consumer protection and in some ways a competition question. But I will turn it over to David first.

MR. VALDECK: I think the answer is yes. The Commission has struggled with what is a reasonable consumer and what percentage of consumers must be deceived by a message. But the mission of the Commission is to prevent deception in the marketplace. Tim and I may disagree at the margins about this, but I agree with Tim's fundamental point that the core mission of the agency is to protect against fraud.

The statute does not really use the word "fraud;" it uses "deception." In my view, that has always been the core mission of the agency. The first cases the agency brought were consumer deception cases. They were the sale of silk, which was really cotton and it was sold C-I-L-K. Those were literally the first enforcement cases the Commission brought. So, historically, that has been at the center of the agency's mission.

MS. HUTNIK: I would also just add to that we have to reconcile what is a reasonable consumer and the gullible consumer standards. And one of the other parts of the FTC's mission is consumer education. And, particularly, as we go through the emerging marketplaces and people are learning even about those

marketplaces, consumer education plays a key role in that, so that we do not dilute the reasonable person standard.

MR. MURIS: I agree with both of those points. Let me take the economic modeling part of that. It is almost 60 years since Ronald Coase's famous article, and the applications of that are all about transaction costs. Shortly thereafter, George Stigler won his Nobel Prize in significant part for discussing that advertising was an extremely powerful tool for the elimination of ignorance. Well, obviously, if there is ignorance, we are talking about a world with transaction costs and that is the world in which you need an FTC enforcement, as I was talking about.

And so the whole -- this straw man that you hear -- in the popular press that, you know, economists talk about these, you know, automatons who only react -- consumers with perfect knowledge who only react to price, that just has not been true in any sensible economic application to what the FTC does for decades.

MR. SAYYED: Okay, well, thank you. Let me follow up on a point David made as well about a Bureau of Technology in the FTC. I am going to depart a

little bit from the question, but ask, you know, first, what do the other panelists think about that? Is it something that is relevant on both the antitrust side of the house as well as the consumer protection side of the house? And what might it look like?

I raise that -- maybe it is a little unfair because I did not raise it earlier. But David was a bureau director; Tim, as well as being Chairman, was a bureau director. How do you set up these things for success really? That is maybe my question.

MR. VALDECK: I defer to someone who was a Chairman. I think that would be the Chairman's mission not -- I mean, I think it would be important to retain some of the technology infrastructure in the bureaus. I mean, much of what the Bureau of Consumer Protection uses technologists for are forensics for investigations. But there is a lot of value to having access to skilled technicians for the policy issues that the agency is going to have to confront moving forward. Biometric identification, things like that, these are difficult technical questions.

MR. MURIS: Look, the bureaus are complementary. They are not substitutes. As the only person ever to head both of them, they are significantly different, they are different in their

personalities, they are different in their career paths. They are, in many ways, autonomous.

It is important -- let me give you an anecdote. I wanted the Bureau of Consumer Protection to do more in working with criminal authorities. And I, unfortunately, insulted them and told them that they were too self-satisfied. Those were not the words I used. And I regrouped and after about a year, they decided it was their idea. And they now have a very successful criminal liaison unit, which, of course, they take complete 100 percent credit for, which is fine with me. And it was a mistake on my part to criticize them in the first place.

But it is a wonderful organization. It reminds me of working in OMB in the old days where you have people who it is their career. It is not as transitory as the Bureau of Competition. But embedding in the bureau, like David says, would be a very sensible way to go.

MR. SAYYED: Anybody else?

Okay. I will answer one of the questions. There is a reference in that question to the Office of Technology Research and Investigation, what we call OTech, which does sit in BCP. The question is, why is this unit insufficient to get the job done now?

Without commenting too much on whether it is insufficient or what job they are focused on, it is a very small group and more resources would probably be appreciated by the Chair and by the Commissioners and even by the Bureau Directors.

So maybe I will end with a question that maybe I have. It is a real question given the difficulty of managing agencies. Do you think the FTC should have more resources to do its mission and maybe if you were to allocate the resources, how would you allocate them? So I have no particular -- I would like the private perspective as well as the -- the folks who have not been at the agency as well as folks who have been at the agency to maybe give some thoughts on that.

MR. RILL: I think a question like that to be addressed by me is like asking a Protestant minister of what he thought about the latest Papal encyclical.

(Laughter.)

MR. RILL: But when I was at the division, one of our major, major efforts was to enhance the workforce at the division, both from the standpoint of law and economics. And it was short-handed when I got there and we were able to build it up and I think

increase the efficacy of the agency with more resources.

It is difficult to get those kinds of resources with all the other budgetary demands. We ran into a number of problems, partly solved by the filing fee issue. But I think the agencies do need -- certainly, the division needed more resources at the time, sensibly used and sensibly coordinated. For the Commission, I leave it to the people who worked there.

MR. VALDECK: Tim?

MR. MURIS: Well, I have a long-running view about this. In '81, when we came in, we were asked to reduce resources. The way to think about it as FTE, we put the agency on a path from 1800 to 1200. That is where it was in the mid '80s.

When I came back in 2001, I asked for a comparison with the mid '80s, and Bob had had about 1,000. It turned out in professionals, 1,000 and 1,200 were about the same, a very small difference. What had happened, there was a lot of outsourcing and a lot of productivity improvements. Technology had had a significant effect.

I think the agency is up to 1,150, something like that.

MR. SAYYED: That is right, that is right.

MR. MURIS: And I do not know how that compares with 2001. I suspect there have been more productivity improvements, probably not as dramatic as in the '90s. But, you know, Bob did a hell of a job with 1,000.

I think we are headed for another retrenchment era. So I think it is probably wishful thinking to ask for significantly more resources and -- besides the people, there is -- BCP, for example, has a significant infrastructure burden that we managed to satisfy with the money from Do Not Call, which we used for building up the infrastructure for Do Not Call, which was very helpful for the rest of the agency.

But I think the present rate strikes me as significantly more. We ended up about 1060, and I thought we did a lot. I thought Bob did a lot. So I do not think more resources are in the cards. I think they are doing a lot with what they have.

MS. HUTNIK: This is not from an internal perspective, but I think it is all about the priorities. Where do you want to focus the resources that you have? Some of the themes from today were, we have Division of Enforcement and we need more manpower in terms of business guidance. And I think to not get

distracted by calls for regulation, which would take a whole bunch of people off of doing some of those things now, that may not be as productive.

MS. MCDAVID: Speaking only on the competition side, the lawyers and economists with whom I work regularly at the Commission are incredibly dedicated and hard-working. The general populous has a view of government employees that is deprecating and it is not fair. They do yeoman's work. They work weekends; they work nights.

A lot of the competition mission is consumed with things they cannot predict. What is the merger wait going to be, all of which are time-sensitive. So they have to at least retain the kinds of resources they have because you will burn them out.

MR. VALDECK: Yeah, I would argue for more resources. I understand Tim's argument, and I realize this is probably swimming against the tide. But since 2001 or 1981, Congress has added considerable workload to the agency. Changes in the marketplace have required the agency to do more work.

The Bureau of Consumer Protection, at its height when I was there -- and I do not think we have added any resources to it -- had fewer than 450 people, including most of the people in the regions.

People work extremely hard. They are incredibly dedicated. But there are lots of people with their fingers in the dykes and the water is just coming over the transom. So I would urge the Commission to think about asking for an increase in resources. Of course, most of it should go to BCP.

(Laughter.)

MR. VALDECK: But I think the agency could well use a couple hundred more FTEs.

MR. SAYYED: Okay. Well, I think we will conclude right there. We were on target for 11:45 and I think that is where we are.

Before we conclude, I would like to thank a bunch of people. First, I would like to thank the panelists, including Jason who had to leave, very much for devoting some time and effort to this.

I would like to thank my colleagues in the Office of Policy Planning, who have been working very hard on what will probably be about 20 days of sessions. This is only 5 percent of the way through once we are done today. Just a wonderful crew to work with. I am very proud to work with them. And I think I have the best job at the Commission.

(Laughter.)

MR. SAYYED: And, finally, thank also the

staff of the executive director for helping put this thing together. You will see more of it this afternoon. I will not be on stage and I wanted to put that out there.

Thank everybody for showing up and paying attention. We will be back here at 1:30. So if you can come here slightly before, that would be great.

There is a cafeteria across the courtyard if people want to eat law school food. But, but, but, but, but, but it is good. It is better than I remember. So hope to see you back here slightly before 1:30.

(Applause.)

(Panel 1 concluded.)

PANEL 2: HAS THE US ECONOMY BECOME MORE CONCENTRATED AND LESS COMPETITIVE: A REVIEW OF THE DATA

MR. SAYYED: Okay. I am just going to say welcome back and remind people in the audience or new people that that two of my colleagues, maybe more, are collecting questions that you make right on the question card, and they will be brought to the panel near the end of the panel for some audience Q&A.

So with that, I am going to turn this over to Greg Werden from the Antitrust Division. He is going to discuss with the panel whether the U.S. economy has become more concentrated and less competitive.

MR. WERDEN: Thank you. I am not a fan of introductions, so I will not introduce the speakers. They can introduce themselves if they want to spend their time that way. They have total control over their time.

The way we are going to organize this is Jon is going to give a long side presentation, and then each of our panelists will give much shorter presentations, and they will go to a series of questions that I pose and then, finally, questions from the audience.

So, Jon?

DR. BAKER: Thank you. Thank you for having me. It is nice to see all of my co-panelists. Thank you, Bilal, and the FTC for inviting me. I was involved in the hearings in 1995, and I am delighted to be back for these today.

So the FTC hearings two decades ago, that I just referred to, were spurred by two challenges for antitrust policy. Markets were becoming increasingly global and innovation competition was becoming increasingly important. And, today, we have an additional challenge for antitrust policy. Economic evidence has been accumulating since the 1995 hearings, and much of it from the past five years or so, that shows that market power has been growing for decades. I think of what we are seeing as today's antitrust paradox, conjunction of substantial and widening market power with well established and extensive antitrust institutions.

In my presentation, I will sketch the evidence that market power has been growing over the past quarter century and has become substantial in the United States. I am going to go through nine reasons. None of them is individually decisive. There are ways to question or push back on each, but their weaknesses are different. So when you take them collectively,

they paint a compelling picture of growing market power.

I am also going to explain why the recent economic trends I point to reflect growing market power, not solely increased scale economies and temporary rents to early adopters of new technologies in competitive markets.

To fit my presentation into the allotted time, I will say less about most of the reasons that will appear on the slides. And the very last slide will reference my forthcoming book, the first chapter of which goes into more detail on this topic, including full cites for the research that is referenced on the slides. It will also mention criticisms of the research that I do not have time to bring up in the presentation, although I would be happy to talk about them during our discussion later.

Before I get into the nine reasons, I want to make clear what I mean when I use the term “market power.” Firms exercise market power in their output markets as sellers by raising prices or by altering other terms of trade adversely to buyers, relative to what would prevail in a competitive market.

Market power is not just about prices. It can be exercised on other competitive dimensions, too.

Market power can be exercised in input markets, exercised by buyers, and that is defined analogously.

The first of the nine reasons to think that market power has been growing is that we insufficiently deter anticompetitive coordinated conduct. The Justice Department keeps uncovering cartels year after year. They seem to form at the same rate that we catch them, and that suggests under-deterrence because the penalties are probably too low to deter collusion and there is no reason to think that the threat of penalties chills procompetitive conduct or leads to excessive compliance expenditures. Under-deterred express cartels are probably the tip of an iceberg because tacit collusion is probably even harder to deter.

We also insufficiently deter anticompetitive mergers, and there are several empirical studies that support this conclusion.

The third reason is insufficient deterrence of anticompetitive exclusion. Since the late 1970s, the courts have targeted rules governing exclusionary conduct for extensive relaxation. And in some cases, the new rules conferred de facto legality on such conduct.

The empirical evidence that exclusion is

under-deterred is about the competitive effects of vertical practices. Now, vertical conduct and exclusionary conduct are not the same thing, but they are correlated and the evidence shows that vertical restraints often support collusion. There are a number of examples of competitive harm from vertical restraints and vertical integration.

Now, that interpretation of the literature on vertical conduct may surprise some of you. So I want to make an important methodological point. Most empirical studies about the effects of vertical restraints are looking in the wrong place to learn about whether stronger antitrust enforcement would be beneficial. If you want to know whether oligopolists can use vertical restraints to harm competition, you will not learn much by looking at markets with competitive structures or in markets where the firms could be deterred from anticompetitive conduct with a threat of antitrust enforcement.

Looking in those kind of markets lets you learn about potential procompetitive consequences and about ways that firms can craft their vertical arrangements to limit the inefficiencies and costs that they may impose.

Now, you might see some instances in which

vertical restraints harm competition, but the markets are not randomly selected. You would expect, in general, the studies would not often find harm to competition, even if the conduct could be harmful in other settings that are not being studied where one might want to think about antitrust enforcement.

And you are not going to learn much about whether relaxing antitrust constraints has or would lead to greater competitive harm. If you want to identify the effects of antitrust enforcement in the econometric sense, you have to compare outcomes with and without antitrust complaints.

And there is a MacKay & Smith study that is in the small print on the slide about resale price maintenance. That is a rare example of a study of vertical restraints that addresses this identification problem. It finds that on the whole, competition was harmed when the antitrust constraints on resale price maintenance were relaxed.

Fourth, market power is durable. Markets are not invariably self-correcting. Cartels and monopolies often last a long time. The eight-year lower bound on the length of the average cartel compares favorably with the time it takes to correct erroneous judicial precedents, even Supreme Court

decisions, you know, through later court decisions that overrule them or narrow them procedurally or substantively or through lower court decisions that distinguish or limit them or through legislative abrogation.

Fifth, the increased equity ownership of rival firms by diversified financial investors is another reason to worry about growing market power. Rival airlines or banks or pharmacy chains or other competing firms increasingly have overlapping ownership by financial firms, like Blackrock, State Street, Fidelity and Vanguard. The initial studies have found that common ownership leads to higher prices. This is an active research area where we are likely to learn more soon.

Sixth, increased governmental restraints on competition. Over the past few decades, the U.S. has broadened patent scopes substantially and granted too many patents after inadequate review. This trend may have halted, but it has not really been reversed. And other examples of governmental restraints that may be on the rise include occupational licensing and lobbying to limit rivalry.

The seventh is the rise of dominant information technology platforms. Now, the empirical

evidence suggests that price-cost margins have been growing economy-wide since 1990, in the United States. The trend seems clear, although the magnitude of the margin increases has not been measured. Growing price-cost margins are probably tied to investments in information technology. Dominant information technology and internet platforms are not the only firms making those investments or likely exercising some market power as a result. But the platforms are an important part of the story because they are likely insulated from competition in some of their major markets.

So eighth, oligopolies are common and concentration is increasing in many industries. The best evidence that increasing concentration allows firms to exercise more market power comes from studies of particular industries, like airlines, brewing, and hospitals. The economy-wide evidence on concentration suggests only modest increases in concentration and many industries with rising concentration remain unconcentrated.

But the economy-wide evidence is less reliable than industry-specific studies. That is because the economy-wide studies often use broad product markets when it would be better to look for

competitive products in more narrow markets, and they often use national markets when it would be better to look at regional or local markets.

Now, some of the evidence involving broad national aggregates is consistent with rising overall concentration but could instead reflect increased multi-market contact. But that could equally raise competitive concerns about coordination. And there are recent studies that also find concentration is high and possibly growing in many labor markets, potentially making it more possible for businesses to express monopsony power to depress wages.

The final reason to think that market power has been increasing is a decline is economic dynamism. And Jason Furman highlighted this reason this morning. Growing market power is a leading explanation or a plausible contributing explanation for a range of economic trends: a secular slowdown in business investment; rising profits of a share of U.S. GDP; a slowed rate at which firms expand when they become more productive; a declining rate of startups; a shift in growth and productivity gains from entrants to incumbents; and a growing gap in accounting profitability between the most and the least profitable firms.

So I have interpreted the evidence in these nine categories that I highlighted as indicating growing market power. I want to explain now why I think that is a better interpretation than the most plausible alternative, namely increased scale economies and temporary returns to the first firms to adopt new information technologies in competitive markets.

Now, the benign alternative has an initial plausibility because the efficient size of firms has likely grown overtime in many industries as a result of the high fixed costs of investments in information technology, network effects, and an increased scope of geographic markets. That means firms could grow larger and concentration could rise and price-cost margins could increase even if markets are competitive. In addition, the first firms to invest in new information technologies might earn substantial rents, which should be temporary if those investments do not confer market powers and their rivals follow suit with investments of their own.

The first six reasons I gave for thinking market power is substantial and widening in the U.S. cannot be reconciled with the benign alternative. Anticompetitive coordination, mergers and exclusion

are under-deterred, market power is durable, and increased equity ownership of rivals by financial investors can soften competition, and governmental restraints on competition have grown.

Also, market power is a better interpretation than the benign alternative for the other three reasons. The growth of dominant platforms probably does owe a lot to scale economies and first mover advantages, but those platforms may still have the ability to exercise market power by excluding rivals. Scale economy and rents to early adopters of new technologies probably did contribute to rising concentration in various industries. But there is often independent evidence that the firms in those concentrated markets exercise market power, which is not surprising because the same fixed expenditures that make scale economies and rents to first movers possible can deter entry and soften competition.

Now, some of the evidence for the loss of economic dynamism could be consistent with the benign alternative of growing scale economies and returns to early adoption of new technologies in competitive markets, as well as consistent with increasing market power. And that might include the rising profit share of GDP and the growing gap in accounting profitability

between the most and the least profitable firms.

