FEDERAL TRADE COMMISSION

COMPETITION AND CONSUMER PROTECTION
IN THE 21ST CENTURY

Friday, September 21, 2018
9:00 a.m.

Federal Trade Commission
400 7th Street, S.W.
Washington, D.C.

FEDERAL TRADE COMMISSION

I N D E X

ORAL ARGUMENT	PAGE
Welcome and Introductory Remarks	
By Commissioner Rebecca Slaughter	6
Opening Address by Joseph E. Stiglitz	13
Remarks by William C. Kovacic	36
Panel 1: The State of U.S. Antitrust Law	53
Panel 2: The State of Antitrust Law	126
Panel 3: Monopsony & Buyer Power	204
Closing Remarks by Commissioner Maureen K. Ohlhausen	272

P R O C E E D I N G S

- - - - -

MS. MUNCK: All right. Good morning, and welcome to the FTC's second session of our hearings on Competition and Consumer Protection in the 21st Century. My name is Suzanne Munck, and I am the Deputy Director of the Office of Policy Planning, and on behalf of the FTC and all of my colleagues, I'd like to welcome everyone who is joining our session in person and via webcast.

And I would like to give my special thanks and gratitude to our tremendous panels that we will have today, including Nobel Laureate Professor Joseph Stiglitz, who is one of the probably most esteemed critics of approaches to antitrust in the modern economy; and also our Former Chairman and Former Commissioner, William Kovacic. So thank you very much to everyone who is participating today. We are very grateful for your time.

Before we get started, it is my job to run through a few housekeeping announcements. First, if you have your mobile phone with you, please silence it today. We are very grateful for that.

Second, if you leave the Constitution Center today for any reason, you'll have to go back through

the security screening again. So please keep that in mind as you're scheduling the time for coffee, et cetera.

Most of you have received a lanyard with the FTC event security badge. We recycle those. So if you wouldn't mind giving that back at the end of the day, we would be very grateful.

If there is an emergency that occurs that requires you to leave the Constitution Center but remain in the building, follow the instructions provided over the PA. If you have to evacuate the building, an alarm will sound. Everyone should leave the building in an orderly manner through the main 7th Street exit; that's where you entered. After leaving the building, turn left and proceed down 7th Street and across E to the FTC emergency assembly area. You can also just look for me or any other FTC staff and we will make sure to guide you in the right direction.

If you notice any suspicious activity today, please alert security. And please be advised that the event is photographed, webcast, and recorded. By participating in this event, you are agreeing that your image and anything you say or submit may be posted indefinitely at ftc.gov or on one of the Commission's publicly available social media sites.

Restrooms are located in the hallway just around the corner. If you need anything, please ask any of the FTC staff; we're happy to help you. And we have a cafeteria onsite that closes at 3:00 p.m.

So with that housekeeping, it is now my tremendous pleasure to introduce Commissioner Kelly Slaughter, then to hear from the panelists today. Thank you very much.

(Applause.)

WELCOME AND INTRODUCTORY REMARKS

MS. SLAUGHTER: Thank you, Suzanne, and thank you to all of you. It's so nice to be here today. I am pleased and privileged to be opening our second day of hearings on Competition and Consumer Protection in the 21st Century. I have long been interested in how policymakers tackle complicated questions about the challenges and opportunities posed by new technologies.

In fact, as an anthropology major, I wrote my college thesis on the first set of congressional hearings on genetic engineering in the early 1980s. I conducted a detailed and sophisticated analysis of the language that members and witnesses used in those hearings and reached a staggering conclusion: everyone came into that exercise with their minds made up.

As an anthropology student who had no experience in government at the time, I was shocked by this conclusion, but now, with the benefit of a decade of experience working in Congress under my belt, my insightful deduction feels more like a statement of the staggeringly obvious.

I bring up this story because the hearings we are now convening have a similar backdrop to those genetic engineering hearings in the early eighties. Technological innovation has raised serious and

important questions of law and policy, and I can understand why those familiar with the ways of Washington might be suspicious that there is a predetermined outcome or a desire to simply endorse the status quo.

However, I believe this moment is different. These hearings are not a project of reaffirming our current policies and practices. To the contrary, they must be a critical rethink of what we do, how we do it, and what we should do differently or better to advance the FTC's mission of protecting consumers and promoting competition. If, at the end of the day, we appear to be merely patting ourselves on the back for a job well done thus far, we will have failed.

This is an extremely exciting moment to be at the FTC. Technological innovation is not only affecting our traditional work in both competition and consumer protection, it is blurring the line between our two traditionally distinct missions. As we heard on the first day of these hearings, there is substantial evidence that markets and sectors are becoming increasingly concentrated across the economy.

At the same time, they are becoming increasingly technologically dependent. Technology is no longer simply an industry. It is a part of every

industry. As a result, it is relevant in more and more matters before the Commission.

Privacy and data security might come to mind first, but the consumer protection staff also grapple with the implications of technology when tackling cryptocurrencies, online marketing, data throttling, tech support scams, thin tech, and even robocalls.

On the competition side, we have also long had to keep pace with technological advancement. We are seeing more and more mergers and conduct matters with technology-related issues, such as data collection, intellectual property, and network effects. And as consumers become data commodities themselves, the nature of competition has been evolving as well.

What is even more interesting to me is how these questions about competition and consumer protection no longer happen in isolation. Addressing a legal question on one side often has profound implications for the other. Consider a hypothetical merger between two companies which each control substantial consumer data. What are the privacy and security implications of that rollup? Consider also the consequences for consumers when limited competition means there is no meaningful choice about whether to patronize a company that may not prioritize user

privacy.

Policy changes on the consumer protection side have competition implications as well. How could effective data portability help facilitate entry and competition while sufficiently protecting privacy? Will new privacy regulations have the unintended consequence of stifling innovation and entrenching incumbents?

The FTC is uniquely well positioned to tackle these issues with thoughtful attention to their interplay. Many other jurisdictions have completely different agencies to address privacy, consumer protection, and competition missions. The FTC is somewhat anomalous by having these issue sets housed under our single umbrella. It is incumbent on us to take advantage of our structure and expertise to meet this economic moment.

In other ways, perhaps, we can learn from the contrast with other jurisdictions. First, the passage and implementation of GDPR across the pond, as well as CCPA closer to home, provide excellent natural experiments for us to see how longstanding ideas, like the right to be forgotten, work in practice. We can also monitor implementation for unintended consequences, including for competition.

At the same time, the European Commission is pursuing high-profile competition cases that involve American companies. Of course, they are working with an entirely different set of laws with respect to competition. The abuse of dominance standard, which does not exist in our statutory framework, puts specific burdens on firms that reach a certain market share.

