's not true, but one of the  
11 weaknesses is that it basically -- the focus on  
12 competition without a focus on market structure leads  
13 to the complete consolidation of markets.

14 MR. SHAPIRO: We're talking about mergers  
15 now, not unilateral conduct.

16 MR. LYNN: I understand. But in terms of  
17 the -- in terms of the -- you know, it's important to  
18 go back and understand what -- how we saw these things  
19 for most of the 20th Century. How did we see these?  
20 We carefully separated out -- you know, you talk  
21 there's a lot of heterogeneity. You said there's  
22 different markets are different, and that's obviously  
23 true.

24 You know, one of the things that we used to  
25 do a much better job of is clearly separating out what

1 is a network monopoly, what is a complex industrial  
2 firm that is dedicated to the application of  
3 industrial arts to mass manufacture, and then what is  
4 just a business that could be handled by a family.  
5 And we had different sets of rules for each of those  
6 different areas for most of the 20th Century when it  
7 came to farmers and small businesses, you know, small  
8 shopkeepers.

9           You had -- the goal was actually to keep the  
10 small shopkeepers, the farmer, the independent  
11 businessperson in their business to avoid  
12 concentration, to prevent concentration throughout  
13 that entire political economy. Now, we could debate  
14 whether that's smart or not. We could debate about  
15 whether that led to all kinds of inefficiencies, but  
16 that was the goal. And that's -- it's not -- there's  
17 no ifs, ands, or buts. I mean, it's like that was  
18 what people aimed at.

19           When it came to, say, production of  
20 automobiles, the production of chemicals, later the  
21 production of semiconductors, you know, the antitrust  
22 enforcers didn't say, oh, we're going to keep things  
23 really small. You know, it's like when you hold up a  
24 semiconductor chip, inside of that semiconductor chip,  
25 there's like a thousand different markets that used to

1 exist, but they've all been vertically integrated  
2 away.

3           So the antitrust enforcers didn't stand in  
4 the way of the engineers who are seeking to integrate  
5 something that was much better, more effective, more  
6 beautiful, so they let that happen. But they said  
7 there's going to be a limit to the number of -- the  
8 amount of the market share that a car manufacturer or  
9 a semiconductor manufacturer or a chemical  
10 manufacturer can have. And that's about one-quarter  
11 of the marketplace. If you go above that, then we're  
12 going to have to start really talking about that.

13           And then when it came to network monopolies,  
14 communications firms and railroads, there are some  
15 really simple rules that were applied to that. No  
16 vertical integration, no discrimination. Now, this  
17 was a -- this wasn't all under the roof of antitrust.  
18 This was under the roof of antimonopoly. This was  
19 under the roof of the U.S. Government.

20           You know, so it's like we can't say that  
21 it's left entirely to the antitrust people to come up  
22 with this regime. The American people came up with  
23 this regime. We ran it for a long time, and it did a  
24 lot of things really well to those who didn't want a  
25 boss. They could go in and have -- run their own farm

1 or run their own business.

2 To those who wanted to go in the industrial  
3 system and be an employee, they could do that. You  
4 also had back then a pretty strong right to unionize  
5 if you're an industrial company. And then when all  
6 individual producers, all individual businesses, and  
7 all individual consumers came to the intermediate  
8 companies, the communications firms and the  
9 transportation firms, there was various forms of  
10 common carriers to keep those enterprises neutral and  
11 to ensure that the massive political power in any  
12 enterprise was not being misused to concentrate  
13 political power, as we see today with the  
14 communications and transportation network monopolies  
15 of today which are Google and Facebook and Amazon.

16 So there's a lot of different approaches,  
17 and we have to actually understand how to use these  
18 approaches to deal with the actual problem at hand.

19 MR. SHAPIRO: That is not the answer I  
20 expected when asked about Cournot versus Bertrand, I  
21 have to tell you.

22 MR. MOORE: I want to give Maurice a chance  
23 to respond to that question because he emphasized  
24 structure in his opening presentation.

25 MR. STUCKE: Sure, yeah. So I go back to --



1 whenever I'm in doubt I think of Bernie Hollander, for  
2 those of you know who spent many years at the DOJ, and  
3 his favorite -- I asked him one time, who is his  
4 favorite AAG, and he said Stanley Barnes. And Stanley  
5 Barnes, during the Eisenhower Administration, said in  
6 his study of the antitrust laws that legal  
7 requirements are prescribed by legislatures and  
8 courts, not by economic science.

9           And I heard earlier today that, well, we're  
10 in the prediction business. First off, we don't know  
11 how accurate we are in our predictions. Nobody knows.  
12 I mean, you would think we would -- I mean, and I  
13 think this is commendable about the FTC in the  
14 hospital retrospectives, they could actually change  
15 the law, but we don't know how accurately we're  
16 actually predicting price effects.