But other aspects of declining dynamism cannot be reconciled with the benign alternative. The benign interpretation assumes that profits rise because markets are increasingly dynamic with higher rates of entry, investment, and business failure. In competitive markets, growing scale economies yield higher profits because entrants have a greater risk of failure when fewer firms can succeed. Earlier adopters of new technologies would earn profits, but they would be temporary, competed away by new or expanding rivals making their own investments.

But the benign interpretation is inconsistent with the evidence showing the reverse, a slowing rate of new entry, a declining rate of expansion when firms and plants grow more productive, and a secular slowdown in business investment. And in addition, the financial markets appear to view corporate profit streams as less risky than in the past and, yet, if markets are increasingly dynamic, as the benign alternative supposes, those streams would be viewed as riskier.

The bottom line is that growing market power is a better explanation for declining dynamism and for all nine reasons taken as a whole than the alternative

of increasing scale economics and early adopter rents in competitive markets. The benign alternative may well be a partial explanation, but increasing market power is likely an important part of the story, too.

Now, I do not need to spend much time with this audience explaining what is wrong with market power. The harms within markets are described on the slide from a partial equilibrium perspective, you know, within am industry, within a market. The harms, they can arise regardless of whether market power is exercised by sellers or buyers. Market power can also harm the economy as a whole by slowing economic growth and increasing in equality. And the adverse economic consequences of the exercise of market power could be reinforced if firms and industries can use their market power to secure political power and use their political power to protect or extend their economic advantages.

So just to summarize, the evidence I presented shows that market power has been growing in the U.S. economy for decades. From an error cost point of view, we have learned that we are deterring anticompetitive conduct less than we thought we were in 1995 when the FTC last held hearings. That means we should take steps now to strengthen our antitrust

rules, institutions, and enforcement.

And, Greg, I think I will reserve the remainder of my time for rebuttal.

MR. WERDEN: Sorry, you have to check in with the clerk before you start talking.

DR. BAKER: It's a tough court here.

MR. WERDEN: If you have ever argued at the Court of Appeals, that is the rule.

(Laughter.)

MR. WERDEN: Okay, go ahead, Steve.

MR. BERRY: Okay. I want to give a talk, only about six minutes, that I think is complementary to what Jonathan is talking about, and I want to talk about what kind of evidence we should weigh more or less as we are looking at this debate. And in particular, I think that Jonathan's mix of evidence was quite different than the evidence you often see in presentations in the press by macroeconomists and by other nonspecialists. I wanted to indicate what some of those distinctions are so that we can think about what evidence is the most convincing and also what kind of things we would like to look forward to in the future.

So I am going to divide things a little bit starkly into good and bad. And to talk about the

relative bad, I want to go all the way back to the year 1989. In the year 1989, there were two, I think, magisterial chapters that were published in the handbook of IO, one by Dick Schmalensee and one by Tim Bresnahan. And Dick Schmalensee was a participant in and a sympathetic observer of decades' worth of work that did something like what people are doing today, which is try to look at the correlation of various outcomes, like prices and markups, with measures of concentration, like the Herfindahl Index.

And his chapter laid out a whole host of problems with that, but I want to emphasize particularly one. The Herfindahl Index in particular is probably better thought of as the cause of market competition, an interesting summary statistic of what is going on rather than as an effect that causes outcomes. The Herfindahl Index, itself, is a function of market shares, which are a function of outputs, which are co-determined simultaneously with price.

The most famous example that people used in those days is that differences in firm heterogeneity, cost heterogeneity where you had some firms with very low prices; those low marginal costs would feed into their market shares; their market shares feed into the Herfindahl Index. But their low marginal costs also

flow into markups and you would see a positive correlation between markups and concentration that has to do with efficiency rather than with competition.

That is the problem of simultaneity, the problem that, in this case, correlation is not causation, and we should be very skeptical, I think, of these studies that in some ways naively regress an outcome on a Herfindahl Index.

Now, some people in this literature, I think, are actually quite aware of this and they think of this as a problem with the Herfindahl Index itself, is correlated with other things, is endogenous. They look for purely statistical ways of dealing with that endogeneity. They look for what's called an instrumental variable or just a more plausible exogenous variation of market structure.

And that brings me to the second of those great handbook chapters written by Tim Bresnahan. And what he pointed out is that even if we grant that you have discovered the true causal effect, say, of the number of firms on price, you have not established anything about the role of markups either on the output side or on the input side.

Let me just give you one example of that. I teach freshmen micro, and on the third day, we teach

them that supply slopes up and there are a bunch of shifters. Among them are the number of firms that shift supply back and forth. That is because of the upward sloping marginal cost curves of the individual firms. Demand slopes down. As you move the number of firms, the supply curve moves against that demand curve and it shows that as the number of firms goes up, supply shifts out, prices fall.

In the perfectly competitive output market, decrease in concentration drops prices. But there are no markups. You have not found evidence of markups. You may have found evidence of increasing marginal costs.

The same thing happens on the input side. It is an implication of the perfectly competitive model of wage determination that an increase in the number of firms will drive wages up. That is not evidence of monopsony power. What Bresnahan said is that we actually have to separately consider demand and cost and competition and we cannot do that in one equation or one correlation.

I think that kind of evidence with -- by the way, did not feature greatly in Jonathan's discussion -- should be downweighted a lot, right? We thought it died with the publication of these two chapters 25

years ago. Some of us woke up and were a little startled to see it suddenly outside of our window looking in, and that is trouble.

I want to talk for just two minutes about possible alternatives. One is just to look directly at the effects of policy that have changed and what effect did they have. We can learn about policy that way.

Let me skip a couple of slides, though. Another thing, though, is to back away for one minute, to back away for one minute from causation and just think about measurement. What has happened to markups? We heard about these papers just a minute ago. I think they do show that regardless of cause, our best evidence is that markups are going up. It is sensitive to measurement, like whether you include certain intangibles and fixed costs in that or not. But that kind of simple, descriptive, cross-industry measurement is very valuable for telling us what has happened, but not why. Not why.

So I think, ultimately, we are going to have to do what Jonathan suggested. We are going to have to do studies of individual important industries and ask what is going on. So here is an example a graduate student of mine did as part of his thesis.

He looked at the wholesale sector. That is pretty important. That is a pretty important sector, right?

And what does he find? Concentration is up. Ah-ha, concentration is up. On the other hand, output is up. That does not sound like monopolization, does it? Output is up. The product itself has changed. Multi-warehouse wholesalers are locating closer to their customers. They are investing in IT for logistics. They are dual-sourcing goods. You can shop between China and the United States with one stop at a wholesaler. The nature of the good is changing.

And when you put this through a Bresnahan-like series of models, you see that markups are going up in the industry, just like in the cross-industry analysis, but for a mix of all of the reasons that Jonathan mentioned, not for one or the other, but for all of them. Product quality is going up. That is pushing price up. That pushes margin up.

The marginal cost is going down as firms get better logistics and locate closer to their customers. Marginal cost is falling. That is efficiency. But markups go up. Competition is really going down and that also contributes to the markup effect.

Why don’t we see the entry that Jonathan talked about? Implicitly, there must be fixed costs

or some costs that are preventing new entrants from somehow competing away these profits. It is costly to build all of those plants near your rivals and that is a sunk cost and it is very hard for that to be competed away. This is a complicated story.

And what I want to finish with is a substantive hypothesis. What if this is true in broader sections of the economy? What if it is happening in broader sections, not just wholesale, maybe IT, maybe other parts of retail, maybe broad sectors of the economy, that firms for endogenous reasons are changing their production methods and the quality of products so that marginal cost is falling and fixed cost is rising? Markups are going up. Concentration is going up.

If that is happening in a broad-scale way, it does not seem just that big is bad, but we are way also -- we are way far from the theory of perfect competition as well. We are in this very complex setting where there are some good and bad things happening. Like Jonathan, it is not just economies of scale. There are other things, too. There are competitive effects, as well. We cannot just wave our hands and say it is all fine.

I also do not think we can just simply say

big is bad. I think it is these better kinds of evidence, these descriptive studies at the broad level and causal studies that are within industry level that we ought to emphasize. And I think they are the ones that are going to eventually tell us what the correct policy path forward is. And these guys are better policy experts than I am, so I am mostly going to listen for the rest of the time.

MR. WERDEN: Thanks very much, Steve.

(Applause.)

MR. WERDEN: I am not sure who is going next, but why don't you do it.

MR. WRIGHT: Okay. There are a few of my students in the audience who are laughing at the idea that I am going to do anything in six minutes. But let's give it a shot nonetheless.

I think sort of extending the discussion from Jon and Steve to move on, I would probably start in the same place as Steve, which is I went to grad school in economics and studied IO in the early 2000s, and those handbook chapters were sort of taken as the starting point for learning empirical IOs. We did not read studies that attempted to infer causation from changes to HHI on -- the effect on the price, we read Steve's stuff.

I think the fundamental challenge in this area -- and then I will dive into the data -- is that while it is probably true that zombie IO economics has died in economics departments a long time ago, I think the fundamental challenge in part is making sure we do not get antitrust policy that adopts zombie IO. I think that is a challenge for the agencies; I think it is a challenge for IO economists because the punch line for some of this is going to be on the real questions that matter for designing policy.

My interpretation of the evidence is that we know a lot less and probably need to know a lot more before we start playing much with policy. So I will spend the rest of my time talking about that.

For starters, I think it is important to separate -- we are going to talk about testable hypotheses and testing with empirical data. I think it is really important for these discussions, especially if we are going to attach any policy relevance to them, to separate claims.

One of the claims around is that we have got a rise in concentration at the aggregate, sort of nonmarket level, sort of really aggregated industry sector, stuff made with metal not necessarily just capturing firms that are competing against each

other.

There is a second set of claims that try to do the relationship between what is happening in markets, changes in concentration in markets, and relate those to price or output or markets. Are we getting more or less competition?

And I think there is a third set of claims that is, is any of this caused by lax antitrust enforcement? I will spend most of my time talking about why it is so important for a discussion of antitrust policy that we focus on markets and not sort of broad aggregated sectors. That does not mean that the sector-based research is not incredibly useful. It is. We learn things like, at a rough level, what is happening to markups over time? That is interesting as a descriptive matter.

We do not -- and, often, these studies are used to sort of glom on causation and make claims about whether antitrust is doing too much or too little. The reason that we care fundamentally about markets and not sectors in antitrust is because the fundamental lesson of those IO handbook chapters, and I think most of modern IO in this area is that competition and concentration are different things.

Concentration can be caused by more

competition, it can be caused by less competition. I think Steve had this as the Chicago critique on his slides. I am a UCLA guy. I am going to call it the Demsetz critique or else I will lose my Bruin lunch card.

So but the fundamental idea that we grapple with and what makes antitrust hard is that changes in concentration can be the outcome of more or less competition. That makes identification difficult. It makes broad claims about whether we have too much or too little or sort of Goldilocks just right levels of concentration really difficult to do and probably outside the scope of the ability of modern IO. That really was the lesson of sort of the big empirical revolution of OI in the '70s and '80s.

So the punch line for me is I think a lot of the evidence that we see are attempts to do sort of this broad industry sector stuff where we do exactly what we learned not to do in the '70s. We regressed markups or price or profit on really broad aggregated industry data. And then the policy world sort of jumps on and makes causal claims and sort of we are off and running. I think that is a dangerous place to be in.

There are attempts to do better work. There

are attempts to do sort of more sophisticated merger retrospectives and trade off sort of broad general insights for learning about one case and maybe, I think, in discussion, we will talk a little bit more about that.

But my read of the evidence is at the aggregated -- sort of relationship between aggregated concentration and competition outputs, we do not know much that is relevant to formation of antitrust policy. I think there are interesting questions. I think it is important for modern sort of IO economists and for the agencies, for the FTC and the DOJ, who have great collections of IO economists inside those buildings, to engage in answering those questions.

I would say it is great that we all get up here and engage in those questions. But I am hopeful that the economists inside the agency, who are experts and have access to data, things like agency predictions and individual cases that they can test against data, that they are also an active participant in that discussion.

So I think the real challenge moving forward is if you have data that is not what you need to have the type of discussion that you want to have about whether it is desirable to move policy one way or

another, whether it is mergers or something else, the challenge I think both for the academy and for the agencies is to invest in producing those data, producing tools, producing studies to move the ball forward in that literature, because I certainly agree there are interesting questions here that require investment and are sort of worth the time. I will stop there.

MR. WERDEN: Thank you.

Fiona?

MS. SCOTT-MORTON: Great. Hello, everybody, and thanks to the FTC very much for being invited to contribute to this panel.

I agree with both Jon and Steve on the IO research here. It seems very easy to run the wrong regression. To someone without a PhD, it looks tempting. We need to resist that temptation because it is, in fact, just wrong.

But we need to find another way to answer the question. That is not an excuse for not answering the question. And as Josh said, concentration and competition are not the same thing. It is not actually, I think, very informative to learn about aggregate concentration in the United States. I would like to know about competition in the United States.

And I think, as Steve said, the markups are a good way to get there.

I think the real reason that there is consensus among a large fraction of the people who do this work for a living and people who read the newspaper, that we have a competition problem in the United States, comes not from papers published in academic journals, but from two main sources.

One is from people who work in this area, the actual experience of litigating. So it took 23 years from the time the FTC first found a pay-for-delay agreement in the record to getting the Supreme Court to say, yes, under certain conditions, those could be anticompetitive. Twenty-three years. And a pay-for-delay is when a branded monopolist pays the generic to stay out of its market. That is pretty straightforward. It is exclusionary conduct. It harms consumers. It keeps prices very high. Why did we have to wait a quarter of a century to get that practice banned, or never mind banned, actually, to get that practice scrutinized properly?

The American Express opinion by the Supreme Court completely misses the locus of competition between American Express and Discover. It is all about American Express' consumers versus the retailers

and so on, and gives a complete miss to the issue of competition, which is what the antitrust laws are supposed to protect.

So when you look at litigation and you look at what the agencies are trying to prove in the courts, it is a really heavy lift. And as Bill Baer said when he was at the DOJ, why are some of the mergers we are reviewing even getting out of the boardroom. They are just obviously anticompetitive and, yet, we have to litigate them anyway. So I think that is one big area that we look to for evidence as to why there are anticompetitive effects.

A second one is our experience as consumers. Look around at hospitals, airlines, beer, media, big tech. I think people in the economy walk around buying things and the experience they have is of less competition. And I think also consumers can get easily confused between what is regulated and what is not. So, for instance, pharmaceutical prices and cable prices are not fundamentally something that antitrust can do a lot about and, yet, those things are exhibiting less competition. Also, for the reason that Jonathan covered in his talk about lobbying to get government protection.

So what is my response to this merging

consensus? We need to revisit the economics. And I will say this slowly because it is worth saying 25 times and I do not have that long. So I will say it once slowly. Economic analysis is not the same thing as less enforcement. Chairman Simons said it exactly right this morning. Economics is a tool. If you feed a set of facts into the economic analysis box, you can come out this merger is competitive or this merger is anticompetitive. It works beautifully.

But what happened in 1975 is we applied economics to antitrust and we got the pendulum swinging down. But arguably we had too much disorganized enforcement. The pendulum swung down and now we have these things as sacred texts and the answer is always if you believe in the sacred texts of Chicago to enforce less. Obviously, if you enforce less for 30 or 40 years in a row, you are eventually going to pass the optimum. And that is what we have done, I think.

And we need to recognize -- I luckily was too young to be part of that project and so it is perhaps easier for me to see that we well overshot the optimum and that we need to go back and look at the economics fresh and try to get the right answer. Let me remind you all there is a big drumbeat of dollars

in favor of keeping those sacred texts because the parties that have monopoly profit would like to keep the monopoly profit and they will spend their monopoly profit to fund people who say that less enforcement is always better.

So it is going to be difficult to achieve progress in this area because the parties that have financially gained from less competition are going to work hard to keep their status. So I just want to alert all of you in the media and the enforcement community to be battling courageously for the consumer.

But I think that the bottom line is that we have the tools and we have the ability to get the right answer, and we should use them and we should not be trapped in paradigms from 30 years ago because those are really outdated to the extent that they were even correct 30 years ago, which I would not stipulate to.

All right, that is all.

MR. WERDEN: Thank you. We are going to turn now to a series of questions that I will pose to our panelists. They have gotten the questions in advance and actually done some negotiating. There is a designated first answerer on each of the questions.

But after that, it is up to them to work it out.

So the first question, which is directed initially to Josh, goes like this: Jon's basic point is that we have more market power than we used to and that is bad. Assuming that we do have more market power than we used to and that it is a significant increase in market power, my question is, do you agree that it is necessarily bad and do you think something ought to be done about it?

MR. WRIGHT: First, no one ever told me there was negotiating. I always get left out.

(Laughter.)

MR. WRIGHT: So let me spend ten seconds fighting the premise and then I will give up an answer. The question is sort of assuming arguendo the increase in market power that then sort of is that a bad thing. I think my ten seconds is almost up. But I will say I am not sure that premise has been established.

But assuming per the question that it is, again, I think we get back to the fundamental point and, you know, some of these old Chicago texts are pretty good, including Demsetz on the point about identification, which I still think is very relevant to our discussions about concentration and price. I

have a feeling you meant a different one.

But I think here we do not know, ex ante -- and this is the fundamental problem -- whether -- we in antitrust want to care about changes in market power that are attributable to reductions in competition. That is not all of the ways in which market power can be increased. If we want to do antitrust that is sort of consistent with IO, if we want to get the economics right, we need to have a set of tools that enables us to distinguish between those propositions.