As we observe the European cases and practices in practice, we have an opportunity to consider the benefits or risks of changing our statutory standards here. I hope that these hearings generally and today's panel specifically give us a chance to analyze these issues carefully.

Chairman Simons noted in his introduction last week that he has an open mind as to what conclusions will be drawn for the hearings, as do I. This is not to me like those genetic engineering hearings I analyzed back in college. I do not approach this with the conclusions pre-inscribed. This critical self-examination should not lead to a reaffirmation of everything we are already doing.

Reflection premised on changing conditions will inevitably uncover areas that are ripe for improvement. It is simply not plausible that a meaningful

self-examination will lead to the conclusion that nothing should change. I am very open-minded as to what that change should be in terms of substance and magnitude. I also think it is important to consider what should change operationally at the FTC and what should be changed by Congress. Those inquiries are not mutually exclusive. We can both do better with our current toolbox and identify areas where we need to supplement it with additional authority or additional resources.

My mother teases me frequently with the adage, "Change is hard." It's funny because it's true, and I think it's particularly true not only for me personally but also for many of us across the legal profession who are raised with the idea that doctrine is developed carefully and thoughtfully over time.

Even though change is hard, it can also be good. Healthy democratic institutions can comfortably acknowledge areas of weakness or prior errors and improve. We can think carefully and also radically at the same time. We must hear and consider new ideas and new voices and not be wed to the notion that the status quo is any more justified than a departure from it.

Thinking both carefully and radically is nothing new for our first speaker today, whom I have

the honor of introducing. Joseph E. Stiglitz is an extraordinarily accomplished economist who has been at the forefront of major economic policy issues for the past 40 years. His work and achievements are vast, so I will attempt to give you just the highlights.

Professor Stiglitz currently teaches at Columbia University, and he is Co-Chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress at the OECD. That is a mouthful. He is also the Chief Economist of the Roosevelt Institute. His career has included stints in leadership at the World Bank, the President's Council of Economic Advisors, and the Initiative for Policy Dialogue.

Professor Stiglitz may be best known for his innovative work to create a new branch of economics, the economics of information, and for his analysis of markets with asymmetric information. He has received almost innumerable prizes and accolades, including the Nobel Memorial Prize in Economic Sciences. And, perhaps most notably, his son once worked for me as a law clerk.

Thank you to Professor Stiglitz and to everyone who is participating in the FTC's examination of Competition and Consumer Protection in the 21st

Century. I also want to thank the FTC staff for their tireless work in planning and carrying out these hearings, and I look forward to lively discussions today. Thank you.

(Applause.)

OPENING ADDRESS BY JOSEPH E. STIGLITZ

MR. STIGLITZ: Well, it's a real pleasure to be here at this time where the issues that we're talking about are so much up in the air. I had the good fortune to participate in a similar convening 23 years ago, in 1995, when I was Chairman of the Council of Economic Advisors. At that time, the broad consensus in the Council was that America had a monopoly problem. We were also concerned -- we and the Office of Science and Technology Policy, with which we worked closely -- were very concerned that this market power problem was going to have and was having an adverse effect on innovation. Those concerns that I felt then I think have been multiplied in the intervening almost 25 years enormously. So what I want to do today is to try to describe the ways and the reasons that I think the time is ripe really for a rethinking of competition policy.

We have a market problem. It's both -- a market power problem. It's both a monopoly and a monopsony problem, and I think in the past we haven't focused enough on the issues of monopsony. It's evident, it seems to me, that current antitrust and competition laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace. The point is that if our

standard competitive analysis tools don't show that there is a problem, it suggests something may be wrong with the tools themselves. Many changes have occurred in our understanding of economics, in the structure of the economy, and there have been innovations in anticompetitive practices. It may be that the innovation isn't showing up in GDP, but it's showing up in market power, and competition law, I think, has not kept up.

Much of the current presumptions and law has been influenced by what is sometimes called the Chicago School. I don't want to blame just Chicago, and not everybody in Chicago has flawed views, so it's just a term of art and not meant to target a particular location. What I'm really referring to when I say the Chicago School is to the competitive equilibrium model, and that model, which has informed our thinking, is basically not robust, as I'll explain, and it does not provide a good description of the economy. And the legal framework based on that as the underlying model will not serve the purpose of ensuring a competitive marketplace. It won't do that very well.

Having an inadequate competition framework has broad economic and political consequences. In other words, having an economy that's rife with market power

means that we have a less efficient economy; it reduces opportunity as a result of important barriers to entry; it creates an unlevel playing field. Market power can lead to growth not based on efficiencies.

The example that everyone knows about is the lower cost of capital of large banks as a result of implicit "too big to fail" guarantees may result in big banks expanding not because of economies of scale or scope, but simply because of the implicit guarantee of Government.

There are political consequences. The concentration of economic power is translated into politics, undermining our democracy, and a broad sense of powerlessness in society leads to a view that the system is rigged and unfair, and that, too, has political consequences. These, of course, were some of the original concerns of antitrust law, and I think the focus has been unnecessarily narrowed.

But I want to emphasize that my talk today is really on the economics. If we get the economics right, we'll have broader political benefits, but I think we really have gotten the narrow economics very badly wrong.

The failures of competition show up at the macroeconomic level; growing inequality, lower

investment, decreasing entry and growth of small businesses. I wanted to emphasize lack of competition is not the only source of these problems, but I believe that it's an important contributor to many of these trends. There has been just a rethinking of the consequences of these inefficiencies.

When I was a graduate student, Arnold Harberger's work talked about the triangles, the Harberger triangles, the inefficiencies associated with them being relatively small compared to the macroeconomic consequences and insufficiency of backward demand. But there are new studies by Farhi and his co-authors at Harvard which show that the loss of GDP, national output, as a result of market power, of the markups of price over margin or cost that would not exist in a competitive marketplace, are orders of magnitude larger and today are very, very significant.

From the perspective of economic theory, we know that the efficiency of market economy is based on individuals and firms facing the same price. That's the way everybody has the same marginal cost, marginal benefits, but the pervasive price discrimination that big data, the new technologies that were referred to just a minute ago by the Commissioner, undermines the fundamental theory of welfare economics, and except in

the limited case of perfect discrimination, the attempt to extract more consumers or producer surplus distorts the economy. That was one of the points that I made in one of my earlier articles on price discrimination in the presence of imperfect information.

And then turning to what most of us think in the long run is really important, innovation, it is also clear that market power can have a very negative effect on innovation, and I'll have a few minutes to talk about why the Schumpeterian model, as it's conventionally understood, doesn't provide, again, a good description.