17           Now Jon Kwoka looked at the post-merger  
18 reviews. Some of you have problems with that. He  
19 himself identified limitations with that, but it's  
20 questionable to what extent we're actually accurately  
21 predicting price effects. The other thing is the --  
22 we're not arguing that these mergers are per se  
23 illegal, we're just saying that it switches the  
24 presumption because there are things that are  
25 measurable and there are things that aren't

1 measurable. And those things that aren't measurable  
2 can be as important if not more important.

3           So another person when you go to doubt is  
4 Hayek. Hayek said that in many of the sciences,  
5 what's measurable is what's important. But for  
6 economics, what's measurable isn't what's important.  
7 And what we're seeing now is evidence of a market  
8 power problem that doesn't come necessarily from  
9 efficiencies, and you're seeing an inverted U  
10 relationship with respect to innovation, that when you  
11 can have very high concentration, that can actually  
12 have an adverse effect on innovation.

13           So what we propose, and this is currently  
14 legislation, is that when you're having markets like  
15 this, and that could address then what Carl talked  
16 about, the incipency, is when you have a company  
17 that's already a monopoly, you could then deal with  
18 the Alcoa-Rome situation where a monopoly then  
19 acquires a very small firm.

20           And the reason why I think this is important  
21 with dataopolies is this. Back in the '90s, Microsoft  
22 didn't really have a great sense of where consumers  
23 were going, but in controlling these platforms right  
24 now, they can see what are some of the nascent  
25 competitive threats, what apps are being downloaded

1 and the like. And that gives them an insight, and we  
2 call this the now-casting radar.

3 And that's the concern because they could  
4 see trends possibly before the Antitrust Division or  
5 the FTC, and they can eliminate those nascent  
6 competitive threats, either by buying them or subtly  
7 engaging in pressure that the agency won't necessarily  
8 pick up, and then you could have a market power  
9 problem. So that's why we proposed, then, reversing  
10 the burden on mergers.

11 MR. SHAPIRO: Can I just respond?

12 MR. MOORE: Go ahead.

13 MR. SHAPIRO: The question was about the  
14 economic theory has different predictions about  
15 oligopoly, so how we do feel -- how can we have this  
16 structural presumption because we don't really know  
17 that much. And I guess -- I have a paper with Herb  
18 Hovenkamp pretty recently about the importance of the  
19 structural presumption, where Herb on the law  
20 basically says, look, it's very solid law going back  
21 to Philadelphia National Bank and we need to  
22 strengthen it. And I say more on the economic side,  
23 there's a lot of good economics supporting structural  
24 presumption.

25 So I think it's true in any given market it

1 can be very hard to predict this is kind of the point  
2 about if you look for specific numbers it's going to  
3 be hard, and the structural presumption is a way to  
4 cut through that in a pro -- to help enforcement in a  
5 lot of respects. And so I think we need to strengthen  
6 it. So -- but while recognizing it's hard to predict  
7 and markets are different.

8           And that's, I think, why the Merger  
9 Guidelines, you know, what the agencies can do is go  
10 beyond. They're not just going to do what they did in  
11 '68, right? They're going to go and look more  
12 carefully, okay, here are the -- what do we know about  
13 the way the market is evolving and all these other  
14 things and try to look at effects and not just  
15 structure. But, really, it's a different process at  
16 the courts than at the agencies. There's different  
17 institutional competencies.

18           And so I do think what you can do in a few  
19 cases where you can look deeply to help make a better  
20 enforcement decision is quite differently when you get  
21 into court where the structural presumption's valuable  
22 and needed even though it is and because it's hard to  
23 predict.

24           MR. MANNE: Can I just add one little quick  
25 thing --

1 MR. MOORE: Go ahead, Geoff.

2 MR. MANNE: -- which is precisely that  
3 process. You know, there is uncertainty, there's  
4 obviously administrative value to presumptions. It  
5 helps if they're actually grounded in, you know, some  
6 sort of reason to think that they cut in one direction  
7 or the other, but even that's not required for  
8 administratability purposes.

9 But what's great about the system we have  
10 now is that if the economy changes or a particular  
11 market changes in such a way that the structural  
12 presumption doesn't really make much sense anymore,  
13 there is at least a process by which it can be  
14 adjudicated in court. And the courts, over time, will  
15 adjust the way they approach the structural  
16 presumption.

17 What would be the worst of all possible  
18 worlds is imposing an inviolable structural  
19 presumption that isn't subject to any kind of  
20 amendment by the --

21 MR. NUECHTERLEIN: As a litigator, I can  
22 tell you that nothing's inviolable because the  
23 antecedent question of how you define markets is often  
24 --

25 MR. MANNE: Whenever I say inviolable,

1 assume I mean relatively.

2 MR. SHAPIRO: But I don't think we'd want to  
3 go back to where it would be irrebuttable, for example  
4 --

5 MR. MANNE: Right.

6 MR. SHAPIRO: -- which it was kind of close  
7 in '68, right?

8 MR. MANNE: Or if they passed any of the  
9 industrial reorganization acts.

10 MR. SHAPIRO: I wouldn't want to go back  
11 there. Maybe some others here would.

12 MR. MANNE: Or if they had passed any of the  
13 industrial organization acts. I mean --

14 MR. SHAPIRO: I wouldn't want to go back  
15 there. Maybe some others here would. But that's

16 MR. MANNE: I just want to caution against  
17 that. I'm just saying, I agree with what you're  
18 saying, and I just want to make sure it's clear that  
19 part of the benefit is that it can actually adjust  
20 over time.