So what do I think can or should be done? There are simple answers floated around. We could have -- we could sort of go back -- I do not think anyone here wants to do that. We could go back to really simple structural rules that equate competition and concentration. We could pull dust off the 1968 merger guidelines, do antitrust with our fingers, count the firms, and pretend as if we can make causal inferences from changes from concentration to competition.

We could have bright line rules that have presumptions of liability if mergers are above X share or above X dollars. We have one of those in the Supreme Court. I would count that as one of the bad

cases we ought to get rid of. But there is pending legislation that does something like this. None of that, I think, is based in sound economics.

So I think what we are left doing if we properly reject those ideas is making a serious investment both in the academy and in the agencies to improving our tools and being able to answer better some of the questions that we struggle with now with identification. I think we are starting that with merger retrospectives.

I think if you look at the evolution of the way inside the agency empirical analysis of mergers happens now versus ten years ago, much less 20 years ago, the improvement is remarkable. But I think it is a burden on the agencies and on the academy in these areas. You know, like to publish journal papers and whatnot, but sort of engage on these questions, both to fight against oversimplified fixes that will probably do more harm than good, but also to subsidize investment in more knowledge to do a better job designing and calibrating policy with these questions.

MR. WERDEN: Anybody else?

MS. SCOTT-MORTON: Yes, I would disagree. I think we have the tools. I do not think we need to spend ten years developing new tools. I think we

could start now. There is not anything wrong with our existing standards or economic analysis. I think the problem comes when you try to apply it. So if you are in court and, you know, the judge is taking the view of recent cases that we have seen, which is either ignoring the facts or ignoring the economic principles or not applying the horizontal merger guidelines, for example, in terms of are efficiencies merger-specific, are they verifiable? Are they cognizable?

I think that is where the problem comes in. And, of course, if an agency is confronted with, at the end of the day, they disagree with the firms and they have to go to court, that is the outside option. And if you have a very weak hand when you go to court, then there is not much you can get as a settlement.

So I do not actually think we have a problem with the economics. I think we are ready to go there.

MR. WRIGHT: Greg, I do not know the rules on like random intervention, so I am going to make one in the absence of a rule. So the thing that I have in mind in terms of getting the -- I think we are all for getting the economics right. But, for example, some of these errors go the other way. So it is not a Chicago text, but in 1968, Oliver Williamson wrote a pretty well known paper on efficiencies and mergers.

Fifty years later, there is not a single federal court decision. No merging parties have prevailed on an efficiencies defense. Fifty years is a heck of a good winning streak. I agree parties sometimes do a bad job presenting efficiencies. I have been inside an agency. But I think there are places where we could do better. That is one that comes to mind that sort of cuts the other direction.

DR. BAKER: Just on the last point, I just want to observe that if the overall overriding problem is we are worrying about growing market power, sure there might be good government reasons to think about ways in which we could do reforms that avoid, you know, chilling, less beneficial conduct. But the real problem is to strengthen the antitrust enforcement and that should be the overriding focus at the moment.

MR. WERDEN: All right. Let's move to the second question. You have heard from a number of our speakers today about the evidence of or related to increased corporate profits. This evidence seems fairly clear. The trend is worldwide, but it is more pronounced in the United States than elsewhere. Here, the profits are highly concentrated in relatively few hugely successful companies.

My question for the panel is -- and Jon is

going to go first on this one -- does the presence of a relatively small number of hugely successful technology companies in any way suggest a failure of antitrust?

DR. BAKER: The answer is not per se. I mean, a large and profitable firm's size and success alone does not mean antitrust has failed. Firms can and do grow large and become successful by providing customers with valuable products and services, and that includes large technology companies.

We want to encourage firms to grow successful and profitable by offering better and cheaper products and services. But we should also be concerned if firms, including large and successful ones, exercise market power, and some of their major markets are threatened to do that through exclusionary conduct or collusive conduct or merger.

Now, I pointed to the growth of dominant information technology platforms as a reason for concern about increasing market power because I think their high margins probably reflect market power in part, not because of their success, per se.

MR. BERRY: Yes, so I think I would combine my answer a little bit to these last two questions, which is that -- and the IT example is good. I think

they have high markups; they have high profits. For many good reasons, they have high markups. I would say slightly opposite from Jon. It is not just market power. It is a combination of market power and doing things that people want and gaining efficiencies.

So as I said before, it is not bad, per se. But I do think it has implications for antitrust even if it is not bad, per se. Take two of these firms, take two of my big wholesaling firms that have an overlapping set of locations. If the markups are already very high, the stakes for a merger become that much more severe because they are already operating on inelastic parts of their demand curve.

So I think in many cases, we can sort of litigate whether it was bad whether we got here or not, and I personally think we are going to figure out it is a mix of things and we are going to see some bad and some good. I think what I am more interested in is the forward-looking discussion of what are the implications. Now that we are here, is there something different that we should be doing? Is there a kind of scrutiny that we should be offering that we have not offered before. I would really like to hear from my closer-to-practitioner colleagues what those things might be.

MR. WERDEN: Do either of you want in on this?

MS. SCOTT-MORTON: I will answer it as an answer to the next question you are about to ask me. How about that?

MR. WERDEN: Okay. That is fine.

Next question, Steve sketched a scenario in which technology is changing in a way that increases the sunk costs and decreases the marginal costs of companies. That scenario rings true even if lots of other forces are at work.

I would like to hear from the panelists on what they think likely accounts for the empirical observation of increased markups over the past four decades.

MS. SCOTT-MORTON: Okay. So I am going to take the first half of the question and then Steve's question on what do you do enforcement-wise.

I think what we need to do is adjust our enforcement analytics to fit the market structure as Steve suggested. So let's take, for example, the presence of network effects. Network effects are when the value of the product rises in the number of users. So a social media platform is more valuable to me the more other people are on it. What do we get when we

have network effects? We get concentrated market structures. Everybody wants to be on the same network because all their friends are there.

So we get market shares that go 99 percent and 1 percent, or a few little epsilons. We do not see market structures of 70/30 or 50/50 in a world with network effects. So we are necessarily going to see concentrated markets. Is that a problem? No. As we have said already that is, per se, just that fact, that is not a problem. But we need to recognize that the locus of competition has shifted.

Competition in that market does not display itself in the market. The 30 is not competing with the 70. No, it is competition for the market. Who is going to be the winner-take-all? Who is going to get to be the 99? There are some firms that start out together and one of them gets ahead and the market tips and that winner gets the 99 percent.

Okay. So now that we know that the locus of competition is for the market not in the market, how would we do antitrust? We would care an awful lot about entry. We would care an awful lot about potential competition. We would care an awful lot about acquisitions by the 99 percent of a teeny little epsilon percent. Why? Because that epsilon percent

does not have a lot of share, but that is where the competition is coming from. That 99 percent guy is afraid the epsilon is going to become one and attract all the teenagers and there is going to be a flip.

So we care a lot about that epsilon and that is where the competition is coming from. And we need to dust off our theories of harm when it comes to potential competition. We need to stop investing so much importance in market share. The market share of the little guy is not big, and when you calculate the Herfindahls, nothing is going to happen when you analyze this merger.

Does that mean there was no competitive significance to the little player? Quite the contrary. All those little players are the only ones that are making the 99 percent pedal faster and work harder to keep consumers because they are all potentially able to overthrow the incumbent.

So that is a way in which we have standards lessening competition and so on that work perfectly well in an internet platform or a network effects market. But we need to think about focusing our enforcement efforts at the place where the competition is, which is a little bit different in some of these markets than it would be historically in, say,

automobiles.

So I think there are big implications for antitrust enforcement and I would point people in that kind of direction.

MR. WERDEN: Do you want to weigh in, Josh?

MR. WRIGHT: I think I agree with probably everything in that in terms of the description of that and other contexts being appropriate to worry less about the shares and worry more about the competitive constraint imposed by the rival. I think that is sort of a common theme, focusing on the competitive constraint directly rather than using shares as a proxy that probably holds across a bunch of areas.

I will make the observation that it is -- with respect to Steve's explanation with sort of increasing sunk costs and reducing marginal costs -- that one of the implications -- and I think this is a hearing for another day. But one of the implications is that a lot of those industries are industries that are intellectual property-intensive and one of the potential tensions that arises.

And I think the agencies have to engage with and be thinking about, as do academics who are thinking about these things, is the idea that we sort of are chasing markups leading us into those

industries invite a risk of having antitrust and IP sort of go back to the '60s and '70s there. That is where they ran directly into each other.

I think a lot of work has been done to try to get antitrust and IP to serve as complements in the direction of competition innovation rather than substitutes. And there needs to be in those areas -- if that indeed is the right story, I think there needs to be sort of significant thinking about how to make sure that complementary relationship stays intact.

MR. WERDEN: Let's move on to the next question which concerns dynamism. You have heard quite a lot about that today, as well. Jon refers to some evidence on dynamism as one of the major reasons for rejecting a benign explanation for some of the trends that have been observed. But I will point out to our panelists and our audience that the databases on which economists rely may be missing a lot.

The broadest database that I am familiar with is the Census Bureau's business dynamic statistics, which is a very high-quality longitudinal database that includes every business in the United States with at least one employee. But it does not include any of the businesses with zero employees. And you say, well, how big of a deal can that be?

Well, the answer is a presentation done by Census economists a few years ago revealed that between 1997 and 2010, 75 million startups in the United States had zero employees while only 7.6 million had one or more employees. So over 90 percent of the startups in the United States are being missed in the data that shows entry rates going down.

So my question is, what data, if any, is telling on dynamism? And Steve is going first on this one.

MR. BERRY: Okay. So I will start off confessing my confusion a little bit. When we talk about market power, I know what we are talking about. We are talking about the ability to hold price above marginal costs. When we talk about dynamism, a few things come to mind and they seem different.

One is a simply descriptive question which we might want an answer to, which is has turnover in some sense changed? Are the rates of entry and exit from various industries fundamentally changed. I think one of the things Greg is asking how good is the data on that. I do not actually have a great independent opinion on how good is the data on that.

But there is another thing that I think Jonathan suggested, which is it is not a descriptive

matter of entry and exit. It is a question of whether the economy is delivering important innovations to consumers in the form of lower costs that are actually passed through to lower prices and/or better products.

It is possible, as with our last question, that you have a set of really big, great, innovative firms who protect their position by being very innovative. In that sense, we would have a lot of innovation and not much turnover. I do not know if that is dynamism or not.

It does makes me think hard, though, about Fiona's point about potential competition. I think maybe this is what Jonathan is getting at. If there are firms who got where they are by being innovative, how do we ensure that the innovation continues? Surely not by seizing their intellectual property, for example. That seems bad.

But, you know, do we take more seriously potential competition? Is this data that Jonathan is referring to evidence of a lack of potential competition? I am a little confused by that. It is more on sort of actual entry and exit. But these are always first-order questions. These questions about innovation are always first-order questions.

I think if we accept that we have these very

large, very profitable, certainly, firms that got where they were by innovating, again, I would sort of say, well, let's start from where we are and ask how we move forward. I do not know that we have dispositive evidence, but it seems like an important question.

MS. SCOTT-MORTON: Yes, I would agree with everything Steve just said. And I think then the purpose of antitrust enforcement is to ensure that the large firm that got where it initially got by innovating and serving consumers continues to do that. If there is not effective antitrust enforcement then you have the possibility of entrenchment and monopoly profits and a decline in the kind of innovation and price competition that we would like to see.

So it is very important that we have effective antitrust enforcement in this sector. And if we do and we continue to have high concentration, then they are competing hard and we are getting what we want as a society. But if we do not enforce here, then I think we cannot be sure that we will.

DR. BAKER: I would like to just respond by reminding you that I talked about six different indicators of declining dynamism. Really only like one or two depend on the data set that Greg is worried

about. I was talking about secular slowdown and business investment in rising profits to the share of GDP, and a slowed rate at which firms expand when they become more productive and shifting growth and productivity, gains from entrants to incumbents and the growing gap in accounting profitability between the most and least profitable firms, and then also a declining rates of startups, which is more about the data set that Greg is emphasizing.

MR. WRIGHT: One small point on the relationship between business dynamism -- I think for this purpose, however, we defined it and antitrust -- is that, of course, there are issues to explore here on potential competition. But a point of agreement with Jon is a public restraint scenario where the FTC has been very active, sort of state or locally imposed barriers to entry that reduce the ability for entry are a big deal here and an area I do not think the FTC needs to be convinced that it is worth spending time on. It has done for a really long time. It has done in a bipartisan and consensus-orientated way for a really long time.

My own view is that area is probably -- if we are looking for an area to agree on for more cases to bring, I think those cases have legal issues with

state action defense and whatnot. But if you want to target the resources of the agency at stuff you know is anticompetitive, state barriers to entry, including occupational licensing, is pretty good stuff and stuff that I think the agency would be well served. You know, we do lots of competition advocacy, but it used to be an area where we brought a few more cases.

MR. WERDEN: Shall we go after the lawyer monopoly first?

(Laughter.)

MR. WERDEN: I think we can get an agreement right here, that is the one that is really problematic.

DR. BAKER: I am in, Greg.

MR. WERDEN: Okay.

DR. BAKER: You are asking economists that question.

(Laughter.)

MR. WERDEN: Well, they know.

Anyone want to say anything more about dynamism or are we done?

Okay, good. So my final prepared question for the panelists is a broad policy question. If the plan is to somehow ramp up antitrust and the solution is not just to spend more money at the agencies,

which, of course, is always welcome, what should be done and by whom? Congress, the courts, the agencies? And, in particular, I ask what one change in substance or procedure do you recommend and what one change would you most strongly caution against?

I am going to start with Jon.

DR. BAKER: So in the book I mentioned that is coming out next spring, I talk about a number of substantive presumptions for ramping up antitrust that I would like courts to adopt. But I do not want to do the equivalent of picking a favorite child. I cannot really describe them all here. So instead, I am going to give you two cautions, rather than one of each.

So on substance, I would caution against presuming that vertical conduct is procompetitive, and I think I talked about why in my presentation. And on process, I would caution against introducing direct political influence into antitrust enforcement.

MR. WERDEN: So why don't we just go down, Steve next.

MR. BERRY: Okay. So I really wanted to hear the practitioners more than I wanted to hear myself talk about it.

MR. WERDEN: You can pass if you want.

MR. BERRY: But let me just say one quick

thing, which is -- follows up on this last point. I think in general the state of the evidence -- and I think this is even consistent with Josh's concerns about the state of the evidence -- is that I think we could use with some flattenings of prior and some less presumptions in general, that I think it is a time when things are changing, when there is a lot of interesting data and we are not sure what it means.

The idea that we have very strong presumptions, say about whether it is vertical or potential competition, big being bad, I think a lot of those presumptions should be at question and that we should be acting as though before we do the analysis, before we get the data of the specific situation, we should be, you know more modest and our Bayesian priors should be flatter I think just in general.

MS. SCOTT-MORTON: And since current practice is to be extremely worried about over-enforcement and not at all worried about under-enforcement, that would flatten. I agree.

I do not have any cautions, so I am going to do three recommendations to make up for Steve's one so we are symmetric. I think it would be -- I am not going to identify who should do this because I am not enough of an expert in the area. But I think it would

be helpful if courts were to follow the definition of consumer welfare that is correct and the horizontal merger guidelines, in particular, that efficiencies have to be cognizable and merger-specific and benefit consumers. That would be a big help.

A second big help would be if we were explicit about our concern for potential competition and instructing courts to consider that as an important element in the markets where it is proven to be an important element.

Third, I would say that there is, as Josh mentioned, I think an increasing use by firms of government processes to protect themselves from competition and to exclude, and I think it would be helpful if someone could figure out a way to adjust Noerr-Pennington and similar kinds of laws to make it less possible for incumbents to keep out potential competitors and entrants. So those would be my three.

MR. WRIGHT: Steve and Fiona stole my thunder. But let me say I would, one, cosign Steve's proposal that priors be flattened here and we take sort of hard looks at presumptions that are driving enforcement, whether they are structural presumptions in favor of more enforcement, whether they are presumptions that go the other way. I think

flattening priors and reevaluating those is no time like the present to take out zombie presumptions while we are reevaluating the economics.

I would say for the agencies that certainly includes -- Congress has such bright-line proposals in front of it and I am sure we would like to hear from the agencies about what they think about those bright-line presumptions. But I would also say in addition to quickly cosigning the reallocation -- I guess I am not allowed to increase the budget -- so reallocation toward public restraints where I think a disproportionate amount of the harm -- you know, you line up 100 economists and 99 are going to agree that that stuff is harmful. We are not going to have sort of big reasonable fights over which way that the welfare effects cut. So I would say reallocation in that direction.

And the last one I would say, which is more procedural, is resource allocation inside the agency, because I do think there are a lot of really tough questions facing the agencies and facing IO economics and helping guide through what I think is a really interesting time and how we calibrate antitrust policy.

There are 100-some PhD economists between

the agencies, and I guess I am not allowed to raise the number to 200 without firing some lawyers, which would not be popular here. But I think there are more ways to more deeply involve economists inside the agency in these discussions. I think the more of that, whether it is through 6(b)s at the FTC, whether it is -- there are a lot of ways to do it. And I think the more of that, the better.

DR. BAKER: I would like to comment on something that Josh and Fiona were talking about about the -- I really do not think -- I mean, sure there are public restraints that are harmful and appropriate to be concerned with if you want to enhance competition. But I do not think the idea of reallocating the FTC and DOJ budgets towards public restraints is necessarily a good idea.