But the basic idea that -- what are the conditions under which market economies are more innovative are ideas that I've explored in my book, Creating a Learning Society, in which I've shown that increase in market power can have a very negative effect on innovation.

Well, the lack of competition in many sectors is evident in the limited range of choices. You've probably already talked about that in your previous discussions. In many cases, lack of competition has to be assessed at the local level. Small businesses in many locales have only one or two providers of loans.

The FTC has done important work in the area of

hospitals, which are all obviously local, and my referring to that is important because while we're going to be talking a lot about lack of competition in new sectors, like technology, we shouldn't forget that there's lack of competition in a lot of the old sectors as well and that our antitrust standards have not worked not only for the new areas but also for the old ones.

Often, the lack of choice is hidden, and as I say, it's pervasive throughout the economy. You think you're going to different drugstores with different labels, but, of course, they're all owned by the same company; buying different beers, but they're all owned by a couple of companies. And as you start looking through various parts of the economy, it's not only the big things, it's also the little things like dog foods and batteries and coffins.

So there's broader evidence of increases in market power, data on increased concentration across a wide range of sectors, increased markup in many sectors typically linked to increased concentrations, some interesting econometric work that solves the identification problem that plagued people in earlier days. In many sectors, the pervasive price discrimination, as I say, which is actually counter to

the basic argument that we use for what makes for a good economy.

There's an increased share of rents. The share of labor has been going down. That's been getting a lot of attention, but so has the share of capital when you appropriately measure. You can look at the accumulated value of investment, both in fiscal capital but also intangibles, and if you impute an appropriate risk-adjusted rate of return, the share of capital is going down.

Well, what does that mean, that the share of labor is going down, the share of capital is going down? The shares have to add up to one, that's one thing the economists can agree on, and the residual is what we call rents, and some of that is increased land rents, but a lot of it has to do with increased market power profits, and that is affecting the efficiency of the economy but also the distribution.

It has negative macroeconomic consequences. Like I mentioned before, investment is lower than it should be. The downward sloping demand curves result in the margin return to investment being lower than the average return, and this is consistent with investment being weak even as profit shares increase. And there are studies that look at cross-section and relate the

two and show that this is not only an observation we can make on the basis of time series data but also cross-section data.

The constructed barriers to entry discourage entry and innovation, remarkably little entry in some very highly profitable sectors, even though there have been high levels of innovation in sectors that are, you might call it neighboring, where the same kinds of technology would seem to be relevant.

Of course, we know that firms have strong incentives to engage in anticompetitive behavior in the absence of government constraints, so we shouldn't be surprised. Anybody who believes in economics believes in incentives, and when you look at what are the incentives, there are incentives to behave in an anticompetitive way.

I joked that in our business school, we teach our students how to be anticompetitive. I mean, we focus on how to create barriers to entry. We have some really good students who go out there and do that. Of course, that means the Economics Department then has more business, because we fight those barriers to entry that the business school helps create.

But this long-standing presumption dates back to Adam Smith, all of you know, "People of the same

trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices."

It's interesting that many people who think of Smith as the father of modern economics and the defender of the competitive model, he didn't believe that markets would be competitive on their own. He knew that there would be anticompetitive actions.

And in some ways it's quite striking. He anticipated, for instance, the conspiracy of Apple and others in Silicon Valley to suppress wages. "Masters are always and everywhere in a sort of tacit, but constant and uniform combination, not to raise the wages of labor above the actual rate...enter into particular combinations to sink the wages or labor even below this rate. They are always conducted with the utmost silence and secrecy..." He couldn't have said it better, describing what's happened.

And our business leaders really understand this. Peter Thiel said "Competition is for losers." Warren Buffett said, "The single most important decision in evaluating business is pricing power," and he described in a way the economics. We think in terms of an entry barrier, like being surrounded by a moat,

and the ability to keep it with the impossibility of being crossed. We tell our managers we want the moat widened every year. So it's very clear that they understand the importance of making sure that markets are not competitive, and they've learned how to do that.

I want to spend now a few minutes on why there's been this growth in market power, and then I'm going to try to talk about what are the new understandings that we have in economics about why the competitive model that was the paradigm in the background is wrong, and then I'm going to talk about why these two things, the changes in the economy, our new understandings, should lead to new presumptions, a new basis of antitrust policy.

So there are multiple forces underlying the growth in market power. There are changes in structured demand towards local services in which competition may be limited. There are changes in technology. We've mentioned the network platform economies, industries with large upfront costs and big data. Sometimes, though, there's a fatalistic view when you say, well, these market forces, we just have to accept it, and I think that's wrong.

To maintain a competitive marketplace in the

presence of these changes would require more active competition policies with new tools and presumptions. The point is that when you're dealing with assessing the consequences of a merger, vertical or horizontal, in the presence of an economy in which competition is limited, the consequences are markedly different than in an environment in which the economy is very close to perfectly competitive.

So, in fact, the underlying model that we need to use has to be one that recognizes these underlying changes going on in our economy. So while there are these technological changes and demand changes, I think one has to also recognize that there has been enormous innovation by the business community in extending and amplifying market power. Big data has allowed the exploitation and price discrimination. There are innovative contracts with restraints, bundling of nonlinear pricing. These are ideas that 50, 60 years ago were not in the toolkit of the typical business person, but now, go through a good business school, you'll learn all the tools that allow you to amplify and extend your market power.

There are preemptive mergers, the techniques in extending patent life, pay-for-delay. When you see what is going on, you have to admire the cleverness.

You know, there's a lot of innovators. I wish it were directed to increasing the productivity of our economy rather than creating entry barriers, but it does demonstrate that, similar to our education system, we have led to creativity, not necessarily for social good, though.

These are the changes in the economy, but there are also major changes in our understandings of economics. Most importantly, there's a greater understanding of the limitations of a competitive equilibrium model that really was the work horse model, the fundamental paradigm that was taught 50 years ago. The model is not robust. When an economist says a model is not robust, that means slight changes in assumptions destroy the conclusions, a conclusion about the efficiency in a market, conclusions about the presence of market power. So, for instance, information economics showed that even very small assymetries in information totally changed the nature of the market equilibrium that emerged.

Game theory has perhaps had the greatest impact, the fact that in so many sectors of our economy, there are a limited number of players. Again, 50 years ago, we didn't have the tools to analyze those kinds of situations. Now we have rigorous tools to

analyze those situations.

Behavioral economics has resulted in our, again, understanding the way markets work is markedly different than the competitive equilibrium model. In standard economics, giving a discount or charging a price is exactly the same; it's the relative price. But in practice, those two can have very different effects, and the businesses know that. That's why they put constraints. They say you can do one thing and not the other.