21 MR. MOORE: I said I was going to get into  
22 more specific fact patterns or hypotheticals, and I'm  
23 not going to do that with this question because there  
24 are two opposing questions from the audience, and it's  
25 too delightful not to ask them, and they're very high-

1 level questions.

2 So, one, if the consumer in the consumer  
3 welfare standard is so confusing, why not use a total  
4 welfare standard? And the other question is, can we  
5 please put the total welfare standard to bed? So I  
6 will pose that question to the panel and see if  
7 anybody wants to articulate a defense of the total  
8 welfare standard.

9 Go ahead, Geoff.

10 MR. MANNE: Surprising, isn't it? It's not  
11 that I'm going to articulate a defense of the total  
12 welfare standard. I'm actually going to use it to do  
13 two things: number one, to point out that one of the  
14 reasons we have a consumer welfare standard as a sort  
15 of stand-in for total welfare standard is because it  
16 is itself actually a compromise for the sake of  
17 economizing and the like on the understanding that  
18 producers benefit when consumers benefit but also  
19 benefit if they can take advantage of consumers, would  
20 basically say, well, look, you know, and it's hard to  
21 distinguish between the two.

22 Well, let's not look at the welfare of  
23 producers; we'll look at the welfare of consumers, and  
24 we'll capture most of it. And there's a number of  
25 other reasons, too, that the consumer welfare standard

1 is sort of a stand-in for total welfare. It's not  
2 perfect, of course. In a sort of ideal world, if we  
3 were social engineers, we might actually want a total  
4 welfare standard if we could be sure that it wasn't --  
5 that we were actually increasing total welfare.

6 And the problem is, of course, the  
7 uncertainty, the ambiguity and the like, and that's,  
8 again, precisely why we have the standard that we do  
9 use. Moving even farther, further away from that, I  
10 guess, would make sort of even less sense to me,  
11 especially when it's justified on the basis of the  
12 problems of uncertainty.

13 And, again, I think this is sort of what  
14 we've been dancing around quite a bit here, that is,  
15 of course, there is a benefit to increasing  
16 administratability and reducing uncertainty, but it  
17 doesn't help you any if you're reducing uncertainty in  
18 a direction that actually is the opposite of the  
19 direction you want to go. So you want to have some  
20 basis for the sort of presumption you apply. I think  
21 that's what we've done with the consumer welfare  
22 standard, but if we had the mechanism to relatively,  
23 reliably, and inexpensively adopt a total welfare  
24 standard, I would be all for it.

25 MR. MOORE: Go ahead, Maurice.



1           MR. STUCKE: I want do a shout-out to  
2 Marshall and then also Mark Glick. And Mark Glick has  
3 just recently come out with a paper, and Marshall was  
4 emphasizing this with me, is that total welfare is  
5 unworkable when we rely on a partial equilibrium  
6 model. And, particularly, like, we don't even  
7 capture, like, the earlier question had something  
8 about reduction in marginal costs.

9           Normally, we look at that as a good thing,  
10 but what if that reduction of marginal cost is  
11 actually at the expense upstream on labor or farmers  
12 and the like? We're not necessarily capturing that.  
13 So when we're talking -- I mean, we can't even capture  
14 innovation or quantify privacy or quantify quality and  
15 the like. And we can't even do that under a partial  
16 equilibrium model. How would we then try to determine  
17 all of the effects that a merger might have on a total  
18 economy?

19           And Marshall can add to that, but that's my  
20 understanding.

21           MR. MOORE: Okay, I'd like to move on to  
22 think about -- and this is going to be geared first at  
23 you, Maurice, to think about how your proposed  
24 standard would handle a specific example of conduct.  
25 So when I think about welfare or welfare analysis, I

1 think about how do we think about tradeoffs. And  
2 agencies and courts often have to make tradeoffs in  
3 part because the evidence that we're looking at is  
4 ambiguous, so the facts might support a plausible  
5 claim of exclusion or predation but also might support  
6 a claim that the conduct benefits consumers or creates  
7 efficiencies.

8           And I think I'll focus specifically on  
9 predatory pricing, but you can think about this in  
10 terms of vertical restraints, and you can think about  
11 this in terms of innovation that some might call  
12 predatory innovation, but I think we'll focus on  
13 predatory pricing. So the challenge in identifying  
14 the correct legal standard is to pick a standard that  
15 helps the decision-maker distinguish between  
16 beneficial conduct and harmful conduct when at a very  
17 high level the conduct looks like it could be both.