What I am worried about is that a lot of public restraints -- you know, there are other mechanisms that are outside of the antitrust laws, legislative, for example, for addressing them and probably more effectively, or advocacy in front of other regulatory agencies and the like. But it is the antitrust agencies, you know, and private plaintiffs, too, in the states, but the antitrust agencies are really the most important actors in stopping private

anticompetitive conduct, you know, or at least along with other actors. And I am worried about taking enforcement resources away from those important efforts by the antitrust agencies, you know, the way that Josh's proposal would suggest.

MR. BERRY: So it is clear we think the budget should go up.

MR. WERDEN: You will get no argument from me on that, and you can start with my pay.

(Laughter.)

MR. WERDEN: We have a bunch of questions from the audience. Two of them are almost identical. So, obviously, there is a consensus that this is the most important issue because we have two who agree.

DR. BAKER: I wonder if they were sitting next to each other.

MR. WERDEN: The handwriting is almost identical.

(Laughter.)

MR. WERDEN: I think this is not two independent draws, but what the heck.

So I will rephrase. What, if anything, should the antitrust agencies be doing about Amazon?

MS. SCOTT-MORTON: About what?

MR. WERDEN: Amazon.

MR. WRIGHT: Doing the same thing they do in all of the other --

(Laughter.)

MR. WRIGHT: Analyzing -- I mean, I think the point of the conversation and the reason for the silence is I think we are all believers in the idea that you get the tool kit right and you fight over how to get the tool kit right and you work out how to get the tool kit right and you apply it evenly across the economy. You know, you could take account of differences, but you do not have different tools for different firms.

MS. SCOTT-MORTON: You do not pick out a firm and say how do we --

MR. WRIGHT: That is what I am saying.

MS. SCOTT-MORTON: Yes.

MR. WERDEN: So if I rephrase the question, are you aware of any antitrust case that the government should have brought against Amazon, but did not? Would you say no?

MS. SCOTT-MORTON: Well, if they should have brought it, then they should have brought it.

MR. WERDEN: Are you aware of one?

MS. SCOTT-MORTON: Oh, am I aware of one? No. MR. WERDEN: No, okay. Okay, that is

enough for Amazon.

(Laughter.)

MR. WERDEN: We have a question about static versus dynamic view of market power. This came up quite a few times in the conversation. But since I have the question, I will put it again.

Because profit is the necessary incentive for innovation and investment, how should we think about many of the things we are observing today, like high margins and network effects, in terms of a dynamic view of how competition works?

Fiona, you addressed this quite a bit already. Is there anything you would like to add?

MS. SCOTT-MORTON: I mean, this is why Steve and I have been saying, let's look forward and let's try to keep firms honest. You have a good idea. You do something really well. You innovate. You get enormous amounts of revenue. People are very happy. That is excellent. But then it is very easy, if we look at the historical record, for such a firm to find it easier to exclude rivals rather than compete. Competing is hard, it is hard work.

So we need to have a tool kit that is up to date and used to make sure that as we move forward a firm that has significant market power is getting it

honestly by competing on the merits and delivering innovation and low prices. And if that is what we are getting, that is excellent. But it would be not efficient and not good for consumers to stop enforcing against these firms.

MR. BERRY: Yeah, I mean, Fiona mentioned earlier the idea of rivals buying competitors just to remove the potential competition. We have talked about that a bit. I do not think you are blaming the innovative firm or punishing the innovative firm by trying to see if we can stop that from happening. And I have a question, I am not sure whether we should be looking at acquisitions by these firms differently than we would and I do not think that is blaming them or depriving them of the benefits of their innovation.

MR. WERDEN: Well, let me slow things down a little. After I ask the question, you can go next.

Somebody who has worked in an agency realizes -- and I am sure our panelists do, too -- that none of these questions are as simple as they might appear in a panel discussion. So if you get some, let's say, dominant technology platform and it is proposing to buy some nascent competitor that might come up with the next greatest idea or might have it already but has not got it to market, how do you know

whether to think, well, this is bad because this threat to the incumbent monopoly is being squelched or this is good because this is the way that this new idea will come to market?

MS. SCOTT-MORTON: So here I think we rely on Jon and his error cost framework to think about this. If you do not know whether the acquisition is going to be procompetitive or anticompetitive, you have to think of the harms you are creating by getting it wrong. And if under-enforcement creates tremendous harm because the dominant technology platform has lots of market power and that is going to be a huge problem, then we have to make sure we are weighting that risk appropriately.

And it may be that we do not have very much information about or as much as we would like about the potential competitor as we do in markets where we are assessing whether a 15 percent share should be allowed to buy a 20 percent share. There is a lot more information about the products, about the way competition arises, about the prices, and so forth when you have competitors in the marketplace.

When it is potential, the problem is much more difficult. Does that mean there is less welfare at stake? Not at all. So just because there is less

information does not mean we get a free pass to do nothing about it.

DR. BAKER: And I wanted to add, sort of going back to the original question about where they were talking -- which was asking about static and dynamic competition, that some people have the idea that competition is somehow bad for innovation and that when we are acting as antitrust enforcers, if that is who we are, to increase competition, we are just going to -- we are going to benefit the buyers at lower prices which somehow will impede innovation and that there is a trade-off. That is not necessarily right and it probably is not right on average.

There is lots of evidence that competition spurs productivity, lots of economic studies. And on innovation particularly, I read the literature as saying the motive that firms have to innovate by escaping competition is probably stronger on average in the data than the motive to innovate that comes from appropriating more returns, you know, on the margin.

And it is not surprising, you know, because firms that are making major R&D investments usually have a lot of reasons, other than preexisting market power, to appropriate sufficient returns, even if

there is some imitation. And successful incumbents may be discouraged from developing new products because that would cannibalize their existing rents and because as Steve and Fiona have been emphasizing, firms with market power can discourage new competition with exclusionary conduct.

So there is every reason to think that more competition is good for society, for dynamic innovation-oriented productivity reasons, not just for static price and quality reasons.

MR. WRIGHT: So long as we are including the -- maybe the caveat or the definition in Jon's claim that more competition is good, that we are not equating competition to the number of firms. I get nervous about these discussions when they convert to policy because the temptation is when I have a really, really hard policy problem to figure out, like is that acquisition of the nascent or small competitor a good or bad thing on net, on welfare, the trade-offs are really difficult to figure out.

And it is sometimes tempting, and I think history teaches us certainly in antitrust, that there is a temptation that is often succumbed to by agencies to sort of cling to those bright-line presumptions because you can do them. And that I think is

something that, in that area, we certainly do not have enough empirical evidence or economic theory to do.

This may be an area I think Fiona and I disagreed some about whether we have all the tools we need. And I think we probably agree, we have most of what we need, but I think there are areas where we could do better and even if that means -- doing better means learning more about the distribution. Potential competition is one of those areas.

MS. SCOTT-MORTON: But here is the problem, Josh. If you say we do not know enough to draw a line, I am fine with that. But that is not the same thing as saying because we do not know anything, we are going to decide all the cases so that it is fine for the big firm to buy the potential competitor.

MR. WRIGHT: You certainly did not hear the latter claim out of me. I voted these cases and to bring them.

MS. SCOTT-MORTON: Okay, yeah, let's not go there, but yes. Then I agree.

(Laughter.)

MR. WERDEN: Okay, good. So rephrasing these next two questions. Economists are really on top of how goodly or badly market concentration tells

you that there is competition or not competition in an industry. So we do not want to further that conversation. The question is, what else, what would you look at, if you wanted to know how competitive a market sector, the whole economy is?

MR. BERRY: Well, it is easier on the sector, right? And the fact of the matter is there are a lot of tools of merger analysis looking at the close substitution of products and differentiated product markets, for example, which I think are well accepted as being much better than concentration measures. And in my understanding, concentration is used largely as a screen -- I am not the practitioner -- and I think some of us may be questioning that a little bit.

But in horizontal mergers really I think practice has moved very, very far away from concentration measures and toward the closeness of substitution of merging parties.

I think there is less consensus in vertical mergers, but there are a new set of tools that look at changes in bargaining that result as a result of vertical competition. I think those are not as well accepted outside of economics, and I understand some of the legal fights going on right now are not even

over the specifics of whether a particular merger should go forward as much they are about whether those economic tools have value.

So I think there are, in both horizontal and vertical cases, real tools of economics that focus on I think what is actually at issue in these cases both horizontally and vertically. Horizontally, they are well accepted and maybe less so vertically.

MR. WERDEN: When you get to a case you are going to have information that a researcher would not have, a lot of it. It can be very useful and we have tools for analyzing it. I think that where the question was coming from is, as a researcher, you know, as a policymaker, if you are looking at the whole big picture, what is it you should look at.

MR. BERRY: So I am such a micro guy, I find it hard to move past the aggregation is the same of its components. I think it is very hard to do at the broad aggregate level. Broad evidence on markups, broad evidence on profits are interesting and they do not particularly get to the whys. I think they are a flag of interest, I would say.

MS. SCOTT-MORTON: The field of IO is a micro field, so we are just really bad at answering this question. And if you look at Jon’s list of

cites,
a lot of those people are in finance or macro or labor --

MR. BERRY: Labor.

MS. SCOTT-MORTON: -- that I have come into this empty space that we generated, which is how do we describe the economy as a whole, because our field does not do that. And so that is partly why we have these conflicting methodologies.

MR. WERDEN: Don't you wish we had some occupational licensing here?

MR. BERRY: You know, in all honesty, I have said this before, it is actually excellent that those papers are raising these questions. That is an excellent thing that these questions are being raised by those papers, and I think people deserve a response. In the meantime, we do not necessarily believe the causal conclusions of those papers.

MR. WERDEN: I was just handed this emergency question. Are there important competition issues that antitrust cannot handle? And I take this to be antitrust enforcement as we know it. So these would be problems that would be addressed in some other way than antitrust cases.

DR. BAKER: So sure. Natural monopoly. You

have to regulate that. You cannot use antitrust --

MR. WERDEN: We did that. We are kind of past that.

MS. SCOTT-MORTON: No.

DR. BAKER: Well, it is important to --

MR. WERDEN: It is almost all gone now.

MS. SCOTT-MORTON: Your electricity bill, I am afraid to say, has some regulation in it.

MR. WERDEN: A little bit. But I am at the mercy of an unregulated water monopolist.

DR. BAKER: And then some of the governmental restraints we were talking about probably have to be dealt with legislatively.

MR. WERDEN: Apart from regulating monopolies, which is an old but still good idea, is there anything else you would suggest?

MR. BERRY: Well, I mean, I do think when people talk about the tech companies -- and this is a good question for the FTC -- is that people are sometimes talking about data and other forms of social relationships that I think are difficult to handle outside of the existing antitrust framework and may be subject to different kinds of regulation.

And I think sometimes when people talk about old-fashioned antitrust they are also talking about,

for example, political power, and I think that is way outside the realm of traditional antitrust regulation. I think it should stay there. But it does not mean there should not be some response.

DR. BAKER: And then also leader-follower conduct that leads to tacit coordination, that is very hard to address through antitrust laws.

MR. WERDEN: Do you think it should be addressed at all?

DR. BAKER: Well, you mean do I think some other actor could do a better job than the courts on that?

MS. SCOTT-MORTON: So I do not want to --

DR. BAKER: They have the same problem that antitrust agencies have.

MR. WERDEN: So that would be a no?

DR. BAKER: You know, it would be nice to be able to do that, but I am not sure how.

MS. SCOTT-MORTON: So I would like to follow up on what Steve said. I mean, there is political power, there are things like privacy, there is misinformation. It is not clear that vigorous competition fixes the problems that people want to see fixed in those domains. And it might be that you want another agency or some other law to do that, if that

is what the community would like to see done.

So I think there are calls -- you read in the paper about people who would like antitrust to -- or perhaps think that antitrust can fix everything, and my view is that that is not going to work, that antitrust is very well geared, it is a set of economic tools, it is very well geared to certain kinds of problems and that we should look elsewhere to other kinds of regulations if we have different kinds of problems to fix.

MR. BERRY: But, Greg, let me come back to that. I am completely baffled that you are subject to an unregulated water monopoly. I know we are here and I still am confused by it.

MR. WERDEN: It is not my house here.

MR. BERRY: Yeah, I just mean there --

MR. WERDEN: There are many unregulated monopolies in this country.

MR. BERRY: I agree. And why we gave up on so many of them, I am still baffled by.

MR. WERDEN: Okay. We are running out of good questions here. So I have to say we are done. But I will give the last five minutes to our panelists to say whatever they choose to say to wrap up.

MR. WRIGHT: Remind them about the book,

Jon.

MS. SCOTT-MORTON: Yeah, there we go.

DR. BAKER: My publicist insists --

MS. SCOTT-MORTON: Good idea.

DR. BAKER: -- that every one of you go out and buy it when it is available next spring.

MR. WERDEN: Are you offering a discount?

DR. BAKER: You will have to discuss that with my publisher.

MR. WERDEN: Hmm. Have you set the price yet?

DR. BAKER: I do not think it is even available yet.

MR. WERDEN: Okay. It is too soon to talk about the book.

DR. BAKER: Yeah.

MR. WERDEN: No?

MS. SCOTT-MORTON: I think it is great we are having these hearings.

MR. WERDEN: Okay. Well, then we are going to take our break now a few minutes early.

(Applause.)

(Panel 2 concluded.)

PANEL 3: THE REGULATION OF CONSUMER DATA

MR. SAYYED: All right. Let's get started. This is the last panel for the day, and as I mentioned at the beginning for those who have not read the website or were not here at the beginning, because at least the potential for weather difficulties, we are going to reschedule tomorrow's sessions to probably sometime late in October.

So we turn now from mostly antitrust, but not exclusively, to a consumer protection issue, and James Cooper, now with the FTC, will moderate this panel.

MR. COOPER: All right, thanks, Bilal.

Welcome, everyone. Good afternoon. I am James Cooper. I am the Deputy Director for Economic Analysis in the Bureau of Consumer Protection here at the FTC and it is my great pleasure to be here and take part in these hearings and moderate this August panel.

Before I get started, I have to -- recently, I am on leave from academia so I am not used to doing this, but I am going to try to say zero things of substance today. And in the off-chance I do, anything I say is just my opinion only and not necessarily that of the Federal Trade Commission and any individual

commissioner, including the one sitting next to me.

COMMISSIONER OHLHAUSEN: Most especially not.

DR. COOPER: Most especially the one sitting next to me.

COMMISSIONER OHLHAUSEN: Just kidding. James and I have worked together many years.

DR. COOPER: Yes. All right. So as you probably already heard today, nearly 25 years ago, Chairman Pitofsky, he began the FTC's journey on the path to become the nation's privacy and data security cop. Along the way, much has changed.

When this all began, things like the iPhone, Facebook and Google did not even exist. But, today, we find ourselves in a digital economy that lives on consumer data. Clearly, this evolution has provided tremendous value for consumers. We have vast troves of information at our fingertips. Most of us cannot get anywhere without our phones anymore, myself included. And we can connect with millions of people instantaneously, as I am sure many of you are doing right now via Twitter. I could go on.

But at the same time, the fact that consumer data is so tightly woven into the fabric of today's economy has presented unique consumer protection

challenges. Part of what I think makes these issues so tricky may stem from the fact that there is no agreed upon framework for analysis.

As we have heard a lot today, antitrust is married up with microeconomics. It has been for about the past four decades. Privacy and data security, however, have yet to find such similarly suited mates. So the FTC, you know, or clearly economics has an important role in shaping privacy and data security policy.

For example, the seminal work of the economics of information that garnered Nobel Prizes for people with names like Akerlof, Spence and Stiglitz teaches us generally that reducing the cost of information flows typically improves market performance because it helps consumers make better choices. But at the same time, privacy and data security policy also involve significant consumer values, such as dignity, the right to be left alone, and autonomy, which are really difficult to balance in a typical benefit-cost framework, though they are equally important. Never one to shy away from a challenge, the FTC has been in the forefront of trying to tackle these complex and weighty matters.

As I mentioned before, beginning in 1995,

when Chairman Pitofsky convened a series of workshops designed to educate the FTC and the public on consumer protection issues surrounding the online use of consumer data and continuing with the 2012 policy report and subsequent reports and workshops examining issues like big data, the internet of things, data brokers and most recently informational injuries through what former Chairman Bill Kovacic has called policy research and development, the FTC has continually attempted to calibrate its enforcement posture to balance consumer interests and privacy and data security with the remarkable benefits that the digital economy provides, and I think that these hearings will continue that tradition.

So this brings me to the subject of our panel today. Today, we appear to be at an inflection point. Many of the same undercurrents that are animating the challenges to the antitrust status quo that were addressed earlier today and that will be addressed in other hearings, coupled with catalysts of high-profile data breaches, the use of social media to attempt to influence the 2016 election, Cambridge Analytica, and the coming online of GDPR, have caused many to question whether the current privacy and data security framework needs a rethinking.

For example, some have suggested the U.S. should adopt a more European-like approach. And it appears that California has already taken up the mantle. We see legislative proposals in various forms kicking around Congress.

So today, we hope to work through some of these thorny issues, examining where we are, where we might go, and what that might mean for both consumer privacy and the digital economy which has provided us with so much.

So I am very happy, we should all be happy to have an all-star panel on this journey today. To my immediate left is Maureen Ohlhausen. Maureen is currently a Commissioner of the Federal Trade Commission. She was acting Chairman from January 2017 through April 2018. Before that, Commissioner Ohlhausen was a partner at Wilkinson Barker Knauer where she focused on FTC issues, including privacy and data protection. She also served at the FTC for 11 years prior to that, where she was the Director of the Office of Policy Planning. And prior to that, she was a clerk for Judge Sentelle on the D.C. Circuit.