Standard theory would say, well, why would you ever do that? They're equivalent. But they're not equivalent. They understand the nature of behavior, and, unfortunately, our legal framework hasn't caught up. So there are a whole set of presumptions that were based on the old model, and they no longer hold.

The irony is the critique of the standard competitive model was in full force just as the model's influence expanded. So at the time Bork was writing and others were writing, we already understood that that model was not a good model, but the legal profession didn't. There was a lag or perhaps the important role of ideology.

There are some other aspects of the new understandings that I want to just mention very

briefly. It shows that once we recognize the pervasiveness of market power and that even small market power in multiple industries can add up to having very large effects, very different from Harberger's perspective, and that the market power and the market imperfections can be generated in multiple ways.

I already mentioned assymetries of information. Search costs, the work of Peter Diamond, show that even small search costs can lead to large market power, even to monopoly situations. My own work showed that even small sunk costs can lead to large market power, undermining what was called the contestability doctrine. And once you have this market power, that market power can amplify and extend into multiple ways. And we now know that there are serious problems of monopsony and especially in the labor market.

I want to turn for a minute to the dynamics, because obviously innovation is important. We've learned three things. One, potential competition is not a substitute for real competition. The second is the Schumpeterian doctrine that monopolies are only temporary competition to be the monopolist drives innovation are also not robust. Monopolies can and have the incentive, have the ability to stifle

innovation. And that means the competition policy needs to focus not just on the effects of competition today, but on competition in the future.

So the bottom line of all of this is these changes in the way our economy functions, changes in our understandings of the economy, require new presumptions, new criteria and tools, new remedies. One way to think about this is within a Bayesian framework. If we have strong beliefs about the way the economy behaves, we will build those priors into what evidence we require to come to whatever conclusion that we come to.

But the law over the last several decades has been influenced by presumptions of the competitive equilibrium model, which is not a good description of many sectors in the economy and I think the economy as a whole, and that means that we have to rethink the presumptions. We ought to be thinking more about new rulemaking, new regulations.

Certain kinds of practices should be forbidden in the context where, say, there's large amounts of market power with a strong burden placed on those who are engaging in those practices to show that perhaps there's an efficiency defense.

So what we've seen is that, over the last

several decades, rampant abuse of the efficiency defense for the restraints, and the two-sided market argument that's been used, for instance, in the American Express case and in the Master/Visa, is an example. The presence of significant externalities is not even established; no attempt to show that observed pricing patterns are those predicted by the theory; no attempt at incidence theory; pretend the price imposed on merchant is not shifted to consumers, as it would be in the case of anticompetitive models.

There's a kind of intellectual incoherence in a lot of the argumentation, no attempt to analyze the impact of restraints across platform competition, that there are horizontal effects of vertical constraints, and that's one of the basic insights of modern recent research in industrial organization.

Well, let me talk a little bit about some of the new presumptions that I would put forward. I think there should be a presumption against predation. I think the presumption against intervening in vertical mergers needs to be changed. A vertical merger can have a very big effect on the competitive landscape.

The consumer welfare standard I think is misguided, especially with monopsony and when long-run dynamics are important. Even if a firm with monopsony

power passes on some of the gains to consumers, there's extortion in the economy and societal welfare is lowered. Predation may lower prices in the short run, but reduced competition will hurt in the long run.

At the same point there needs to be new approaches to determining market power. Some of these changes have already been going on for some time, and what worries me now is that there could be backsliding by the courts. So historically there was always a focus on market share as an indicator of market power, but there are many cases where you can ascertain market power directly, and when you can, you should.

Is there evidence of pricing power or power to force buyers to accept contract provisions that are prima facie not in their interest? Large markups should be a prima facie evidence of market power. Usurious interest rates by banks are an example. Price discrimination, if it pays to sell to some firms at a low price, then selling to another at a high price should be a prima facie evidence of market power unless the defendant can show that they are justified by cost differences. And forcing buyers to accept terms that should be unacceptable, like arbitration clauses.

So consumer protection needs to be extended to transparency of contract, and this echoes the remark

that was made in the beginning, that increasingly there is an interplay between consumer protection and competition.

There are other considerations that may reinforce the conclusion that a market is not acting competitively, a market constraint is anticompetitive. For instance, persistent profits with no entry for an extended period of time should be symptomatic that something was wrong.

This leads one to the view that some of the simplifications of the past should not be viewed as acceptable. There are some instant cases where one can reliably ascertain incidence without full general equilibrium analysis. Illinois Brick puts the constraint on antitrust enforcement and, going beyond that, would enable one to attack some obvious cases of anticompetitive behavior that have been left unaddressed.

So this brings one to a discussion of some new remedies. Just like there's been a lot of innovation in anticompetitive behavior, there needs to be innovation in remedies. Some of this what I call innovation is actually going back to standards, practices that were done in the past.

So one has to recognize that market power, once

established, can persist. So there's a view sometimes that we don't want to make a mistake and stifle a merger that might be good for the economy, and so there's a lack of -- the Type I and Type II errors are balanced, but the point is that once you allow a monopoly power to get established, it persists, and the effects can go on for decades.

So the market is not self-correcting. The view that if we make a mistake, it's self-correcting, is just wrong. There is one large persistence. There is both theoretical and empirical evidence in support of that, and we have to recognize that firms have incentive and ability to circumvent and innovate to re-establish market power.

That means, for instance, there will have to be continued court oversight, that new natural monopolies and oligopolies need new policies. Just because market power arises from technology doesn't mean we should do nothing. It requires even more intense scrutiny of behavior, stronger policies to prevent the leveraging of market power.

And among the kinds of policies are structural policies, breakups, prohibitions from going into downstream or upstream activities. My own view is typically the economies of scale and scope have been

exaggerated and seldom established. And also, regulatory policies, nondiscrimination.

I'm running out of time, so let me go on to just mention just a couple more points. One is that we need stronger remedies. Some of this we can learn from abroad. As the Commissioner was mentioning before, I think abuse of market power, however acquired, should be illegal, and some of the issues that have gotten the most outrage, public outrage, are cases of that kind. And so the fact that our antitrust laws aren't able to deal with these kinds of abuses really undermines confidence in our competition policies. We need to have more active consumer protection prescribing arbitration clause, and strong transparency, net neutrality are examples. So there are a whole set of issues of that kind.

Lack of workers' bargaining power is a competition issue. I know that historically there's been a focus on product markets, but labor markets are markets, and there is a lack of bargaining power, and once you go away from the competitive equilibrium model, you realize that there are restraints that affect the outcome that result in, for instance, abusive working conditions, and while, again, there are forces contributing to that, like globalization, I

think competition authorities should articulate the consequences of trade agreements for competition, including for workers' bargaining power.