18           The D.C. Circuit in Microsoft said the  
19 challenge for an antitrust court lies in stating a  
20 general rule for distinguishing between exclusionary  
21 acts which reduce social welfare and competitive acts  
22 which increase it. So in the context of a predatory  
23 pricing allegation, how would your standard operate?  
24 You have an example of a company offering low prices.  
25 So, you know, the first cut is to ask whether those

1 prices are below cost; and, second, would it matter if  
2 the seller offers multiple products? So here I'm  
3 trying to capture what you might think about loss  
4 leading or how your standard might analyze loss  
5 leading.

6 MR. STUCKE: Okay, sure. So, yeah,  
7 actually, we talked predatory pricing yesterday in  
8 class. And what we propose is basically what the  
9 standard is currently in Europe, whereby if a dominant  
10 firm is engaged in sustained pricing that's below  
11 average variable costs, or let's say marginal costs or  
12 another appropriate cost measure, then that is  
13 presumptively anticompetitive. And you don't  
14 necessarily have to prove recoupment.

15 Now, I think Carl said that, you know, the  
16 recoupment, well, we can talk about the recoupment. I  
17 think, my understanding, going around antitrust  
18 circles, that after Leegin, there hasn't been any  
19 successful predation case brought by either agency,  
20 correct me if I'm wrong. And the only one we were  
21 able to get is where Spirit Airlines survived summary  
22 judgment.

23 I do know that Bruce Brugmann brought a  
24 predatory pricing case under California state law  
25 where there wasn't a recoupment against New Times, and

1 I think he prevailed, but I'm unfamiliar with any  
2 successful predatory pricing case since that decision.  
3 And I'm interested because Spencer Weber Waller is  
4 also doing a paper on this.

5 And, so, what's rose is something that's  
6 already now employed in Europe and it would foster  
7 then greater convergence.

8 MR. NUECHTERLEIN: Well, I mean, you're  
9 describing a -- can I?

10 MR. MOORE: Go ahead.

11 MR. NUECHTERLEIN: You're describing a set  
12 of circumstances in which a regulator, let's say, has  
13 accurately found that a producer is pricing on a  
14 sustained basis below marginal low cost. Either that  
15 producer is acting rationally or it expects to recoup  
16 those losses at some point. So if you just assume  
17 that most businesses operate rationally, then  
18 recoupment is more or less built into a finding of  
19 genuine, long-term -- not long-term, but genuine,  
20 sustained, below-marginal-cost pricing.

21 MR. STUCKE: Right, and there you have --  
22 like, let's go back to Leegin. There, you had 18  
23 months pricing below average variable cost, and there  
24 was strong evidence of anticompetitive intent,  
25 predatory intent. So, here, the company believed in

1 what it was doing. And the majority was rather  
2 paternalistic. They said, no, despite what you may  
3 believe, you could not prevail in this market. And I  
4 think this is where Justice Stevens says in this  
5 dissent, that in that market, they knew how to dance  
6 this dance very well.

7 MR. NUECHTERLEIN: So there are a couple  
8 questions here. One of them is how often is this  
9 really a problem and what are the costs of false  
10 positives and false negatives, what are the error  
11 costs in this context. And I think in that respect  
12 Justice Breyer, and very rightly, got it exactly  
13 right, which is you don't want to create systemic  
14 disincentives for companies to lower prices. That's  
15 not to say that there cannot be successful  
16 prosecutions for predation, but the theory of those  
17 prosecutions has to be that at some point consumers  
18 will be net worse off than they would be in the  
19 absence of the strategy.

20 MR. SHAPIRO: I think it's important to  
21 throw into this mix, I mean, the notion of recoupment  
22 here, I think as has been discussed and probably in  
23 most people's minds, is the company prices below cost  
24 and then at some time in the future they recoup that  
25 somehow through some positive margins.

1           Let me just suggest, and this relates to  
2 your question about multiproduct, is that you really  
3 have to be careful. I think if a monopolist is  
4 pricing below an appropriate measure of cost that they  
5 have some explaining to do. That's how I think about  
6 it. Now, there's different ways they can explain it,  
7 okay?

8           The way that would favor -- that we might be  
9 all for is when they say, yeah, we're going to drive  
10 everybody out and then we're going to make the money  
11 later, okay, by jacking up the price. Well, that's  
12 what we're worried about. But what if they say, well,  
13 no, actually, what's happened is we're actually at a  
14 fairly smaller scale of production right now so it's  
15 actually pretty expensive -- imagine it's an  
16 automobile or something or some other manufacturing  
17 item -- but we know that by getting down the learning  
18 curve and getting scale, we're going to get our costs  
19 down, and we're trying to get there, and we'll get  
20 there faster, okay. So is that a defense?

21           Okay, well, the economics of that would say,  
22 well, actually, if you look at the economics of  
23 learning by doing, that by producing more today you  
24 learn and produce less in the future, the currently  
25 measured cost of that car is actually not the right

1 measure of cost because you get some future benefits  
2 on the cost side due to scale. So you have to measure  
3 it correctly. It might look like they're below cost  
4 but not really.