So next to Commissioner Ohlhausen is Howard Beales. Howard is a Professor of Strategic Management and Public Policy at the George Washington University.

Importantly for the purposes of our panel today, Howard, from 2001 to 2004, served as the director of the Bureau of Consumer Protection. In addition, in his earlier stints at the FTC, he helped think about and really develop a lot of the framework today for how we analyze informational issues surrounding consumer protection.

Next to Howard is Daniel Solove. He is the Jon Marshall Harlan Research Professor of Law at the George Washington University. Daniel is one of the leading privacy scholars in the country. In addition to writing some of the seminal articles on privacy, he, along with his coauthor Paul Schwartz, is the author of a case book on information privacy law that everyone, including me, uses to teach that subject.

He is also the CEO of TeachPrivacy and runs a myriad of privacy programs, which unfortunately for us may mean he has to cut out early -- I don't think he will -- because he has something going on tonight, including his annual privacy forum, privacy salon, things like that.

And then, finally, last but definitely not least, David Vladeck is the A.B. Chettle, Jr., Professor of Law at Georgetown University Law Center. And he, like Howard, was the director of the Bureau of

Consumer Protection from 2009 to 2013. And before that, he spent 25 years in public citizen litigation groups.

So we are kind of lucky here, I mentioned, to have both Howard and David, because in their time frame with Lydia Parnes and kind of in between as well, really helped usher in the era of the FTC being involved in privacy and data security and really kind of being at the helm of that in large part.

So what I want to do with the format today is we are just going to have a discussion. We do not have any presentations, but we want to drill down on some questions and we also will have, if you have questions from the audience, we will be taking notecards to -- I guess there are designated people to take those questions, and we will certainly save some time at the end to address these.

So let me get started. The big picture, headline question of this panel is to kind of see and take stock of where we are in the privacy and data security regulation in the U.S. and where we need to go. And I think if we are going to assess that, maybe at sort of a higher level, we should think about what would be the goals of a privacy and data security program. So at a high level, what should a privacy

and data security program be concerned with? What sort of values should it be protecting? And how might we think about measuring whether that goal is accomplished?

So, Maureen, I want to have you take a first crack at the question, and then invite others to respond or react.

COMMISSIONER OHLHAUSEN: Great. Well, thank you, James, and I am delighted to be here. Thank you to the organizers for including me in the panel.

This is a topic I have thought a lot about. What are the values that we are trying to protect and pursue in our privacy and data security enforcement in the U.S.?

I would say one of the first values -- because our authority under the FTC Act, right, is deceptive or unfair acts or practices in or affecting commerce. So, first of all, it is commercial. Everyone forgets that one at the end, but it is in commerce. And then deceptive, that means there was a promise made to a consumer that is not kept, or unfair, which means there was an act or a practice that caused substantial injury to a consumer that the consumer could not reasonably avoid that is not outweighed by countervailing benefits to competition

or to consumer protection.

Now, of course, the FTC is not the only actor in this case. We already have lots of other or a certain number of other privacy laws. You think about HIPAA, you think about financial privacy, you think about the CPNI rules for communications data. So those are areas where, in a way, if you think about it, we have already, as a society through our political system, decided there are special buckets of information that need special protection. So where does the FTC fit in there?

First of all, to talk about deception, I was actually at the FTC back when we brought the first online privacy case. Dan Caprio was there with me as well and some other people in the audience probably, too, under Chairman Pitofsky in the GeoCities case. So they had made a promise about how they would collect or use data and they did not keep that promise, and we have brought lots of privacy cases alleging deception since. And what we are trying to protect there, I think, is twofold.

One, it is consumer sovereignty. The consumer made a choice and that choice was not respected. So I think that is the primary thing. There is also a competition element there, because you

certainly want to allow the marketplace to operate in an efficient way, where you have someone not getting a competitive advantage because they have lied about what they are doing and they actually are not adhering to it, maybe it is costly.

I mean, that was like in the Uber case that we brought. They had initially promised that they were going to do certain things with the data to stop accessing it, and then it turned out to be kind of expensive to keep that promise. So we had to modify our order. So I would say the first thing is consumer sovereignty.

But then the second thing I think that we are supposed to be protecting is protecting consumers from substantial injury, and that is captured in our unfairness authority. Now, what is substantial injury is really the question, and you do not always need a promise made to consumers. In fact, unfairness I think works particularly well when there has not been a promise made to the consumer, but there is sort of an expectation that consumers will not be injured through data collection and use.

So some of the cases that we have brought in that space involve things like collecting and sharing realtime location data about consumers because that

can be abused in a way that can be used for stalking, right? So there is a health or safety risk. Certainly, the collection of financial information or the failure to protect financial information that is sensitive, so it could be used to hurt consumers financially.

We mentioned the informational injury workshop, and so one of the things that I tried to do with that is actually come up with a little bit of a taxonomy of the different harms that we have addressed through FTC enforcement. And what I came up with, doing a review of all the cases that we have brought in the privacy area, the first one I have already mentioned, which is the distortion or not respecting consumer sovereignty through deception. Financial harms, health and safety, I mentioned that one already, and unwarranted intrusion.

So cases -- we have had some where -- we had the TRENDnet case where there was an internet-enabled camera that had a pretty obvious flaw in its software so that anybody who had the IP address could hack into this camera that was sold to be used for home monitoring and watching your kids. So we think, well, that is intrusion. We also had the rent-to-own, I think it was the Aaron's case. David and I agreed

very vigorously on that one.

MR. VLADECK: Well, it was the DesignerWare case, the predecessor.

COMMISSIONER OHLHAUSEN: DesignerWare, right, right, very good. But where the laptops had a program that could turn on the camera and companies could use that or take screenshots.

And then the last one is reputational injury. My view is at the FTC we have never brought a case purely based on reputational injury, but reputational injury has been certainly present in some of the cases that we have brought, such as the Ashley Madison case. So I would say those are the -- reputational is a little, I think, more controversial, but, otherwise, I think those are the types of things that the FTC's approach, the authority that we have been given, those are the values that we should be pursuing in privacy enforcement.

DR. COOPER: Would anyone else like to weigh in on that, sort of at a high level? Perhaps even leaving aside the FTC's goals, what are some things that -- what would we think of, what should we be thinking of when we think about an enforcement program or a regulatory program to protect privacy, which sort of values should it be protecting? What should we be

thinking about?

MR. VLADECK: So let me just add to Maureen's point about the DesignerWare, Aaron's kinds of cases. You know, Ashley Madison, I am not sure is a reputational harm case only. And I think part of the struggle -- and I am glad that we have the workshop on informational harms -- is they all sort of fit generally into what we used to think of as an invasion of privacy tort, but they are very hard to label. So in Ashley Madison, marriages were broken up and --

COMMISSIONER OHLHAUSEN: People committed suicide.

MR. VLADECK: People committed suicide. So labeling that kind of harm, you know, is difficult. But I think partly what we ought to focus on is the nature of the intrusion. So in Ashley Madison, it is intruding into very personal relationships. In DesignerWare and Aaron's, it was intruding into the home. I mean, the real problem in those cases was that cameras can be activated remotely while people were sitting on their couch or doing whatever.

And so I agree that it is important to try to see if we can come up with a taxonomy, but a lot of this really just sort of depends on context.

DR. COOPER: Since David said taxonomy, I don't know, Daniel, if you would like to jump in. Daniel wrote one of -- A Taxonomy of Privacy, which is kind of a seminal --

MR. VLADECK: Right. That was not inadvertent.

MR. SOLOVE: Well, I would say there is obviously protection of consumers from harm, which I think is important, and a lot then depends on how we define harm. I tend to define harm broadly to also encompass risk, which I think is a very important concept.

There is also the broken promises, that it is very important that if a company makes a promise, that it be held to that promise. Otherwise, the entire self-regulatory regime collapses, because the privacy policies are meaningless then. So it is nice that the FTC has a backstop to that and enforces.

I think there is also an important component to an enforcement regime that I think the FTC can and sometimes has gotten involved in, which is consumer expectations. Even if it is not a direct promise, consumers have expectations about how their data is going to be handled and used that are often and sometimes at variance with what is said in a privacy

policy or with what companies do.

There have been studies about consumer attitudes about privacy and the vast majority of people agreed with the statement that if a company has a privacy policy, it does not share data with third parties. So there is definitely a lot of misinformation out there. Consumers have incorrect expectations.

And the FTC can play a very important role in helping to make sure that faulty consumer expectations are not exploited. So companies, you know, knowing that consumers kind of already have this maybe unjustified trust in them, don't exploit that trust, that what companies do that starts becoming at great variance with consumer expectations, that those be outliers stop.

The Sears case I think is a wonderful example of that where they installed spyware into people's computers, and this was actually disclosed in the fine print in a very lengthy privacy policy. So it was actually there, but it was not very salient. It was not very noticeable. So most people missed it, and the FTC said that it was not sufficiently disclosed and not conspicuous enough.

And I think that is great because what we

had is a practice that was very unexpected to consumers that caught a lot off guard. So I think it is very important that consumers can use sites and engage in ecommerce and other commerce and know that what they expect generally is going to be the case and there are not going to be unpleasant surprises down the road. And so I think it is very important that the FTC police that, especially because we know from a lot of studies that a very, very small percentage of people actually read the privacy policies or privacy notices, something like less than 1 percent.

So we really are in a world that consumers come in with this baggage, these expectations, and I think we have to play in that world and know that that is how people are going to make decisions on how to share their data, and there should be some protection from that being exploited.

DR. COOPER: Howard, did you want to jump in? One thing just to -- and maybe it will be completely orthogonal to what you were going to say, but maybe it will be related. It sounds, you know, listening to David and Daniel -- and I do not know if it is -- to what extent should we think about privacy as sort of a right space framework or is it something that needs to be balanced with, you know, other values

as well? Is it something that can be balanced or is it just a right? And I don't know, it is something I was just thinking about as David and Daniel were talking.

So anyway, Howard, I will let you speak to that or whatever you want to --

DR. BEALES: Well, I did want to comment a little on the discussion that has gone on before, but first, I wanted to take you to task for listing the Nobel Prize winners for the economics of information without listing the guy who founded the field which was George Stigler, first and foremost. He was one of my advisors, too, so that --

(Laughter.)

DR. BEALES: But I will forgive you.

DR. COOPER: Okay.

DR. BEALES: The attraction to me of the consequences-based approach to thinking about consumer privacy, which is what we developed in the time that I was at the Commission, was that it makes explicit what ought to be there all the time, which is that particularly in the commercial context, this is a balancing issue. There are tremendous benefits that come from the ability to use information, even if it is an unexpected use of the information.

And we do not want to sacrifice those benefits because somebody did not think to include that in the list of things that might be done with information in the privacy policy, because it was not thought of at the time that the privacy policy was written. We did not know this was a possible use of the data.

Those kinds of benefits -- we have an enormous number of services that are built on exactly those kinds of secondary uses of information that was collected for a different purpose, that may or may not have fit with consumers' expectations.

What we want to make sure of is that that information is not being used in ways that are harmful to consumers, that is doing damage to consumers. And that is where privacy regulation and privacy enforcement really ought to focus. If there is not a harm, it is not something that the FTC in particular should be worried about.

Now, I also have a reasonably broad concept of harm, perhaps not as broad as some. I certainly think that the kinds of subjective harms that fit within the traditional privacy torts are the kinds of harms that are actionable privacy harms. But I note that the tort standard in virtually all of the privacy

torts is highly offensive to a reasonable person. If the intrusion or the putting somebody in a false light is something that would be highly offensive to a reasonable person, that is an essential element of the tort, not just any intrusion, not just any false light that might be held out. But including those kinds of harms I think makes complete sense.

We have had two mentions of DesignerWare and Aaron's and there is a part of that case that I completely agree with and that is the "turn on the camera" part of the case. This is a part of it that I have always found really troubling, and that is this is a computer that when somebody stopped paying, you could activate the software and the computer would call home and tell the company that had rented the computer to somebody who was no longer paying for it where it was. That is really useful.

The complaint says, well, this is location tracking and location tracking is bad, but the complaint does not say why location tracking is bad and especially when it is every two hours. And the remedy that is in the complaint -- or in the consent order is, well, if you disclose when you first turn this on and track continuously, that will comply with the order. So to fix tracking every two hours, we

track continuously. I do not get what harm we thought we were fixing there. And it is that harm that really needs to be the focus.

If we cannot articulate why we think this is a problem, we are not going to be able to adopt sensible and low-cost ways to control that problem. We have to think first about what is the harm we are trying to prevent.

DR. COOPER: Thanks, Howard.

So after hearing kind of a high-level view of what sort of values we should be concerned about when we are thinking about a privacy program or regulatory framework, maybe it is important now to take stock of actually where we are. So I wanted to turn to Daniel, who as I mentioned before has written a seminal textbook on this and lots of articles defining and thinking about what privacy is.

So, Daniel, could you just kind of help us characterize the current U.S. system of privacy and data security regulation in about five minutes maybe?

MR. SOLOVE: Sure. Well, at the high level, the bird's-eye view, my sophisticated synopsis of it is it is a mess.

(Laughter.)

MR. SOLOVE: We have a sectoral approach

with laws that have arisen in various economic sectors over a very long span of time. Then you have common law torts that have arisen, the privacy torts, plus there is the forgotten breach of confidentiality tort that I would like to mention to you that does not require highly offensive. There are all sorts of other common law torts that could apply in these contexts, such as negligence, that are making a resurgence in data breach cases.

Then you have various state statutes in the states. You have dozens of federal laws, not as many recently, but certainly in the '70s, '80s, '90s, you had a real series of laws that were passed to deal with various privacy issues in various economic sectors. And then you have the FTC, kind of an overarching, the broadest jurisdiction of any federal agency regulating privacy that regulates most companies, except for some carve-outs.

And that is the U.S. approach and there are inconsistencies in the various laws. Some of them are a lot weaker than others. On the stronger side, you have HIPAA, which is very, very broad, has a broad reach. It follows the data through the chain of its custody. But you also have laws like FERPA that regulate schools that by and large are kind of, for

lack of a better characterization, a bit of a joke. They are not really enforceable; they lack a lot of the features that more recent privacy legislation has.

Contrast this to a number of other countries in the world, including, especially the E.U., they have a comprehensive privacy law baseline of protection. So they can articulate, here are the basic rules of the road that we follow. Here in the U.S., it is very hard to articulate, well, how is this particular data protected? We really cannot. It depends on, well, who holds it? If it is held by certain entities, then it is regulated by HHS, but it could also be regulated by the FTC and it depends on who enforces it and it depends on what the sectors are.

And one of the challenges with the sectoral approach is that the sectors change. So in the ‘70s and ‘80s, you know, what various types of companies are doing in the sectors makes sense then, but now, as we see, different companies are jumping into different areas. So when we build laws around, you know, sectors, they don’t stay fixed. And, now, there is a lot of overlap and companies saying, wow, we are regulated by five different agencies and five different bodies of law and we don’t know what to do,

there is so much. Plus, then all the different state laws that are overlapping and it becomes a bit of a nightmare.

I am not sure we can dial this back in the United States. I am not sure we can kind of go and say, hey, we are going to do the other approach, but I think there is some sensible aspects to the other approach that are quite efficient and, to some extent, I think could be particularly business friendlier than the U.S. sectoral approach, which a lot of industries were happy with initially because they liked the idea of a law tailored to them or they liked the idea of the fact that the laws did not apply to them and they fell through the crevices. But those crevices have been largely plugged up by the FTC.

The other problem, too, with the U.S. approach is that we get often no respect from the rest of the world. We are kind of the Rodney Dangerfield of privacy in the U.S., but I think we have some very effective, some really good laws. I think the FTC has done tremendously effective work. You know, we do have a lot of protection. It is just that it is inconsistent; it is hard to articulate. It is very hard to explain to other countries, especially the E.U., how the U.S. system works and how information is

protected here. It is so haphazard.

So I think the biggest challenge is what do we do going forward when we have so many laws that are locked into antiquated visions of the economy from 30 years ago and, you know, a role that has increasingly been -- the leadership role has increasingly been ceded by the U.S. Congress ever since I think around 2000, where we really have not seen a tremendous amount of legislative activity on privacy. It really has tapered off. And we have really seen the states, especially California, and the E.U. take the lead.

And I think if you ask most large multinational companies what privacy law are they focusing on for their compliance efforts, GDPR, the new California law, hardly anyone will say anything about any other U.S. law. Maybe a little bit of HIPAA. FTC, I barely hear whispered these days, although I think a few years ago the FTC was spoken about a little bit more. But increasingly what we are seeing I think is the companies and these are U.S. companies not really looking to the law here as to what they are doing and how they are building their privacy programs and practices.

So that is where we are. And the big question is what should we do in the U.S.? What is

the next step? Do we kind of say, hey, we will let the -- you know, be regulated by Europe and California or will we have meaningful regulation at the federal level that reflects the balances and approaches that the U.S. would like to have.

DR. COOPER: Well, thanks, Daniel.

I would like to invite anyone to react to that and also kind of throw out there it seems as we think about the landscape of the U.S. privacy regime, it seems to be a mixture of ex ante regulation with notice and choice in some areas, HIPAA and COPPA maybe, but then we also see enforcement, you know, private and FTC.

What are the pros and cons of those approaches and what might be -- you know, you think about whether there should be a mixture, if we should hew to one or another or if it makes sense to kind of mix it up in some ways the way that we have here in the U.S. So I would throw that out to anyone.