I know you're going to be having separate hearings on big data and privacy. I think that big data and privacy are both consumer protection issues and competition issues, and this big data can be a very big entry barrier. It also enables the extraction of consumer and producer surplus from the other side of the market, and what that means is that some of the profits are not a result of greater efficiencies but greater ability to extract surplus, and that distorts the long-run performance of the economy, and it has large distributive consequences.

There are some areas where concentration of market power are especially problematic, and one is in the marketplace of ideas in the media, and it's a mistake, I think, to view the media only as a mechanism for delivering advertising. Concentration of media in a few hands can reduce competition in the marketplace of ideas. I know that's going into a new area, but it is, it seems to me, an important one for our society.

So in conclusion, the time is ripe, I think, for a re-examination of our competition and consumer protection laws. Our economy has changed, and our

understanding of economics has changed, and we can better grasp the failures of the existing framework. The underlying political and economic concerns about power and exploitation that drove the original legislation are still present, perhaps even more so.

But even if you looked at this from an economic perspective, what is clear is that competition law, as it's been interpreted over the last several decades, quarter century, has not kept up with the changes in our economy, has not kept up with the innovations and the ability to extend and amplify market power, and has not kept up with changes in our understanding of basic economics.

So today competition and consumer protection law needs to be broadened to incorporate the realities of the 21st Century and the insights of modern economics. Thank you.

(Applause.)

MR. ABBOTT: Thank you for those very provocative remarks, Professor Stiglitz. I'm sure we'll have more to say about many of the topics you raised.

REMARKS BY WILLIAM C. KOVACIC

MR. ABBOTT: I'm pleased to introduce now Professor William Kovacic, who, taking a breath, Professor Kovacic is a Professor at George Washington University Law School where he's Director of the Competition Law Center. He is also a nonexecutive director of the UK's Competition in Markets Authority.

Before joining GW Law in 1999, he was an FTC Commissioner -- actually, that should be 2009 -- he was an FTC Commissioner, and he also served as Chairman of the FTC from 2008 until 2009. Previously, Professor Kovacic was the FTC's General Counsel.

Professor Kovacic.

(Applause.)

MR. KOVACIC: Thank you, Alden, and my great gratitude to my former colleagues at the FTC for the wonderful opportunity to participate in this program. The very holding of the program is part of a wonderful tradition that this agency has developed over time and an indication of its recognition of its special institutional role in providing a foundation for thinking about the way ahead.

In talking today, I am going to give you my own views, not those of the Competition in Markets Authority in the United Kingdom, where I serve as a

nonexecutive director.

Today I want to talk about what I think is an epidemic failure to understand the foundations of modern U.S. policy, to understand how that policy developed, and to understand what kinds of changes would be necessary in order to effectuate adjustments, a number of which I think would be quite appropriate.

I'm going to talk a bit about where the consumer welfare standard came from, a bit about where some major principles that underpin substantive doctrine arose, and to talk about the need for institutional adjustments in order to facilitate changes.

And, in particular, I am going to criticize what I think is an obsession with Chicago -- that is, the sense that the University of Chicago, Bob Bork and others, in the sixties, seventies, hijacked U.S. antitrust policy and they haven't given it back -- and to talk instead about what I think to be some of the deeper, underlying sources of the system that we see today.

Forty years ago, two prominent volumes about competition law appeared, one, indeed, written by Bob Bork, The Antitrust Paradox. I suspect most people in this room have read that. The other is Phil Areeda's

and Don Turner's first edition of their antitrust treatise called Antitrust Law. I don't know if many people in this room have read that volume. I am going to suggest to you that that book has as much to say about where antitrust policy is today, how it developed, and how we have to think about changes in the future.

The Antitrust Paradox is quite famous, especially for its single-minded emphasis on consumer welfare, which Bob Bork basically defined in terms of allocative efficiency, perhaps approaching a total welfare standard. There's no question that that book was enormously influential, widely read, widely considered.

I'm going to suggest to you that it only brought along part of the profession and the community; that is, if Bork's book alone had been the only source of insight, the changes could not have occurred in the way that they did. I am going to suggest to you that Bork was able to bring the right/center right along in thinking about issues this way, but without Areeda and Turner, we would have a much different system.

What did Areeda and Turner have to say in antitrust law? A couple of notable things on goals in particular. They didn't speak about consumer welfare.

They didn't speak about quite the same single-minded emphasis on efficiency. But they did say that competition law that does not embrace a fundamentally economic orientation and focus on microeconomic economic effects is badly misguided.

They go through the egalitarian vision of competition law that appeared in the legislative history. They faithfully recite all the concerns about SMEs, about worker satisfaction, about small communities, about the protection of the democratic order. They conclude that discussion by saying, "Who cares? Ignore it."

And why did they say ignore it? To do otherwise is to create a multigoal framework without a weighting or hierarchy that leads you to idiosyncratic outcomes judge by judge, agency by agency, which they described as "on the border of unconstitutionality."

In other words, they said the only practical way to apply this law in a coherent, meaningful way is to adopt a principally economic orientation and focus without using the specific term on consumer concerns, not just price; quality, of course, innovation. But Areeda and Turner brought the center and the center left along with them.

I'd suggest to you that at the time of my

childhood and long after, who was the most famed lecturer in competition law? It was Phil Areeda. Whose courses were the most influential? Whose articles carried thinking again and again? It was Areeda and his collaboration with Don Turner.

Why did this have so much importance? It was the emphasis on what they called administerability. That is the capacity of agencies and courts in the usual circumstance of contested facts, substantial amounts of information, to reach accurate and consistent conclusions about the legitimacy of behavior. And again and again, Areeda would pose the question, "You have to tell the business person what she cannot do in 20 words or less. It can't be a multifactor test that is very diffuse."

In many respects, that carried into their analysis of substantive principles. It wasn't just the goals. Where are the predation defaults that Joe was talking about set more than any one place? It's in Harvard. And if you go back to the 1975 Areeda and Turner paper on predatory prices, you see the essential ingredients of the modern U.S. approach to predation.

Were they thinking in part about Chicago ideas? I suppose. Phil Areeda was notoriously ungenerous in acknowledging intellectual debts to others. He had

very few footnotes that said this is where the thinking came from, but I think in many ways the institutional perspective that they brought to bear on the topic was decisive, and their decisive influence was the standard has to be administerable, especially in the judicial system in which cases are tried before juries, generalist judges, where notions of intent, multifactor tests are likely to lead you astray.

And yes, indeed, Areeda and Turner were confronted in a famous set of proceedings that this agency convened in 1979, 1980, a famous discussion of predation. I think lots of the tools Joe's been talking about were available nearly 40 years ago. Game theory, prominent in the literature; behavioral features, not so labeled, but preexisting and a matter of concern. And one author after another attacked the Areeda-Turner formula and its price/cost test and especially their observation that you take the low price today and you worry about tomorrow later on.