5 Another one would be, you know, they sell  
6 this product because it's bringing people in the door  
7 and they're going to buy some other products just in  
8 the same transaction or the same month. That's not a  
9 temporal recoupment. So I think you need to be  
10 careful, but if it really is temporal recoupment in  
11 the future, then that's more suspicious.

12 But I don't know how you can do -- now, that  
13 all should fit fine within the -- are the trading --  
14 the customers ultimately hurt. So I don't think any  
15 of this disturbs the use of the protecting competition  
16 standard, no matter how you come out, and I tend to  
17 come out thinking that in Brooke Group the court put  
18 in too many hurdles and that's why we don't see any  
19 plaintiffs really bringing, much less winning, these  
20 cases.

21 MR. MANNE: That's not why. That's not why.  
22 We don't see it because it doesn't make a lot of  
23 sense. I mean, or there is no way to tell that that's  
24 not the reason. I mean --

25 MR. SHAPIRO: Well, I'm saying the standard

1 is overly restrictive, and, therefore, it is  
2 reasonable to infer that --

3 MR. MANNE: Or it's properly restrictive.

4 MR. SHAPIRO: that -- well, I'm saying  
5 overly and you're saying properly. We're having a  
6 conversation.

7 MR. MANNE: Well, I know, but what I'm  
8 saying is that the fact that it's hard to bring one of  
9 these cases is not itself any evidence whatsoever that  
10 we don't have enough of those cases. You may be able  
11 to point to the specific restrictions in the economic  
12 literature and say, hey, given what we know, this is  
13 actually too restrictive. That's something very  
14 different.

15 That's not what Maurice's point was.  
16 Maurice was saying, well, clearly it's not -- it's  
17 overly restricted because we don't have any cases, but  
18 those are not --

19 MR. SHAPIRO: Well, I didn't mean to make  
20 that syllogism just like that, Geoff.

21 MR. STUCKE: Well, let me just quickly -- I  
22 mean, you're right, but one of the things, if you look  
23 at some of the research among firms, it's like what  
24 are sort of acts that you engage in to thwart rivals.  
25 There was an old study about this, but one of the



1 things that they cited was predatory pricing. So, I  
2 mean, I think it's an empirical thing, is to see what  
3 extent is that occurring and what is it -- and I  
4 think, there, look at other jurisdictions, look at  
5 states, see the type of claims that are being brought,  
6 and then that can tell you how often it actually  
7 occurs.

8 MR. NUECHTERLEIN: I think a lot of the -- I  
9 mean, the analysis --

10 MR. MOORE: Wait, actually --

11 MR. NUECHTERLEIN: Go ahead, Derek.

12 MR. MOORE: We've got, I guess, five minutes  
13 left.

14 MR. LYNN: This has been a fascinating last  
15 five minutes, I thought. I was just, you know, on the  
16 edge of my seat, you know, but actually Geoff Manne  
17 said something really important earlier today, which  
18 is this isn't just a discussion about consumer  
19 welfare; this is a discussion about bigger issues. So  
20 I'm going to -- I want to do a little quote here,  
21 another one. This is from our friend Bob Pitofsky.

22 MR. MOORE: I had one final question that I  
23 want to ask the panel, so you've got, like, 30  
24 seconds.

25 MR. LYNN: This is -- actually this is very

1 pertinent.

2 MR. MOORE: No, no, no. Thirty seconds,  
3 Barry.

4 MR. LYNN: "Antitrust is about more than  
5 economics." This is Bob Pitofsky in the late 1990s  
6 when he was head of the FTC. "If someone monopolizes  
7 a cosmetics field, they're going to take money out of  
8 consumers' pockets." That's kind of like the  
9 conversation we just had. "But the implications for  
10 democratic values are zero. On the other hand, if  
11 they monopolize books, you're talking about  
12 implications that go way beyond the wholesale price of  
13 what books might be."

14 We have, my organization back on June 12th,  
15 we had Makan Delrahim come to this event that I --

16 MR. MOORE: You're over 30 seconds, Barry.

17 MR. LYNN: You know, it's like we're going  
18 to -- are we going to talk about only consumer welfare  
19 and leave the big issues on the table? What I  
20 actually would like Mr. Shapiro to actually tell me is  
21 how in his new system that he's come up with under  
22 this new standard, how are you going to deal with the  
23 monopolization that is taking place of the advertising  
24 industry that it supports and has supported for more  
25 than 200 years.

1 MR. MOORE: Okay, I'm going to move on, and  
2 we're going to talk about Supreme Court cases. So  
3 this is a question for every member of the panel. I'm  
4 going to give you a magic wand, and the magic wand  
5 allows you to strike any decisions on the books by the  
6 Supreme Court. And the question is --

7 MR. NUECHTERLEIN: Antitrust-related?

8 MR. MOORE: Antitrust-related, yes, yes.  
9 Antitrust decision, yeah, that's not a can of worms  
10 that I would like to open.