MR. VLADECK: Let me comment on that briefly because until at least a few years ago, the difference between the E.U. and the United States was we did a lot of enforcement, but we had this crazy patchwork of laws. On the other hand, in the E.U., even before the GDPR, they had a general regulation which was much

more comprehensive than any of the U.S. privacy law, but there was almost no enforcement. And some scholars have done a lot of work, looking at sort of privacy on the ground, both in the United States and in the E.U., and they found that the privacy commitments in the E.U. were met only to the extent that there was a real enforcement or culture of compliance, which left out large swaths of the E.U.

And so I think that somewhere in the middle is the desired outcome, but strict rules without enforcement, you know, at least according to the studies that have been done did not work all that well in the E.U., and I think that was one of the major driving forces for enacting the GDPR and to basically base the new system on commitments of compliance and enforcement.

And it will be interesting to see the extent to which the new GDPR is enforced by the data protection authorities in the E.U., who are not used to doing FTC-like enforcement cases.

DR. COOPER: Anyone else like to jump in on the ex ante versus ex post question or anything --

COMMISSIONER OHLHAUSEN: I was going to say I agree that regulation, you know -- if there is clear regulation that says -- you know, like the Children's

Online Privacy Protection Act. Congress drew the lines there and the FTC implements it and enforces it.

One of the things that I think has been a real strength of the FTC's approach has been its case-by-case enforcement, maybe a little bit less predictable in some ways, but it trades that for great flexibility. So a focus on harm in case-by-case enforcement reduces the need for you to predict the future to design some overarching regulation that foresees all innovation.

Howard mentioned this, and I think we all would agree, consumers have gotten enormous benefits from a lot of these technologies and consumers have gotten a lot of free content and they have gotten a lot of information at their fingertips, as you mentioned. And so that does not mean anything goes, but I think we need to be careful about coming up with a system that is too regulatory, because it cannot predict what the new innovation is going to be and perhaps it is going to prevent it from happening.

DR. COOPER: Okay.

DR. BEALES: Just to pick up a little on the ex ante versus ex post problem, I think part of the problem with the ex ante regulation is that the approaches we have now and particularly the approaches

that are embodied in the GDPR and in the California statute are really based on a premise that will not work, that people are going to read privacy policies and pay attention to these notices about what is going to be done with the information and make choices based on that.

And Dan says -- and I think he is right -- nobody reads privacy policies. It is probably a good thing because there is a study out of Carnegie Mellon that said if people actually did read their online privacy policies, the opportunity cost to the U.S. economy would be $787 billion. It is just out of all proportions to what might be at stake in commercial privacy decisions. And with ex ante approach, that difficult, if you will -- the focus ex post on where have things gone wrong that need to be fixed and what can we do to keep them from happening again seems like a much more sensible way to approach the problems.

COMMISSIONER OHLHAUSEN: Howard, I just wanted to weigh in a little bit on your point about people not reading privacy policies. I agree probably the average consumer does not, but we have academics in the U.S. -- I bet Daniel reads privacy policies, I bet David reads privacy policies, and academics and consumer groups, consumer organizations and

competitors.

DR. COOPER: I do not read them.

COMMISSIONER OHLHAUSEN: Right, so James does not. No, I am just kidding.

DR. COOPER: Well, you said academics. I just want to make sure that you --

COMMISSIONER OHLHAUSEN: Academics other than James Cooper.

(Laughter.)

COMMISSIONER OHLHAUSEN: But I think there are mechanisms for if there is a problematic term in a privacy policy for it to get noticed and surfaced. And that is one of the things that we have seen I think with social media, that when something is discovered that people do not like, that news gets out there pretty quickly.

DR. BEALES: If that is the goal, then that points to a very different kind of a privacy policy because you do not want something that is understandable to consumers; you want something that is understandable to geeks and competitors, who can figure out whether there is something wrong going on here. That is sort of not where we are headed. It is not where the Europeans are headed. It is not where California is headed. We want simple privacy policies

that anyone can understand, that tell you nothing, and mostly are not read. I mean, no doubt some people read them.

MR. SOLOVE: A while ago, I wrote a piece about privacy self-management, which is this idea that people manage their own privacy by reading these policies and making choices. I think this is a flawed approach, not just because people do not read privacy policies. And, also, I think the point that there is this tension, privacy policies are useful to regulators and advocates and academics and others who can read them carefully and you want to give a lot of information, but the average consumer really cannot get all of that. So there is a tension. You almost need two different things, which is what Paul Schwartz and I have proposed in our ALI Project, which is a transparency statement for the regulators and then something simpler for the consumers.

But as a consumer, reading the privacy policies is relatively meaningless. I do not read them because it is too many with the amount of entities I do business with and sites I visit, you know, hundreds, thousands. I do not have time. And then the choices, do I share this piece of information on Facebook? I don’t know.

The implications for privacy depend on how that information is combined and aggregated with other information over time and how that information might line up and what someone might do with something and what algorithm someone might create five years from now and a whole litany of things I cannot figure out. So I really cannot make the judgment as a privacy expert on exactly what the complications and costs and benefits to me, especially the costs over time, are going to be for me to release a certain piece of data.

So it is very, very difficult. And, now, multiply that by 1,000. And I have to make that decision all the time. Just really, really hard to do for the consumer. So I am just not sure that that approach -- you know, it is great if there is like one company that you actually do business with, like I am only on Facebook. But it is not. I am on all these sites.

Like the professors who -- I give an amount of homework every night and I think, hey, it is reasonable for my students to read 30 pages in a night, but what if they have 10 professors and each assign 30 pages? And that is what the companies are doing. Every company thinks, hey, they can pay attention, we have this great mechanism. Yeah,

multiply it. It does not scale. That is the problem. And the consumer, if you say, hey, we protect your data with reasonable data security, well, what is that? As a consumer, how do I assess your security? How do I know how prepared your employees are to not be phished? And I cannot -- how do I know what kind of encryption you are going to use and all these other things?

I cannot really make an informed assessment, which is why we need an agency like the FTC to be looking out for people. Just like when I would travel abroad and the taxi fares were -- they did not have a meter and I did not know what the right fare was and they would just say like it is X whatever. I had to trust them or make some -- I did not know. It is nice to know that someone is looking out for me and there is a meter and someone has thought of what the right fare is going to be and I do not have to worry about someone cheating me or I can pick up a jug of milk and know that I can drink it and I am not going to be poisoned. I do not have to do research.

Imagine if you did not have the food safety and you actually have to go online and research like the safety conditions at each farm to figure out do you buy food from there? I would just like to know

like I pick up a product at the supermarket, it is safe, and I think we want the same thing for privacy.

MR. VLADECK: It is amazing how when whenever you use the phrase "privacy policy," everybody launches into a diatribe. So I am going to take a minute and launch into my own.

One is they are not privacy policies. The original sin was calling them something that they are not. None of them really deal with privacy. They deal with data use. And part of the problem is they have been misnamed.

The other problem, of course, and this gets back to the question that James started with, the difference between ex ante regulation and something else. If you have a regulatory regime that is clear, so you know that everything you do on the internet is safe or at least you have that promise, even if it is not enforceable, then the privacy policy or the data use statement becomes less important.

And part of the problem that we have -- and the FTC has done a lot of work on simplified notice and Dan and the ALI have done a lot of work on trying to figure out a better system for this. But these are really notice systems, and they need to be simplified. Many of them are written by lawyers so they are bound

to be incomprehensible and they are often designed to be incomprehensible.

So this is an issue that plagues us and I do not think we have collectively figured out a way to escape it.

DR. BEALES: I think actually Mick Jagger had the answer to what is going to happen here. In 1964, the technology was a little different, but he said, a man comes on the radio -- like I said, the technology was a little different -- telling me more and more about some useless information, supposed to fire my imagination. What happens? "I can't get no satisfaction."

MR. VLADECK: There we go.

DR. COOPER: All right. So, David, with that segue -- thank you, Howard.

(Laughter.)

DR. COOPER: Now, that we have kind of set the stage for where we are in the U.S., what do you see as any of the problems? Because, again, the headline of this panel is supposed to think about, you know, kind of rethinking the current privacy data security regime. What are some of the problems -- of any of the current status quo, are there any harms that you do not think are being addressed? Is there

inefficient enforcement, either over-deterrence, under-deterrence?

So what do you think, David?

MR. VLADECK: So let me use a few examples because time does not permit me to go through all the concerns that I have. But one is I do not think we have effective tools to really understand what is going on with big data, let alone to regulate it sensibly. So we all know that data collection is now ubiquitous. We bring it into our own homes through always-on devices and sensors or the internet of things. We know that this data is being collected, but our laws really do not have any restraint on the sale or renting of this data.

We know it moves. We know it has substantial economic value, but we do not have any real information on the velocity or volume of this kind of data aggregation. So that presents risks.

Paul Ohm, one of my colleagues both at the FTC and here, wrote an article ten years ago in which he sort of cast in dystopian light what he called “the database of ruin.” Well, we do not know yet whether there are these kinds of enormous database, but there is nothing in U.S. law that really restrains that development. And these kinds of databases pose risks

to consumers. There is the risk of data breach. After all, these would be honeypots. They would be a magnet for identity thieves. And we know identity theft is still rampant.

So one question that the FTC I think is going to have to grapple with is sort of where is this data? What is it being used for? How is it being transmitted, to whom, and for what purpose? So that is one issue that I think the Commission is going to have to grapple with going forward.

Second, the rapid initiation of algorithmic decision-making in the marketplace. Now, I said this this morning, I am no fan of human decision-making.

(Laughter.)

MR. VLADECK: We generally do not do such a great job, and machines may help. But for regulators, these kinds of decisions are very difficult to oversee. They are not transparent. Machine-learning algorithms are impossible to interrogate. You cannot put them under oath. It is hard to root out disparate treatment based on factors that are impermissible, age, gender, race, things like that. Nor is there necessarily due process at the end of the decision-making chain.

So I know the agency has already done a fair

amount of work on this. But this is an issue that I think demands greater attention because I do think it poses enormous risks to those who come out on the bottom in terms of these kinds of decision-making.

In terms of enforcement, my concerns are not really with over-enforcement, because the agency resources are too scarce for that. Indeed, when I was the director of the Bureau of Consumer Protection -- and I don't know whether Howard had the same concern -- but I spent a lot of my time doing triage, deciding which cases to bring and which cases not to bring, even though many of those cases in the latter category were meritorious and we should have brought them, if we could have. So I do not think that is the problem.

I do think there are enforcement challenges. So one is how do you enforce against an industry, like the mobile app industry, which is a highly diffuse, diverse industry, thousands and thousands of app developers, many of whom either do not really know what the law requires or just don't really care. So the New York Times did a story yesterday about COPPA violations, violations of the Children Online Privacy Protection Act, by app developers that were tracking kids 12 and under without explicit parental permission.

Sure, the FTC could bring 20 or 30 enforcement actions against this kind of industry. But it is not at all clear to me that you get any of the kind of deterrent value that you really need. So one question is, with respect to these kind of diffuse industries, how do you make them comply with the law? That is one problem.

Another is we have to figure out to what extent machine-learning decision-making tools are staying within the statutory guidelines. That is an enforcement problem. And last, we have a lot of companies under order, and order violations are hard for the agency to detect and to deal with simply because of the high volume of companies under order. That is a serious enforcement matter.

I mean, for a company to violate an FTC order undermines the ability of the agency to do its work; it undermines the deterrent value of consent decrees or enforcement cases. And I think that the new management at the FTC is going to have to grapple with that.

There are many others, but I will stop there.

DR. COOPER: Would anyone else like to weigh in?

COMMISSIONER OHLHAUSEN: One thing, building on what David said, I agree that one of the challenges for the approach that we have -- and when I talked about privacy policies, it was not certainly to say privacy policies, you know, are it and take care of everything. It is just that I do not think they are as totally useless as some other people seem to think they are.

But the other problem is these kinds of harms that we -- you know, you may have a lot of little bits of data that were not sensitive, that were not even personally identifiable when they were collected, but through these new tools they can be assembled in a more complete mosaic and identified to a certain person.

And then I think the question there is, is there a harm, is there a risk there? And that is where I think we need to start thinking how do we address that? Because a lot of those uses may be great. They may be very beneficial. We do not want to stop those, but for the harmful ones. And if we look at something like going back to the pre-internet days of the Fair Credit Reporting Act, it was trying to get at those kinds of issues to allow some kind of balancing and use of this data, but to allow consumers

to know if it was being used in a way that disadvantaged them in connection with an important decision, like employment or insurance or some other ones, lending, and then gave them insight into what it was and the right of correction.

So I think that is where we need to start thinking about kind of a risk-based approach, because I do not think we can, necessarily, foresee all the uses. I am a little concerned about the data use specification requirement because, as Howard said, there may be great uses down the road that consumers would like. But they still need to be protected from some of these new abilities to use these little bits of data in a new way.

DR. BEALES: I don't know why the more complete mosaic is itself a problem. The one part of that that clearly is a problem is if the Government can get that. But there is another tool to control that problem.

COMMISSIONER OHLHAUSEN: Right.

DR. BEALES: And it is the one we ought to use and not worry about the possibility that this might be put together.

I want to say two things about -- you know, I think big data is a really interesting question and

there are certainly potential costs there. But there has also been big benefits. I mean, that is where our fraud control tools come from is data aggregations, often data that was collected for a different purpose, that is put together in an algorithm that predicts the likelihood that a particular person is really who they say they are.

If it were not for those tools, there would be a lot more identity theft than there is, which is way too much. But that is a big data effect. You cannot do that with little pieces of data one at a time. You have to aggregate the data in order to get a more comprehensive picture.

The other thing I wanted to say is about algorithms, which raise some potentially interesting questions. But I think the algorithms that ought to be of concern are the ones where the user of the algorithm does not face the costs of mistakes. Because an algorithm is just basically a way to classify you are a good risk, you are a bad risk; you are a good prospect, you are a bad prospect.

There is a really interesting example of Reuters, which wants to get scoops on international news, and it does that in part by following tweets. But there is a lot of bogus tweets. And so they built

an algorithm to figure out whether this was likely a real story that they should follow up on or a bunch of fake tweets that they should ignore.

They face the costs of both mistakes. They are going to miss a story if they misclassify these tweets as false tweets and ignore it. They are going to waste resources if they misclassify these tweets as true and pursue it and they are false. So they know what the tradeoff is. They know what the costs are of both kinds of mistakes. There is no reason to think they make the wrong tradeoff.

And I think that is true of a lot of marketing applications, where if I screen out "bad prospects," I am turning away business. I do not want to do that by mistake. I want to turn it away if it is bad business, but I do not want to turn it away if it really is good business. So there are some fairly strong incentives within the system to make sure the algorithm works well.

Where you do not have those incentives is where somebody using the algorithm only pays part of the costs and the rest of the costs are shifted to somebody else.

MR. SOLOVE: With the algorithms, I think there is a lot of concerns because suppose --

especially a predictive algorithm, suppose the hotel chains get together and create an algorithm for determining when a particular hotel guest is going to damage the hotel room or treat the hotel room badly or do misconduct in a hotel room. And they basically come up with the algorithm and it comes up and says that you are one of those people. And starts --

MR. VLADECK: Quotes Mick Jagger.

MR. SOLOVE: -- you know, you are -- yeah, along with Mick Jagger, too.

(Laughter.)

MR. SOLOVE: And you start to not be able to rent hotel rooms or suddenly you are charged more. And what are your rights there? Because when you are targeted in a predictive sense, it is like, well, hey, I never did any damage. Well, we are not saying you did, the algorithm is just saying that we think there is a high probability that you might. So there is nothing wrong with the algorithm. It is just taking into account factors and, hey, it might actually be true, but you have not done it.

Should people have rights to say just because it says I am likely to, how do I disprove that?

MR. VLADECK: Or how do you even know it?

MR. SOLOVE: Exactly. How do you know it? How do you disprove it? How do you argue with a prediction. So if the FBI says, our algorithm says you are going to commit terrorism; we will not let you on the plane; you will say, well, how do I prove it? It's like, well, live your life and die, and then if you have not committed terrorism, then we will take you off the list because we know you did not do it.

(Laughter.)

MR. SOLOVE: The algorithm was wrong. There has to be something to say who regulates, what are the concerns with an incorrect thing? How much transparency do we have? How can it be used? What about people's rights to challenge it and say, hey, the prediction is wrong, either inaccurate -- I mean, how do we -- but to just kind of leave it to industry to do whatever they want without looking to the harms that consumers might suffer from this I think is something that we definitely do not want to do. That is why I think it is very important that we look into this and have good regulation on it.

MR. VLADECK: Let me push back a little on Howard's point. It may be that Reuters bears the risks on both sides of this, but in consumer finance or creditworthiness or anything else, the consumer who

is misclassified by the algorithm bears the risk, may not be informed, and there are no shortage of stories that have been publicly discussed where people have been disadvantaged based on correlations, not on their actual -- so, you know, American Express had a serious problem because it was reducing the credit limits for black customers who went to certain kinds of box stores that were deemed to be indicative of a credit risk. And when that became public, their answer was, we screwed up, but we relied, essentially, on an algorithm.

So, again, I am not trying to suggest that machine learning cannot help us make better decisions, but there needs to be both some transparency and some due process here, particularly where it is not the company that bears both sides of the risks.

DR. BEALES: Well, I think in the financial transaction, it often is the company that bears both sides of the risk because they are turning away business that would be profitable business, and there is an incentive to not do that. We can argue whether it is the perfect incentive or not.

But I think the other thing we have to recognize is human decision makers have all those same biases and they are every bit as hard to tease out.

They are probably less transparent than algorithms.