What was Areeda and Turner's answer? Are we concerned with dynamic effects? Of course, but we think they are "speculative and indeterminate." And one author after another offered a basis for challenging it, but what stuck in the minds of judges, in particular, was the notion that the standard had to

be relatively simple.

Is that subject to change? In my mind, on predation, have the courts -- to use a regrettable American baseball analogy -- have they shrunk the strike zone unacceptably? I think so. The Department of Justice and American Airlines ought not to be bounced out of court on a motion for summary judgment, where there is no jury trial and it's the Government of the United States. That strike zone is too narrow. That should go to trial. That's worthy of fuller discussion.

But if we ask ourselves where did the emphasis on nonintervention standards in so many areas come from, and what we now call consumer welfare, where did that arise, it is as much Phil Areeda and Don Turner as it is Bob Bork in Chicago. If you focus single-mindedly on Chicago and slaying the Chicago dragon, you don't make adjustments possible because you don't address these underlying concerns.

If you want to adopt a broader goals framework, you will have to answer the challenge that these commentators offered, which says, show me how it's applied in a specific case. Show me the hierarchy of values. You want to give more emphasis to workers than you do on consumers. Consumers get lower prices but

workers get lower wages. What's the tradeoff? What's the exchange rate between the efficiency that comes from scale economies and the limited opportunities for SMEs?

If all you're saying is to tell the judge, "You figure it out," that's an inadequate response, and I think to effectuate a change in the goal structure will require a lot of hard thinking to answer the basic question that Areeda posed again and again when people would assail him on this, "Tell me how it's going to work in practice, and don't just tell me that they'll sort it out in some way."

So on goals, administerability is a crucial consideration, and that view, by the way, has been adopted by many, not just those on the right, but a jurist like Steve Breyer who said, "One sentence from Areeda and Turner is worth pages from anybody else." Steve Breyer is the perfect modern embodiment of that point of view, and if you cannot get his vote, my view was, when I had Alden's job in an earlier day, if we couldn't get his vote, hypothetically, we had no basis going ahead.

What to do about this in light of what I suggest is the Chicago obsession and the remarkable forgetfulness about Phil Areeda and Don Turner? A

couple of things. One, on the point of goals, in formulating a different goal structure, the administerability challenge must be met, and it has to be addressed head-on. You don't get a richer goal structure unless you can explain the exchange rate and explain the hierarchy of values. What gets weighted, how much, in what case.

I'm not suggesting that it can't be done. I'd simply suggest that in modern discussions, in saying, well, the view is too cramped, it's not elaborate enough, it's not faithful to the original legislative history -- footnote, Areeda and Turner said, of course, it's not -- but the original legislative history vision can't be applied because it is not administerable; it's faintly unconstitutional.

How do you beat that model? To answer that question, you have to come up with an administerable model, and I'm suggesting that there are lots of center and center left judges and observers who have taken on that view about administerability, and unless you persuade them, you have no chance in moving the needle on goals.

What about doctrine? Is it just the ideology? No. It comes back to this question of administerability. Is it just a blind faith in the

market working, the equilibrium model that Joe offered? No. It's the matter of administerability and administerability in the predation cases that Areeda and Turner care so much about, private rights of action.

In that famous first volume, which is a must read, they point out in stark terms that private rights, U.S.-style, are a menace; mandatory trebling, one-way fee shifting, class actions, contingent fees. They said in the close abuse of dominance case, that's going to overdeter. They said, well, you can't change trebling, that's in the statute, but what can you do, judges? You can change the doctrinal threshold. You can raise the bar. And we urge you to do that, because the real danger here is overdeterrence. It is the false-positives, so err on the side of raising the doctrinal bar.

And that's what the courts did almost immediately after the publication in 1975 of the predatory pricing paper and they've continued to do, and the predatory pricing paper foreshadowed everything, including recoupment. Courts took that on.

Bork criticizes that article bitterly in The Antitrust Paradox. He says, "It's a nice idea, but the right rule is no rule," and the rule that prevails

today is the Areeda-Turner rule more than any other. Bork didn't win that argument, much as Chicago won very few of the arguments on basic doctrinal principles. It's much closer to the Areeda-Turner format than anyone else.

If you want to change that doctrine, you have to do one of two things, I think, and I think I'm using an MRI instead of an x-ray. I think I have a better diagnosis of what limits the system there. You have to persuade courts that the private rights are not the menace that are suggested -- that is, you have to amass evidence that suggests that's not the hurdle -- or you have to create a government-only cause of action. You have to insulate the Government from the operation of doctrines that have been limited in order to preclude private treble damage actions.

That's been a problem for the Government because all of these limiting doctrines spill into the Government's cases. When the FTC lost Rambus, what were featured in the D.C. Circuit's opinions as the decisive precedents working against the Commission? They were all Supreme Court decisions in which a crucial policy foundation for the Supreme Court's decision was overdeterrence by private rights. They were all private cases.

Footnote: When was the last time the U.S. Government was before the Supreme Court as a party in a Section 2 case? That was 1973. All of the jurisprudence since then has taken place in the context of private cases in which the Court's concerns about overdeterrence are magnified.

So what cases got quoted back at the FTC? They were cases like Discon, where the fear is overdeterrence of private rights. The FTC had exactly no success saying, "We're the U.S. Government, we are not seeking treble damages here, we want an injunction, equitable relief, treat us differently," and that carried exactly no weight.

I'm not necessarily asking you to believe that the result that the D.C. Circuit achieved in Rambus was incorrect, though I think it is. I am asking you to note how striking it is that the doctrinal principles that the Commission tripped up on came in cases that were founded principally upon a concern about overdeterrence by private rights.

So you have to carve out a separate government-only cause of action. That could be Section 5. I think Section 5 more and more, as I look at it, except for the little niche of invitations to collude,

is too rigid, too fragile, and is not likely going to work. The FTC has tried to run up that hill so often, so many times. Doctrinally, it's not going to work.

I would suggest an approach that prevails in the UK. That's the Competition in Markets Authority Markets Regime, which allows the CMA to do its study and in selected instances to achieve remedies in order to correct anticompetitive conditions. It's not tethered to the operation of European doctrine dealing with abuse of dominance.

Our system, with this idea, would not be tethered to existing limiting principles built into the Sherman Act or Clayton Act jurisprudence; that is, unless you create a mechanism that gives the Government freedom in a policy space to make more judgments -- and, yes, they will have to persuade critical courts that they deserve the deference, that they're doing the good homework and are creating the basis for making the judgments -- but to say, in that space, we do deserve your deference, and we have a mandate that is exclusively used by us.