11 MR. LYNN: Bob Pitofsky felt that it was  
12 antitrust-related.

13 MR. MOORE: So the question is --

14 MR. LYNN: What's happened since Bob  
15 Pitofsky was head of this agency?

16 MR. MOORE: So the question is what decision  
17 would you choose to strike and why, and in particular  
18 why is the decision that you choose inconsistent with  
19 your view about how the agency should be evaluating  
20 antitrust cases under your preferred standard?

21 MR. NUECHTERLEIN: I'm just going to pick  
22 the cases I hate the most. After I thought about your  
23 question last night, I'm not sure it does a lot of  
24 damage anymore. The case was Utah Pie, which was an  
25 absolutely insane predatory pricing case. I'm happy

1 to describe the facts, but I think it would take up  
2 too much time doing it.

3 MR. MOORE: Carl?

4 MR. SHAPIRO: I would strike Citizens  
5 United, but I'm not sure that's an antitrust case, so  
6 I would go with American Express.

7 MR. MOORE: Barry.

8 MR. SHAPIRO: American Express, but I think  
9 so it's consistent, I think of that case because that  
10 clearly disrupted the competitive process, harmed the  
11 trading partners, the merchants, disrupted price  
12 competition, and the Supreme Court -- you should read  
13 Breyer's dissent. It's really sparkling.

14 MR. MOORE: Barry.

15 MR. LYNN: I agree with Carl.

16 MR. MOORE: Maurice?

17 MR. STUCKE: See, I don't think a magic wand  
18 --

19 MR. SHAPIRO: A hundred percent, man. We're  
20 totally aligned, I can tell.

21 MR. STUCKE: Well, I agree with both of  
22 them, but here's the thing. I don't think it's a  
23 magic wand of one case. And I would point out Leegin,  
24 not because I necessarily disagreed with the result,  
25 but what I saw particularly pernicious in Leegin and

1 what I see in antitrust generally is, number one, is  
2 how bad dicta then takes a life of its own. Where in  
3 Sylvania in a footnote, they said the primary purpose  
4 is interbrand competition.

5 Number two is how the court then basically  
6 said it's untethered. It's not really bound by stare  
7 decisis. It's not necessarily bound by the  
8 legislative aim. It really just then determines what  
9 it finds as the prevailing economic wisdom, which is  
10 really dangerous then when you have an unmoored  
11 Supreme Court.

12 MR. MOORE: Okay, Geoff.

13 MR. MANNE: I'm going to say if Maurice and  
14 Barry at all get their way it has to be Chevron  
15 because we are absolutely going to need checks on  
16 agency and executive discretion. But if you insist on  
17 an actual antitrust case, the easy answer, I guess,  
18 would be Philadelphia National Bank.

19 MR. MOORE: So now that we have roughly 100  
20 seconds left, I'm going to give you 100 seconds to  
21 criticize the FTC and no more than 100 seconds. So  
22 this magic wand allows you to change any decision made  
23 by the FTC over the last 20 years. This could include  
24 a case that was not pursued but should have been, a  
25 case that settled but should have been litigated, a

1 case that was pursued or should not have been, or  
2 something else.

3 And I'm encouraging you to focus on a  
4 decision made by the agency, not the effect of some  
5 decision like the moderator will consider something  
6 like the 11th Circuit should have decided Schering-  
7 Plough the other way, a copout.

8 So we'll go with Jon.

9 MR. NUECHTERLEIN: I'm going to -- so as the  
10 Commission's former lawyer, I'm going to take a hard  
11 pass on that one.

12 MR. SHAPIRO: My mother taught me when  
13 someone invites you over, you're gracious, so I will  
14 decline.

15 MR. MOORE: Okay.

16 MR. STUCKE: The FTC should have taken down  
17 Google.

18 MR. MOORE: Maurice.

19 MR. STUCKE: Yeah, I mean I think Google-  
20 DoubleClick, what I've heard throughout the day, would  
21 -- I mean, I don't necessarily fault the agency at  
22 that time, although I think you had some good dissent  
23 in that case, but I would think that and some of the  
24 other Google transactions certainly warrant a post-  
25 merger retrospective.

1 MR. MOORE: Geoff.

2 MR. MANNE: Libbey-Anchor Hocking and Whole  
3 Foods-Wild Oats. I think that -- and there are  
4 others, too, but those in particular were sort of  
5 pernicious in the extent to which they relied on  
6 channels of distribution to defined markets and wrote  
7 out any possibility of supply-side substitution.

8 MR. MOORE: So we have ten seconds left,  
9 which is not enough time for another question. I just  
10 want to say to all of you, it was a delight -- one of  
11 the highlights of my year so far -- to be moderating  
12 this panel, and I'd like to encourage everybody to  
13 give the panelists a big round of applause.

14 (Applause.)

15 MR. MOORE: So I'd like everybody on the  
16 panel to stay in their seats because we have closing  
17 remarks from our newest commissioner, Commissioner  
18 Christine Wilson.