And know when I was at the FTC in the 1980s, in the early 1980s, and we were bringing a lot of equal credit opportunity cases, every time we looked at a judgment creditor, a guy who sits down and looks at the applicant across the table and says, you look honest, I will loan you money, there was discrimination. It varied whether it was women or race or what kind of discrimination, but there was discrimination.

Credit scoring guys did not have that problem. Credit scoring reduced the discrimination problems that were inherent in judgmental creditors. And that is the potential gain from algorithmic decisions. More data is usually better because it can challenge your preconceptions about what is going on and what is the right answer here.

MR. SOLOVE: Sometimes. I mean, I think that is true sometimes, but sometimes algorithms are no better than the humans that design them and there are hidden biases that can crop up in algorithms, not just the people who design them, in fact, the data being inputted into them. If you input data that is infected with human biases into algorithms, the algorithm spits out data that also is infected as

well. So there are a lot of concerns all around.

Absolutely, algorithms can improve human judgment. Absolutely, human judgment can be problematic. But I do think that the cost of, let's say, for a business just saying, hey, I do not want this business, I am going to turn a consumer away is not enough -- it is not the same level of harm to the consumer. Because a business can say on the aggregate, we just think certain types of consumers are not very profitable for us, so who cares if we lose a little bit of business; we ultimately gain.

For those consumers who cannot have access to credit, who cannot get a loan, it is a much, much bigger deal and a much, much bigger cost. So I actually do not think the market would always work itself out because I think that businesses might make a good economic decision, hey, if we do this, yeah, we lose a little business, but we also lose some risk. But that does not always look the same way on the consumer side.

DR. COOPER: Maureen, you wanted to jump in?

COMMISSIONER OHLHAUSEN: Yeah, I wanted to weigh in on this. I do think that there is the mechanism of the market where if one company has a poorly designed algorithm and it is leaving good

business on the table, someone else has an incentive to try to capture that.

And that is one of the things I think we are seeing in the lending area. There are finer distinctions being made with better targeting tools that allow lending to occur at better rates than really going by the rough calculation of a credit score that, you know, you kind of fall on this side of the line or that side of the line.

So I want to certainly take into account the fact that there are competitive pressures to have a better algorithm to expand your business.

DR. COOPER: Just to kind of follow, it seems a lot of this discussion is about the classifications, obviously, that come out of algorithms. Is Section 5 the right way to address that? We think about Section 5. At least three out of the four of you here on the table have been in the position of an enforcer.

Leaving aside whatever statutory or regulatory authority Congress has given the FTC to enforce discriminatory, is Section 5 -- should it be addressed -- say an algorithm unfairly classifies someone as getting subprime loans, for instance, is that stretching Section 5 beyond where you think it

should go or is that the right place for Section 5 to be or instead should it be Congress making cuts of what is unfair discrimination?

DR. BEALES: It is beyond where I think Section 5 should go. Obviously, the FTC has a role in places where Congress has given it a role, like equal credit opportunities, where it enforces, and it is reasonable and appropriate for it to do that. That is what it should do.

But to look for discrimination, even of the same sort, in other places is a whole different set of considerations than what the Commission knows about and has expertise in. One of the proposals that was kicking around at the time of the unfairness policy statement was, well, maybe we should use Section 5 to say boards of directors should be more representative. Elizabeth Warren, call your office. And that was the kind of thing that the Commission and Congress were trying to get away from.

And that is why those subjective kinds of values, I think, is something that the unfairness statement says in general we cannot do that. And even if it is something we might do, it is probably more appropriate for a different agency to do it.

DR. COOPER: David?

MR. VLADECK: I have a slightly different answer. I agree with Howard that this kind of issue would arise mostly under ECOA or FCRA or some of the other statutes the agency enforces. But I think to the extent that there is some intentionality here, then it would fit under the unfairness doctrine. That is, if there was a reason for the designers or the users of the algorithm to know that it somehow, either inadvertently or because of the training data, systematically excluded X people, based on gender or one of the suspect classes, I think the agency would have an unfairness case. But I think the burden on the agency in a case like that would be very high.

DR. COOPER: I imagine you probably do not want to weigh in on that.

COMMISSIONER OHLHAUSEN: It has been covered.

DR. COOPER: Yes, it has been covered adequately.

While we are on this about -- and you had raised something, David. I think it is interesting earlier on, in your earlier response, thinking about some of the problems, do you think that -- and really both David and Howard's people sat there and looked at the complaint recommendations and thought about what

relief you should get. Do you think the FTC, in its 13(b) equitable powers, do you think it is hamstrung at all in its ability to get adequate relief in privacy cases or do you think there should be -- I realize the Commission, I think on a bipartisan basis, has been on record as saying that in data security cases civil penalty authority would be good. I could be wrong about that. I think that is right.

COMMISSIONER OHLHAUSEN: That is correct.

DR. COOPER: But leaving aside that, do you think in privacy enforcement, do you think there needs to be a bigger stick than we have now? In many cases when these are apps that are free and collect data, it may be very difficult to get equitable relief under 13(b).

MR. VLADECK: I do think that -- in my own view, and I do not think this is the Commission's view, is that there ought to be original fining authority under 13(b). And take Ashley Madison. There is no way to do meaningful redress there. Injunctive relief is not going to give much solace to people whose marriages ended or whose spouse committed suicide. So I do wonder about the ability of the agency to forge any kind of effective remedy in those cases.

I also think that if you look back at some of the cases that we brought early on during the Leibowitz era, I think that a civil penalty, for example, against Google or Facebook initially would have had had a deterrent value. Facebook is currently under investigation again. Google, it took only two years before it violated the consent decree.

I do think there ought to be initial fining authority under 13(b). I think the Commission would have to use it carefully, particularly where other remedies were just simply inadequate. But I do think 13(b) cases ought to be -- I think civil penalties ought to be available in those cases.

DR. COOPER: Okay. Howard, do you want to weigh in on that?

DR. BEALES: Sure. No, I do not like the idea of civil penalties, especially in an area like privacy. I like the original scheme of the FTC Act that was essentially the one bite at the apple, because the precise meaning of “unfair and deceptive” is not that clear. And the way the Act was set up, the Commission could get an order, and if you violated the order, you were subject to civil penalties for that.

But civil penalties sort of presume a really

clear standard I think of what is a violation and what is not. And that is not so clear in a lot of the privacy areas. I think it is a lot clearer in data security. I do think civil penalties there make a lot more sense. But I think in a lot of privacy and some other areas, I think monetary relief is not appropriate.

DR. COOPER: All right. So, Howard, while I have you, we are now turning to kind of how we are seeing a shift. We looked at some changes in the landscape of privacy regulation around the world and throughout the United States, you know, we see in the GDPR, California, the FCC Privacy Rule that is now defunct. They all seem to be taking more of a FIPS-based approach in notice and consent, deletion rights, correction rights, we see in the GDPR and California.

On the other hand, we have the FTC which has been really based on demonstrating likely consumer harms or deception. This tees off a little bit -- we have discussed a little of this in the ex ante versus ex post discussion. But do you have thoughts on why you think we have seen a trend towards this, at least in recent evolution of these newer privacy schemes, away from harms-based and more toward a consent-based?

DR. BEALES: Well, I think two things. One is -- and I think this remains true -- there is a remarkable unwillingness to articulate what are the harms we are worried about or inability to articulate what are the harms we are worried about. And if you cannot do that, then it is hard to do a harm-based approach, especially as an across-the-board regulation that applies to absolutely everything. You have to think through the harms that you are trying to prevent first. And there has been, to me, a remarkable unwillingness to do that.

Second, I think the FTC in the last few years has -- it certainly has not abandoned worrying about consequences, but it has also moved towards more what I would call FIPS-plus in its enforcement action. I mean, the Vizio case is a really good example. There is just no way to tell the story about that case that does not come down to notice and choice. People were surprised to learn -- did it violate their expectations to learn that their internet-connected TV was connected to the internet? Really?

(Laughter.)

DR. BEALES: And did they think that it was making recommendations for the next thing they should watch without knowing what they had been watching in

the past? Really?

COMMISSIONER OHLHAUSEN: It did not make recommendations, Howard. It said that is what it was collecting the data for.

DR. COOPER: But it did not make recommendations.

COMMISSIONER OHLHAUSEN: But it did not make recommendations.

DR. BEALES: Well, that is not what the -- the complaint does not charge the failure to make recommendations.

COMMISSIONER OHLHAUSEN: No, but it charges that it was collecting the data and sharing it --

DR. BEALES: For ratings purposes. This was a completely innocuous use. There is no harm there at all, no harm there at all, other than people did not know. It violated their expectation.

COMMISSIONER OHLHAUSEN: But it was also --

DR. BEALES: But why is that bad?

COMMISSIONER OHLHAUSEN: It was also collecting data, like even if you were not watching something, streaming. If you were watching a DVD or something, it was collecting and reporting back, this television watched this DVD. So that is not a ratings purpose.

DR. BEALES: Well, again, what is -- I mean, it is a ratings purpose because it is how are people spending their time with the set, which is what you -- I mean, it is what the television rating services are busy measuring is, how much time is the set on? That is what the boxtop is recording.

COMMISSIONER OHLHAUSEN: But that is not what was being collected.

DR. COOPER: Right.

DR. BEALES: But this is complementary to that data. It would help you --

MR. VLADECK: Well, in addition to that data.

DR. BEALES: Well, it --

MR. VLADECK: It is anything that --

DR. BEALES: This is competition for Nielsen, all right, that has a box that measures what the TV is on and what channel is it tuned to and that is about it. It is additional information about whether people are actually watching a TV show on the channel that it is tuned to or watching something else. I mean, there is -- you know, you can say it was unexpected. But I do not know why it is bad.

MR. SOLOVE: Well, I guess there is a lot of dispute about harm. This is one of the problems when

it comes to harm is that, you know, you say, well, harm is never articulated. Well, maybe the harms that you would think of what harm is is not articulated. There are harms in some of these cases that do not necessarily mean that someone is out financially or their reputation is ruined.

Part of it just is consumer trust that you buy a product, you think something is going to be used in a certain way, and suddenly, you discover, well, whoa, all this other stuff is going on. And that does not just hurt the consumers; it also hurts other industry. People start to not trust it. Well, gee, I do not want to buy the nest things because they are going to do something with my data. I do not want to buy a Google Home. I do not want to go and use these new technologies because I cannot trust what they are going to do. Nothing they say -- and it could be a different company.

But if consumers start losing faith that, you know, what is told to them, what they expect is not what they expect, all these products, they are going to start to say, why do I want to start bringing this stuff into my home when it seems like everybody -- the common story is they are doing something else with it that I did not expect? And

that hurts other companies.

It undermines the companies that are doing the right thing, and are saying what they are doing with it and then doing that. And then if they want to use it for something else, tell people. Try to get their consent.

MR. VLADECK: This is a Bob Bork problem. This is why we have the Video Privacy Protection Act, because someone went to -- you know, they used to have stores where you could rent videos -- and got a list of what -- and everyone was outraged because who knows whether he was sitting there at night watching Disney shows or porn?

DR. BEALES: But Vizio says -- to me, the Vizio case seems to say the store cannot keep the record.

MR. VLADECK: No.

DR. BEALES: And that seems crazy. They are not publishing this.

MR. VLADECK: It is a TV set. It is not your content provider. It is not your content provider. It is a TV set. It is like a radio. It is not a content provider. It is -- and what Vizio is doing is keeping an account of what you watch and selling it with no restraint on selling it and that is

why --

DR. BEALES: They are selling it anonymized.

MR. VLADECK: Well, okay.

DR. BEALES: And aggregated.

MR. VLADECK: But that is why we have a Video Privacy Protection Act because Congress --

DR. BEALES: No. There is nothing in the Video Privacy Protection Act that would keep the store from reporting the aggregate rentals by title.

MR. VLADECK: That is true. That is true.

DR. BEALES: And that is what Vizio wanted to do with this data, was stuff by title. I just want to say if we think about the problem the way Daniel just characterized it, then I think it is a problem that has no solution. I mean, there is an interesting article in the Wall Street Journal today that I didn't read closely about 5(G) and why it is important to be first, that predicted, among other things, that we are going to have internet-connected tennis shoes.

(Laughter.)

DR. BEALES: Now, imagine having to read the privacy policy for your shoes and your light bulb and everything else. There are going to be things that happen in this new world that consumers will not know about, right? Their cars will do things now that they

do not understand how it happens or that it happens.

If the goal is for consumers to understand, at a technical level, what is going on and how all information is being used, we are not going to get there, guys. Let's think about what is second best.

MR. VLADECK: Well, I think the consumer -- I totally agree with that point. Consumers really are not going to understand the technical thing. That is why I think the FTC plays a great role here as a backstop to say, look, someone's got your back. If the uses are going to start to get so far afield, so unexpected, we are going to stop that, we are going to keep that in check.

And I think it should not be like, okay, wow, you are going to be totally ruined, that should not be the standard, or else then I think it should just be -- obviously, if there is a small variation in use and it is very innocuous, it is not a big deal, I do not think we should go after trivial things. But I think significant variances in use are not totally trivial.

And it is not like it is impossible -- and you can also look at the circumstances. How hard would it have been just to try to shape expectations a bit better about what this product is going to do?

Companies should have some kind of an obligation not to just hide the ball and secretly do things, not saying that it has to be in a fine print of a privacy policy.

But, you know, the more people that understand a little bit about like, you know, okay, what are these new products doing and what are the consequences, there is an education that needs to happen as we make these changes, and it is not happening because there is no incentive to do it. It is like, great, I can get away with just doing it on the sly, and no one is going to come after me.

DR. BEALES: I think the important backstop, though, is not that there is something -- that I know there is nothing surprising happening with my data. Because, I am sorry, whatever your data is, there is something that would surprise you that is happening with it, almost for sure. And even if you are quite sophisticated about what is being done with information and how it is being used, that is probably true.

The question should be, is there something that is being done with that data that is creating a problem? But the mere fact that I did not know it was there is not the problem.

DR. COOPER: Well, now that Daniel and Howard agree on the role of consumer expectations in privacy, it is great that we solved that problem.

(Laughter.)

DR. COOPER: I want to make sure we have time for some of the questions we got. But I want to turn back to David and -- in my introductory remarks, I kind of posited that weird inflection point that there is something out there that seems to at least have a lot of people talking or suggesting that we need to rethink privacy here in the U.S., maybe moving us closer to the E.U. We see this in California.

So to David, do you think that the pressure for national or international conformity is going to drive federal privacy law closer to these other models whether we like it or not?

MR. VLADECK: Well, first of all, I think that the enactment of the California statute and sort of the slow implementation of it, deliberately slow implementation, has created an interest in many other states to see if they could replicate what California has done. And so I do not think that Congress is going to immediately race to enact federal privacy legislation.

But many of the most important statutes that

we have, the environmental protection laws, the occupational safety and health laws, these were all enacted basically in response to an emergence of state law. So my guess is that unless the business interests that are unhappy with the California law succeed in either scuttling it back into the California legislature or attacking it successfully in court, you will see other states moving to adopt a regime based on the California statute, which is to some extent based on the GDPR.

And so the other force that is very much at work -- and the privacy lawyers in this, either here or watching this on the web, may know this because they have spent the last six months advising clients nonstop on compliance with the GDPR. So I do think it is going to have an influence on the United States. I think that is problematic in and of itself.

I think there are many laudable goals in the GDPR. I think for the United States to adopt that kind of approach would be very difficult. We are not based on a code system of laws. And the GDPR reads a little like the Napoleonic codes updated a little.

(Laughter.)

MR. VLADECK: So I think there is some friction in the joints. But I do think --

particularly, California has 37 million people. It is the fifth largest economy in the world. It is the locus for much of the development of the tech community. And I think it is going to be highly influential. And I think the FTC has to sort of be very conscious about what is going to take place as a result. And I do think that Congress has basically made itself irrelevant in this debate and that may be a good thing.

(Laughter.)

DR. COOPER: Howard or Daniel or Maureen?

DR. BEALES: I agree with that. I would point to a slightly different example of what I actually think is probably the most likely outcome. California is big enough to sort of drive things substantively, but as it turns out, so is Vermont. Vermont passed a law requiring labeling of anything that had genetically modified organisms. That provoked industry support for a preemptive federal law that says you have to label if it is genetically modified ingredients, but you can label by a QR code that people can scan and go to a website to figure out whether it is genetically modified or not.

There will be pressure for preemptive federal legislation. What that federal legislation

will look like is not so clear. But I think there will be that pressure.

MR. SOLOVE: In the early days of breach notification, I remember I testified before Congress right after the ChoicePoint breach -- this was 2005 -- and there was interest, very strong interest in Congress, look at all these states that are starting to pass breach notification and industry was all behind it. We have to comply with all these different standards and this is going to be very complicated and expensive and we really need some federal preemptive law. There were even a couple of bills kicking around. Nothing happened.

So I have very little faith that this Congress really can pass a law, let alone tie its shoes. So I think that it really -- I am not expecting -- even though I think that some of these laws could benefit consumers and benefit industry to have some in these areas, I just do not think it is likely. So I think Congress just will not have the role, unless it somehow gets its act together, really will not.

I mean, the most significant privacy legal change that was passed was passed as part of Obamacare. It was the High Tech Act's updating of

HIPAA and passing the notification rule, and that is really the big accomplishment for Congress since 2000 really. Not much has gone on. I do not hold out much hope. So I think it is going to be what it is.

And I think there are some problems with that approach, when we are going to have a lot of different varying state legislation on privacy. Breach notification is at least something that is more focused on one thing and you have variances. All sorts of different laws, like California's, with different variations is really going to be a big nightmare for industry to comply with. And I do not necessarily think that is a good thing.