The UK does not seek divestiture in case after case, but they carried out a magnificent restructuring of the ownership of London area airports and others as a result of this. I think a markets regime for the

U.S. that allows the Government, in this case the FTC, to operate without the overhang of the limiting concerns about overdeterrence by private rights is essential if Section 2 is going to work.

What's the alternative? You are going to have to go case by case through the courts. And look at Joe's agenda. Did you find that a bit breathtaking? Can you think of how many cases, rules, or other initiatives it would take to do that? That's a lot of hard work that will take a long time, hard work that may be very much worthwhile, but behind each of those is a big case, and we know in this agency that building those cases effectively is like building an aircraft carrier. You don't turn them out in a day or a week. That will take a lot of effort.

I'm suggesting that a way that you can do that is to go back to the courts and say, "Please change your minds on these issues," to slowly and gradually overcome the concerns with private rights, or you change the framework to give the Government a policy space in which it can operate, liberated from the constraints that have been imposed by the concerns with the operation of private rights of action.

I'm not saying that the Supreme Court's perceptions about private rights are correct. I am

saying with certainty they believe it, and it's not just the right side of the Court. It's Steve Breyer. It's Ruth Ginsburg. It's a universally held suspicion. If you can't correct that, you can bring all the cases you want, and you're running into a brick wall.

Last thoughts: Changes in institutions. If you are going to take on a broader agenda -- and there are areas worth doing it. I think the Commission itself realizes that. I'm a little concerned in Joe's talk that there's a sense that the agencies don't think about this. Of course, they do, and they work hard on these issues, but I do think the U.S. is operating well inside the protection possibilities frontier with respect to its institutional framework, and there are a number of steps that would helpfully take it out to that frontier, one I've just mentioned. I would like a markets regime in the U.S.

First, to do all of these things will require, to take on Joe's agenda, a much better program by which the public agencies set strategy and choose priorities, not in isolation, but as a collaboration. We have no equivalent to the European Union's Economic Competition Network, which has become a very valuable device for not only coordination across the institutions, but more and more the formulation of strategy. We have no such

thing. That's an embarrassment.

We have nothing like the United Kingdom's United Kingdom Competition Network, which joins up regulators in sectoral areas with the Competition in Markets Authority. We have no network of that kind, and I've seen firsthand how the ECN and the UKCN add lots of value to policy integration and enable individual public officials and institutions to achieve collectively results that they cannot accomplish. If you want to take on the bigger agenda, you will have to do more with what you have, and this kind of network governance and cooperation can do it.

Better setting of priorities, better setting of strategy to map out doctrine, but suppose we're going to carry out Joe's agenda. What do you do first? Which cases do you want first? Which rules? This will not just happen spontaneously. That requires a degree of integration and planning that doesn't exist now.

It involves looking at past successes and past failures. Is the current concern with concentration unique? Go back to the early seventies and look at the literature that's just scalding about the failure of the U.S. system to deal with concentration, and the massive literature that develops in the late fifties onward, written by Don Turner and Carl Kaysen, that the

biggest failures of competition policy is dominance and collective dominance.

The concern has been there a long time. There have been instances in which agencies have tried to take those issues on. It's worth studying what's succeeded and what failed in great detail as a way of thinking what you do next. So better priority setting, better strategy, collective effort rather than individual effort. I'd say you can't start touching this agenda in a significant way unless you get more results out of what you have.

Last thought: The FTC's unique array of capabilities. About 130 competition agencies in the world today. Half of them do something more than competition law. What's the single most popular additional element? It's consumer protection.

And when I look around the world, the question is, in theory, everybody has a nice slide deck about how they can be tied together and how they're conceptually linked. How many actually do it in practice? That's more rare.

But there's a lot of room for seeing what, for example, the ACCC in Australia, the CMA in the UK, which I've seen firsthand, the New Zealand Commerce Commission, and, indeed, the Competition Bureau in

Canada have done. They're a lot farther ahead than their counterparts are which have similarly situated portfolios -- that is, this institution -- in achieving a general integration.

I think the FTC's capacity to bring to bear its three product lines -- competition, consumer protection, and privacy -- backed up with a robust capability to gather data and analyze it gives it the capacity to do special things. Historically, that capacity has been difficult to realize in practice. That won't happen by accident or spontaneously.

So in thinking about the changes, in a way I'm talking about, one, how we have to think about more than Chicago. That's a distraction in key respects. Second, we can't just think about the physics, about what we would like to do. We have to think about the engineering of how to get there. And great physics with bad engineering is a formula for failure.

Thank you.

(Applause.)

MR. ABBOTT: Thank you, very much. Two excellent addresses. It makes me think of the famous article about two views of a cathedral by Calabresi and Melamed, so this is as seen from different light, you have two very interesting perspectives.

PANEL 1: THE STATE OF U.S. ANTITRUST LAW

MR. ABBOTT: Now we are going to go to a panel. Our first panel is The State of U.S. Antitrust Law, and it will include -- and by the way, I'll be the moderator. I'm Alden Abbott, General Counsel of the Federal Trade Commission.

Okay. Well, I'm informed that there's a demand for an exogenous shock here, a ten-minute break. So I will follow instructions, and we will have -- and do keep it to ten minutes, because we're running a little bit behind schedule. Thank you.

(A brief recess was taken.)

MR. ABBOTT: Please take your seats. Thank you.

We had a provocative discussion of the state of competition policy from two very different and interesting perspectives. We're going to have our first panel now on the state of U.S. antitrust law, but before introducing the speakers, there will be interns going through the audience, taking questions from interested members of the audience. So if you have a written question, write it down on a card that's distributed to you. These will be given to me and, time permitting, we will try and give at least ten minutes for those questions. We will address some of

those questions.

I'm about to move immediately into Panel Number 1. Again, I'm Alden Abbott, the General Counsel of the Federal Trade Commission. Our second panel will feature one of the keynote speakers, Professor Joseph Stiglitz. Other speakers include today Dennis Carlton, who is David McDaniel Keller Professor of Economics at the Booth School of Business, University of Chicago, and Senior Managing Director of Compass Lexecon. Professor Carlton recently served as Deputy Assistant Attorney General in the Antitrust Division of the Justice Department, and he also served on the U.S. Antitrust Modernization Commission.

Eric Citron is a partner at Goldstein & Russell, P.C. Previously he clerked on the U.S. Supreme Court for Associate Justices Sandra Day O'Connor and Elena Kagan. He has also served as counsel for the Assistant Attorney General in the Antitrust Division of the Justice Department.