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## 1 CLOSING REMARKS

2 COMMISSIONER WILSON: Good afternoon,  
3 everybody. It is great to be back here at my alma  
4 mater talking about one of my favorite topics --  
5 antitrust law -- and I'm going to sound like a geek  
6 when I say it, but talking about my two favorite  
7 subtopics of antitrust law -- the appropriate welfare  
8 standard and vertical mergers.

9 Because I want to get you home in time for  
10 dinner, I'm only going to talk about vertical mergers.  
11 I'll save consumer welfare for another day. So it is  
12 good to be back here on Steve Salop's stomping  
13 grounds. He was a professor of mine when I was here.  
14 I think I took every single class that he offered, and  
15 I was his research assistant.

16 So as he will be able to attest, I've been  
17 thinking about vertical mergers for many years. While  
18 I was his research assistant, one of my first jobs was  
19 to do research in conjunction with his draft paper on  
20 vertical mergers. And that draft paper eventually  
21 became the article that he and Michael Riordon  
22 published in the Antitrust Law Journal.

23 So with the benefit of both that research  
24 and subsequent developments in the law and in policy,  
25 I'd like to discuss three core points on which I



1 believe there is broad agreement. First, sound  
2 vertical merger policy requires a firm economic  
3 foundation. The legality of a transaction depends on  
4 its likely economic effects. Forecasting those  
5 effects, in turn, requires a clear understanding of  
6 the underlying economic principles.

7           So stepping back, vertical mergers, as we've  
8 heard today, bring together firms at different levels  
9 of production, whereas horizontal mergers bring  
10 together firms that compete at the same level. So  
11 horizontal mergers combine substitutes like two brands  
12 of soft drinks; and vertical mergers involve  
13 complements such as soft drink manufacturers like Coke  
14 and Pepsi and the downstream firms that bottle and  
15 distribute their products.

16           So for many years, economists disputed  
17 whether and to what extent vertical restraints and  
18 vertical mergers raised competitive concerns. George  
19 Hay once said that vertical mergers are the area of  
20 greatest disagreement among lawyers and economists.  
21 And another one of my mentors, University of Florida  
22 Professor Roger Blair, made an even stronger  
23 assertion. In his 1983 book on vertical integration,  
24 Blair said that vertical mergers are an intellectual  
25 battle ground akin to the Mekong Delta. And if you

1 watched a couple of the early panels today, you might  
2 understand what he meant.

3           So the battle on vertical mergers was slowly  
4 won by those who believe vertical mergers were less  
5 likely to raise competitive concerns in horizontal  
6 mergers. Writing in the 1950s, when the law treated  
7 vertical and horizontal arrangements in a similar  
8 fashion, Bob Bork wrote that a comparison of the law  
9 and the economics of vertical integration makes clear  
10 that the two bear little resemblance. Of course, that  
11 was long before GTE-Sylvania, let alone Leegin. And  
12 by 1991, Judge Doug Ginsburg was describing the rule  
13 for vertical restraints as one of de facto legality, a  
14 characterization that my friend, Professor Danny  
15 Sokol, echoed after the Supreme Court decided Legion.

16           But in his article in the Antitrust Law  
17 Journal, Steve Salop identified several potential  
18 harms flowing from vertical mergers. And if you were  
19 here this morning, you heard his thoughts on the  
20 circumstances under which vertical mergers could give  
21 rise to anticompetitive effects. That said, a number  
22 of other panelists today took issue both with the  
23 scenarios that Steve outlined and with our ability to  
24 apply those theories in a rigorous and systematic way.

25           Many of the panelists seemed to say that

1 vertical mergers are less likely to raise competitive  
2 concerns than horizontal mergers, and this sentiment  
3 echoes the 2007 joint submission to the OECD  
4 Competition Committee in which both DOJ and the FTC  
5 said, Vertical mergers merit a stronger presumption of  
6 being efficient than do horizontal mergers and should  
7 be allowed to proceed except in those few cases where  
8 convincing, fact-based evidence relating to the  
9 specific circumstances of the vertical merger  
10 indicates likely competitive harm. And they drew on  
11 this conclusion largely because as Bruce Hoffman  
12 explained earlier this year, a vertical merger both  
13 reduces or eliminates transaction costs and can  
14 eliminate the double marginalization problem.

15 So we're left with two important empirical  
16 questions. First, are vertical mergers more likely to  
17 generate efficiencies that on balance fully offset  
18 anticompetitive harm; and, second, are those  
19 efficiencies merger-specific. Ultimately, the answer  
20 to these two questions will determine whether the  
21 agencies should continue to believe that vertical  
22 mergers are less likely than horizontal ones to raise  
23 competitive concerns.

24 Here's the good news. An economist friend  
25 of mine once quipped that the benefit of an empirical

1 question is that the answer is knowable. So that's  
2 precisely why the Commission historically has  
3 conducted merger retrospectives and under Chairman  
4 Simons will continue this important work.

5 On to my second point. Although a sound  
6 economic foundation is necessary, the facts are often  
7 determinative, or as that joint OECD submission put  
8 it, our analysis in each case necessarily depends upon  
9 the specific circumstances of each vertical merger.