DR. COOPER: Maureen, did --

DR. BEALES: I will say when I started at the FTC in 2001, everybody said internet legislation, privacy legislation is going to pass right away, and you guys better get behind it. But it has been a while.

MR. SOLOVE: Well, we said that at the beginning of the Obama Administration, too.

(Laughter.)

DR. COOPER: Maureen?

COMMISSIONER OHLHAUSEN: Well, I was just going to point out that Congress and FTC are not the

only actors in this drama, or the states. So NTIA and NIST, Department of Commerce, and the White House are all considering paths forward. Do we look at some sort of approach that would allow more of a uniform privacy framework to be put in place? So I would encourage people to pay attention to that process as well.

DR. COOPER: That will be interesting. I just got a card that -- I was going to wait for the audience. But it says, point of fact, HR6743, federal data breach is going to the full house and it was just voted out of committee today. So breaking news here.

(Laughter.)

DR. COOPER: So I am guessing it was prompted by this panel.

(Laughter.)

DR. COOPER: Time to take immediate action, immediate action.

So we are talking here about the pressure, the external pressure on the U.S. One thing that we have here in the U.S. is the First Amendment that seems to push back against privacy regulations.

I wanted to, Daniel, turn to you. And I know you have written and thought about this, sort of international or at least comparative privacy law a

lot. Do you see any problems with extraterritorial application element to the GDPR? For instance, we see that the European Court of Justice is now considering the extraterritorial application of the right to be forgotten? We saw a Canadian court deal with some of that earlier this year with Google. So do you see that as a potential pushback?

MR. SOLOVE: I mean, there are definitely certain problems with that. I mean, a lot of laws, including U.S. laws, have extraterritorial application as well, including the California law. To some extent, every country and every region has a right to regulate those who do business in its borders. I guess one thing is good luck enforcing that over in the U.S. If a company is not in Europe, the GDPR says it applies, but I do not see what they are going to do to really enforce it.

So it is there on paper. It looks scary on paper, but, in practice, it is kind of a joke. They really cannot enforce it. There are certain aspects of GDPR that would not fly under the First Amendment, but there are a lot of aspects that are fine under the First Amendment that are embodied in various U.S. laws. I can look to a lot of different provisions of GDPR and find analogs and similarities in U.S. laws,

including even rights to be forgotten. There are already rights to be -- COPPA has one, for example.

A lot of these are not like foreign, radical concepts. There are certain things about GDPR that just will not fly in the U.S. for First Amendment reasons, as well as just general U.S. approaches. So the idea that you need to have a lawful basis to process data, that you have to be somehow authorized to do it, and there are only certain justifications that allow you to even use or collect data, I do not think that would really work in the United States. It is just so contrary to the U.S. approach, which is generally a permissive approach, like you can use it unless there is a problem that is caused by it.

And that is generally the U.S. approach is not to just say you need authorization to do something, unless what you are doing starts creating an issue. I do not see that being carried over. But I think a lot of the things the GDPR does and a lot of things these laws do are not so radical and foreign and different to the U.S. You look at HIPAA, you look at GDPR, there are a lot of similarities, actually much more than the California law. HIPAA has a lot of similarities.

A lot of GDPR is just having a privacy

program, doing basic risk assessments and other things, all of which HIPAA requires. And the GDPR often does not say a lot about what those things should entail. It says, hey, do privacy by design and do it early, but it does not say what you are supposed to do for that. It is largely empty. It says, do a privacy impact analysis, but it does not have a lot of specificity on these things. And that is sort of how HIPAA is in a lot of ways, too.

So in a way, I do not think that things are so radically at odds with each other and that the GDPR approach is radically incompatible with the United States. I think there are certain things that will not transfer over, but I think the things that transfer over, the commonalities and the things that could work, are more than the things that cannot.

DR. COOPER: Anyone else want to jump in on that?

All right. So in our little bit of time left, I have lots of great questions. I, unfortunately, will not have time to ask all of them. But I want to direct one to Maureen because it is right in your bailiwick.

It has to do with the FTC taking advantage of its dual role as both having a consumer protection

and competition side, and using that to examine the impact of data, not just in the consumer protection dimension, but on the impact on small business competition and entry. And I know you have written about that and thought a lot about mixing privacy and competition.

COMMISSIONER OHLHAUSEN: Certainly, in a competition analysis, data could be considered if it is an asset that is being combined in a merger in a way that is going to reduce competition in some way, much like combining two distribution systems or combining two factories.

I think one of the questions, though, is really a lot of times concerns about privacy are really what is driving concerns about trying to use privacy in a competition analysis. So it is not really about hurting competition; it is about hurting privacy. So I think there certainly are examples one could think of, right?

So say there were two very privacy-protective handset manufacturers and they sort of had that big part of the market, and so you could say that was a separate part of the market than other handsets, and they were going to merge, and then they were going to have a high market share of handsets that compete

on privacy attributes. That could be an antitrust case. Just like you could have two manufacturers of super premium ice cream who want to merge.

DR. COOPER: Just hypothetically.

COMMISSIONER OHLHAUSEN: Just hypothetically, super premium ice cream -- that was a case. So I think it is not that data cannot be a part of it; it is just the concern has to be about competition.

Now, on the other hand, we have had situations where one company is buying another company and they are going to be combining data sets. They are not-horizontal competitors. It is not that it is taking a competitor out of the marketplace. But the data that is going to be transferred over to the merged company was collected with a certain set of promises. What we have said through our head of Bureau of Consumer Protection is that the promises travel with the data.

So if you collected this data and said, we are not going to, you know, use it for marketing, and then they are going to combine it and then use it for marketing, they would have to get basically a new consent from the consumers. So if a consumer says, well, no, no, that is not what I wanted, then they

would have to take them out of that data set. So I think that is the way it has been handled.

There are mergers cases where you are combining two very unique data sets. Like we had a case about mapping used for insurance and we had a competition remedy because it was going to reduce competition. So we actually had a remedy that required sort of replication and sharing of this data set.

But, often, these types of mergers that involve a lot of data are being combined to create what we would consider in antitrust like a new product, like a new efficiency, as long as it is not harming consumers as a consumer protection matter. And that would not be considered a negative kind of thing.

So I actually have an article about this, called Competition, consumer protection and the right approach to privacy.

DR. COOPER: She will be outside signing it on the way out.

COMMISSIONER OHLHAUSEN: Right.

DR. COOPER: It is not for sale.

COMMISSIONER OHLHAUSEN: It is in the Antitrust Law Journal in 2014.

So it is not to say these values are not important; it is to say what tools you use are -- that is an important consideration. If you are concerned just about someone is going to use data in a way that harms consumers, that is a core consumer protection issue, and you should use those tools. If you are concerned that this transaction that involves data sets is going to reduce competition, either competition on privacy or competition in some other form, then antitrust is the right tool.

DR. COOPER: Anyone else?

DR. BEALES: Yeah, I think there is a different perspective on it that is also important. As we look at and as states and Congress look at additional regulatory requirements, those often have differential effects on competitors. And, in particular, in the privacy world, it is a whole lot easier for a consumer-facing company, like Google or Facebook, to get consent than it is for the behind-the-scenes somebody that does exactly the same thing, using exactly the same information, but they collect it via cookies planted by a host of different publishers participating in an advertising network. But that is the competitive fringe in the online advertising market.

And regulations that make it harder for them help to entrench Google and Facebook, and that is not necessarily a good thing. But it is very much a competitive concern.

DR. COOPER: Anyone?

Okay. So here is a question in our 2 minutes and 21 seconds left, about the -- it did not come up surprisingly, but we kind of touched around it -- the privacy paradox. Maybe, Daniel, I will aim this one at you first. But the audience member says, how do you reconcile the fact that consumers regularly value privacy highly when asked, but they tend to do things that contradict these stated values?

And I think we all know that as a privacy paradox, that stated preference seems to diverge from revealed preference in the privacy space.

MR. SOLOVE: Yeah, Alessandro Acquisti, an economist at Carnegie Mellon, has done some really great work on this and studied this very effect of what people say and what they do are at variance. And that is often the case.

And part of it is that the choices that people have and the way that they make those choices are shaped by how those choices are presented to them and a bunch of other factors that could lead them to

make choices that are not always consistent with their stated attitudes. So we might say, well, what is true? Do we say the behavior is the truth about what they really value or is it what they say? I actually think it is neither. I do not think what they say is actually reflective of how they actually value something. But I do not think behavior is always a good metric, either, because there is a lot of things skewing the behavior. And Acquisti does a great job of pointing out all the different skewing things on the behavior.

So in a way, it is very difficult to measure what consumers actually value because I think both metrics are problematic for doing that. Because a lot of it is how informed the consumer is and what information they are given and so on. And you get very odd effects.

One of his studies is very interesting. He had two groups. In one group he told them, they are going to collect very sensitive data. In one group he said, we are going it protect it; we are going to give all sorts of privacy protections and security protections on it. In the other group he said nothing. And guess which group disclosed more? The group he said nothing to.

So it is almost like punishing you for actually doing the right thing and that is because when you told people all the privacy and security protections, people's minds suddenly woke up, oh, my gosh, maybe there are these risks I did not think about, and that made them more cautious. So a lot of interesting effects and I encourage you to read his work. It is very illuminating and will do a much better job than I did at tackling this issue.

DR. COOPER: I am sorry, David.

MR. VLADECK: I will make one other -- you know, people are generally presented with take-it-or-leave-it offers. You either are on Facebook or you are not or you use Google search or not. We did some research when I was at the FTC about these issues and part of it just -- and this just sort of echoes what Dan says -- how the choice is presented.

DR. COOPER: Yeah. Howard, did you want to --

DR. BEALES: I think how you frame it clearly matters. But consumers have all sorts of preferences where it is a perfectly valid preference and a perfectly real preference, but when they confront the cost of satisfying that preference, they

make a different choice. There are issues of how you pose the question and how you define it and what consumers know. But there is also these choices have costs, and consumers might make them differently.

The example I like is organic foods. Something like 48 percent of consumers say, yep, I prefer organic. Organic's market share is about 5 percent.

DR. COOPER: Well, I wish we could go on forever. I am sure the rest of you all do. But we are out of time by the six zeroes on the clock up here. So join me in thanking this great group today.

(Applause.)

DR. COOPER: And I will await my instructions from Bilal.

(Panel 3 concluded.)

CLOSING REMARKS

MR. SAYYED: I have one more little end note. Howard Shelanski, a professor here, will give closing remarks, and here he comes now. Price is Right style.

MR. SHELANSKI: All right, great. Thanks very much, Bilal. And thanks to all of you for being here. I am used to, at academic conferences, saying I am standing between the audience and cocktail hour. There are no cocktails here, so you guys are stuck.

(Laughter.)

MR. SHELANSKI: I will, nonetheless, keep things brief.

I want to start by just reiterating what Dean Trainer said this morning. It is a real honor for us here at Georgetown to be able to host these first days of this series of hearings that the FTC is hosting. We have a deep connection to the FTC, as Dean Trainer explained, and it is really just wonderful to have such a vibrant debate and so many of you here today.

And special props for my antitrust students who showed up. I really appreciate that. Former students, so they are not getting any benefit from this since I am not teaching it this semester.

One of the things that I think has been particularly heartening about today's discussion is we really see the full integration of the agency's consumer protection and competition missions. I think both of those are front and center. Certainly, the last panel makes that very clear in the issues that these hearings are tackling.

You heard Bilal say earlier the Bureau of Competition and the Bureau of Consumer Protection are really complementary. I might add Bilal left one thing out of his formulation, which was the Bureau of Economics. It is my view that with a small handful of FTE, the Bureau of Economics could actually be completely substituting of both of those other bureaus. But that is perhaps a chauvinistic view from someone who spent some time at that agency and in that bureau.

The importance of these hearings really cannot be understated. I think one of the great things of the American regulatory system at large, and one that -- sort of a distinguishing set of characteristics that one sees when one goes around the world and sees how regulation and law enforcement is done in many other very sophisticated jurisdictions -- is the level of transparency and accountability that

characterizes the way our federal agencies act.

And to be sure, one could be cynical about certain actions that those agencies take. But when one takes a broad view, it really is quite impressive. Agencies have to justify their decisions. Agencies have to have a coherent framework and they have to have evidence. And those agencies do not get to make those decisions on their own because they are subject to accountability through the courts. And you just have to open up the paper today to see an example of a court overruling a federal agency that did not meet those standards. So the agencies have a real obligation.

These hearings fall into that framework of transparency and accountability. An agency that fails to justify its actions in a particular case to a court loses a case. An agency that fails to justify its program and its approaches and framework loses its relevance before the public. And that is, I think, a very damaging and harmful thing to have happen.

So for an agency periodically to hold sustained public hearings, where it examines both the sets of problems on which it is focusing and the analytical framework with which it is approaching those problems is really a very important aspect of

maintaining that relevance, maintaining that legitimacy with the public. And that is exactly how I see these hearings and what I see the FTC as doing.

The FTC has always been an agency that cannot stand still and rest too comfortably with the problems it is focusing on or with the tools with which it is analyzing its approaches to those problems. Indeed, that was the spirit in which Chairman Pitofsky launched the hearing a quarter century ago. We were in a time of very interesting economic turmoil with the rise of high technology industries. Economics and other tools for assessing where there were competitive harms, where there were harms to consumers, were changing and developing.

And it was his judgment as Chair that the agency needed to go out and make sure that it was well understanding what problems the public was focused on, that it was understanding the industrial changes that were before it, and that it was understanding the state of the art of the knowledge with which it would assess those problems.

Well, I think all of those forces are even stronger today. And when Chairman Simons came into office, he came into office at a moment that most of us in the antitrust field and many of us in the

consumer protection field recognized as sort of an historic moment. I think there is sort of unprecedented debate -- I don't want to say "unprecedented," but certainly unprecedented for the last 40 years -- debate over some of the fundamental framework and conventional understandings of how antitrust should be enforced.

There is a recognition that we have much sharper tools out there for understanding how consumers behave and process information. It is time for the agency to step forward and make sure that it is fully taking account of and understanding that public debate, because if it does not, it will keep looking over here and the public will be thinking about problems over there.

So if you open up, again, the paper over the past week, you will read that there is a lot of public debate, a lot of debate in academia, a lot of debate in think tanks about whether the consumer welfare standard, as conventionally conceived in antitrust enforcement, is adequate to address some of the concerns about market structure changes or wealth distribution changes, things that the first panel this morning talked about.

I had people come up to me and say, can you

believe the FTC invited so-and-so; those are flaky ideas; they should not be giving air time to those, and the FTC and I firmly disagree. These are things that people are thinking about and they are motivated by the problems that everyday consumers are perceiving. And if the agency turns its back on those voices in the debate and does not take into account what might be legitimate in those arguments, the agency will lose its transparency and it will fail the test of accountability before the public.

So recognizing that, we see on all of the panels today, and on the panels that we will see in the other 19 days of hearings that I think are scheduled, a real diversity of views that explore the outer boundaries of what would traditionally be thought of as competition enforcement or consumer protection enforcement.

And only by taking into account that thinking at the outer boundaries of the hearings about the problems that might be novel or different in form from the way we have seen them before, given the rise of large digital industries, and AI and new kinds of technology -- only by fully exploring them and doing what Chairman Simons said we should do and that he would do in his opening remarks, follow the evidence.

Follow the evidence to identify where there is really a problem. Follow the evidence for where we have a good understanding of tools that can resolve those problems.

And that way the agency will do two things. The agency will modernize its thinking. It will better be able to explain its actions. Even where the action is inaction, it will better be able to say, action is not warranted or we do not know enough to take action and we are making that decision having taken into account the state-of-the-art thinking and having really heard from the public, from stakeholders of all kinds, about what the problems are that they are feeling and that they are sensing out there in the marketplace.

By doing that, the agency will become more effective. It will modify its framework as it needs to to be more effective. But it will also be more effective and transparent in justifying what framework it eventually arrives at after these hearings.

So these are more important as events than the one-off kinds of conferences that very often characterize a field. They are a sustained and iterative process over 20 days, where some of the same issues will come up again and again.

Everything is documented. Everything is public. And at the end, there will be reports very transparently explaining what evidence the agency is crediting, what arguments it is crediting, what arguments it does not feel it can credit, and the technology, if you will, of consumer protection and competition enforcement under Section 5 at the agency will be all the better for it.

So this is an important enterprise. It is an important enterprise not just for the people on the different panels, but it is an important enterprise for all of you to participate in, commenting, sending your comments to the agency. The agency has an open window for those comments right now. Because it is a unique moment that we might not get again for another 20 or 25 years. Or else it will occur only incrementally through the case-by-case kinds of transparency and accountability.

So this is a critically important moment. I think this is a really auspicious start today to that moment. I look forward to following and participating in some of, at least, the remaining 20 days. I would encourage all of you to do so as well. Thank you.

(Applause.)

MR. SAYYED: So I am just going to say thank

you and say 5 percent down.

(Laughter.)

MR. SAYYED: And then our next session, September 21, Constitution Center, so not very far from here. And that will get us, I don't know, 10 percent down.

(Laughter.)

MR. SAYYED: Thank you. Thank you. Thank you to the panelists. Thank you to everybody.

(Applause.)

(End of Hearing 1.)

CERTIFICATE OF REPORTER

I, Linda Metcalf, do hereby certify that the foregoing proceedings were digitally recorded by me and reduced to typewriting under my supervision; that I am neither counsel for, related to, nor employed by any of the parties to the action in which these proceedings were transcribed; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, not financially or otherwise interested in the outcome in the action.

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