10 Two vertical merger cases from my last tour  
11 of duty at the Commission illustrate this point  
12 neatly. So let me take you back to 2002. Salt Lake  
13 City hosted the Winter Olympics. Star Wars II was in  
14 movie theaters, and I was Chief of Staff to Chairman  
15 Tim Muris. That summer, the Commission decided two  
16 vertical merger cases. In the first one, Cytoc sought  
17 to acquire Digene. Both companies made products that  
18 screened for a particular type of cancer but their  
19 products were complements. There was also some  
20 evidence that products might in the future become  
21 substitutes. These facts led the FTC to vote five-  
22 zero to challenge the merger.

23 In its challenge, the Commission argued the  
24 combined firm would have the ability and the incentive  
25 to foreclose both an existing competitor and new

1 entrants, and the parties ultimately abandoned the  
2 deal. But at the same time, the Commission cleared a  
3 second vertical merger without a remedy. This was the  
4 proposed merger of Synopsis and Avant. The products  
5 here were complements, in this case, used at different  
6 stages of the process to design computer chips.

7           And after a thorough investigation, then  
8 Bureau Director Simons concluded, at bottom, there  
9 just wasn't enough evidence that Synopsis would have  
10 either the incentive or the ability to foreclose  
11 competitive products sufficiently to harm consumers.  
12 And customers were also supportive of the deal,  
13 believing it would allow the merged company to more  
14 efficiently design next-generation computer chips.

15           So in short, the FTC had two simultaneous  
16 vertical mergers that it was evaluating. It was being  
17 decided by the same bureau director and the same  
18 commissioners, and it posed the same legal and  
19 economic questions. But the facts of those two cases  
20 differed materially and, thus, the outcomes were  
21 different. And, so, as I said, facts matter.

22           And my third point. If the economic theory  
23 and the facts suggest that a remedy is necessary,  
24 obviously we must ensure the remedy we seek is  
25 appropriate. Enforcers seek to preserve the

1 competition otherwise lost as a result of the merger  
2 while permitting the parties to achieve the  
3 efficiencies of vertical integration. Historically,  
4 the agencies have done so by imposing firewalls,  
5 nondiscrimination obligations, and transparency  
6 provisions.

7 For example, the Commission imposed a  
8 firewall in the two vertical mergers involving  
9 carbonated soft drink manufacturers and their  
10 bottlers. And the Commission continues to take that  
11 approach today, most recently when it imposed two of  
12 those remedies -- a firewall and a nondiscrimination  
13 provision -- as a condition of allowing Northrop  
14 Grumman to acquire the upstream firm Orbital ATK.

15 But in recent years, there's been some  
16 discussion about whether the agencies should consider  
17 remedies beyond those that I just mentioned. Some  
18 like the Antitrust Division under Christine Varney  
19 have advocated for a broader set of behavioral  
20 remedies. Others, like the Antitrust Divisions under  
21 Makan Delrahim, expressed a preference for structural  
22 relief in vertical mergers. And that discussion  
23 continues today.

24 Last month, Makan Delrahim announced the  
25 withdrawal of the 2011 edition of the Division's Guide

1 to Merger Remedies in favor of the 2004 edition. And  
2 just two days ago, he announced his intention to issue  
3 new vertical merger guidelines. In the second panel  
4 today, several participants agreed that updated agency  
5 guidance would be useful and that the topic of  
6 remedies should be included. At both agencies, the  
7 choice of remedy necessarily depends upon the  
8 assessment of a merger's likely effects, which is an  
9 empirical question.

10 As I mentioned a moment ago, the Commission  
11 believes that these questions are best answered with  
12 strong empirical work. The Commission has already  
13 released two studies examining the efficacy of its  
14 merger remedies, and I hope that this work continues.  
15 The information we glean from this kind of analysis  
16 will help us refine our approach to crafting vertical  
17 merger remedies and calibrate our overall enforcement  
18 efforts.

19 So to conclude so I can get you home in time  
20 for dinner, today's panels continue a longstanding  
21 debate, and while there's plenty of scope for  
22 disagreement, there's also broad agreement on three  
23 points. First, sound policy requires a firm economic  
24 foundation. Second, the facts of each case matter a  
25 great deal. And, third, if a remedy is necessary, we,

1 as enforcers, must think hard which remedy is best  
2 positioned to preserve the competition that would  
3 otherwise be eliminated by the proposed transaction.

4 So in closing, I would like to thank all of  
5 the panelists and particularly Steve Salop, who I  
6 don't see at the moment, for their participation in  
7 today's sessions. The participation of all of the  
8 panelists in the sessions that we've already had and  
9 today's sessions and in the sessions to come will be  
10 incredibly valuable as the FTC continues grappling  
11 with these important issues. Thanks.

12 (Applause.)

13 (Hearing adjourned at 5:44 p.m.)

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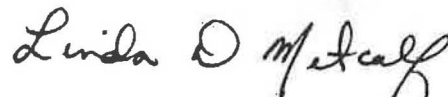
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