Eleanor Fox is the Walter J. Derenberg Professor of Trade Regulation at New York University School of Law. She served as a member of the International Competition Policy Advisory Committee to the Attorney General from 1997 to 2000, and as a Commissioner on the National Commission for the Review

of Antitrust Laws and Procedures from 1978 to 1979.

Finally, Keith Hylton is William Fairfield Warren Distinguished Professor at Boston University and Professor of Law at Boston University School of Law. Professor Hylton, who's a lawyer and economist, is the Immediate Past President of the American Law and Economics Association.

We have a number of specific questions which we're going to address. Our session will run through 11:55 a.m., I'm informed, and before turning to that, I would like to devote up to ten minutes, but no more, to reactions to the presentations by Professor Stiglitz and Professor Kovacic, both provocative and wide-ranging.

Reactions? Professor Carlton, your thoughts?

MR. CARLTON: Okay. Well, first, thank you very much for inviting me here. I enjoy being here, and I enjoyed listening to Joe and Bill, both of whom have produced ideas and scholarship that I greatly admire. I agree with some of what they said but disagree with others. So let me try and explain very briefly.

My main message: Before making dramatic changes in antitrust, look carefully at the evidence and ask yourself what role, if any, antitrust has in

explaining what is an emerging phenomenon.

Second, antitrust has proved that it can improve the process of competition. It is not well suited to fix all social problems, and it's a mistake to misuse it in that way.

Let me briefly talk about the evidence. A dominant piece of evidence over the last 20, 30 years is enormous technological change. Automation plus computers have displaced workers who once had good jobs. That's probably the most important reason why inequality is increasing.

We talk about Facebook, Google, Apple, Amazon. Think back 20, 30 years, the tremendous innovation that has occurred as a result of these firms. Yes, they are large. Does that mean we should break them up? Don't confuse success with an antitrust violation, but we should be vigilant to make sure that they don't maintain that dominance illegally. I think the antitrust laws can do that.

What's the evidence on concentration that Joe talked about? I think it's way overstated, at least if you use the standard metrics -- admittedly crude -- in antitrust. Just to give you one example, although there are exceptions, most markets that have seen increased concentration, they're very modest.

For example, let's look at manufacturing. If you ask yourself the question, what fraction of four-digit industries in manufacturing have concentration ratios above 2500, which we would consider highly concentrated, the answer is less than 5 percent. The other important feature, people who have studied increasing concentration, what do they find? There's a linkage in those industries between increasing concentration and increased productivity. That's good, not bad.

Price-cost margins, people have studied those recently, a good topic. Joe mentioned that they have been rising. That literature is still in a state of flux. I will tell you later, if I'm asked, about what one of my students is doing in that, but let me just mention one thing. A recent paper by Bob Hall, one of the leaders in innovative techniques in this literature from 20, 30 years ago, recently did a paper, and he shows what's happened to price-cost margins. Yes, he claims they have gone up, too, but what industries? He ranks them.

Number one, finance. Number two, utilities. Number three, healthcare. Manufacturing, hardly at all a trend in price-cost margins. What do you think about those three industries I just mentioned? What common

characteristics do you think they have? Regulation.

Third, what is antitrust? This is an essential question for government agencies. What do you think antitrust has to do with these trends? I think very little. I think technology is the main source of what's going on. Low investment? I don't think that has to do with increased concentration. It has to do with the changing nature of investment in the U.S. economy. It's been baffling macroeconomists for a while.

Decline in startups which was mentioned? Do you know when decline in startups started? In the mid-1980s. It's not a recent phenomenon. It's a troubling phenomenon. We have got to get to the bottom of it. I don't think it has much to do with increased concentration. Poverty? These are all important problems. I don't think looking to antitrust to solve them is the right thing.

There was a mention briefly about merger policy, and I'm sure there will be something about John Kwoka's important recent research, but I want you to look carefully at Kwoka and what he says about merger policy. The median increase he finds in his studies -- which have their own problems -- is 1 percent. That's tiny. That's not explaining these major trends in the

economy.

So let me just end by saying it's hard to respond in, you know, three minutes to very well thought out papers. So I want to make sure I don't get mischaracterized as saying we can ignore this evidence on increasing concentration, it doesn't matter. We can ignore this evidence on the declining business startups. We can ignore this evidence on increasing price-cost margin. I'm not saying that at all.

We need to study that and understand the reasons for it, but I am not going to say that antitrust is fine. There are certain things that have to be improved in antitrust in light of many recent developments, and I hope later to be able to tell you what those improvements that I would recommend would be. Thank you.

MR. ABBOTT: Thanks, Professor Carlton.

Who would like to chime in now? Professor Hylton?

MR. HYLTON: Yes, I will agree with some of what Dennis said. The concentration issue, it's both IT investment and the resulting productivity and regulation that can account for some of what we're seeing in this area. The investment is going to lead to lowering of costs and increasing returns to scale,

which would give rise to some concentration and to some extent the observed monopsony problem, but Dennis has said enough about that, so I won't say much more about it.

But one of the interesting features of the modern economy is something that I refer to as the kill zone problem, and I think Professor Stiglitz touched on this briefly, and I do find that troubling, frankly, and wonder what can be done about that and whether it's -- and it strikes me as a somewhat special problem that's arisen with platform markets and competition.

And I do see that as something that's out there that I don't feel comfortable with where we sit at this stage, but it's in the nature of -- I see specific problems such as this that are connected to the modern issues coming out of antitrust. I don't really see general problems out there. I think most of what we're doing in antitrust is defensible.

As far as what Bill said, Bill emphasized the public/private distinction, and increasingly it seems the FTC itself, though, has taken steps to increase its own regulatory power, such as the restitution theory that it's brought in some cases for restitution damages, and to the extent that this is happening, it would lead courts to view the FTC with the same kind of

concerns that it would view private litigants with.

And so I think to some extent, in Bill's own theory, the private/public distinction would not matter here, much as the trend within the FTC continues.

That's all I'll say as a reaction.

MR. ABBOTT: Okay. Professor Fox?

MS. FOX: Thank you.

Those were two very, very interesting opening statements, and I want to take on two of their points of controversy and maybe a couple of additional points. So Professor Stiglitz says consumer welfare standard is misguided, and Professor Kovacic says consumer welfare standard is what we have, and if we had an alternative, there would be lack of administerability.

And Professor Kovacic says Chicago School is a distraction, and Professor Stiglitz says we have to recognize the -- whether or not we call it Chicago or we don't call it a geographic location -- but we have to recognize part ideology, part whatever it is has pulled antitrust in a direction where it has no teeth and doesn't respond to monopoly problems that are becoming more urgent every day.

So as to the first, consumer welfare is misguided, of course, it can depend on what you mean by "consumer welfare," and I take Professor Stiglitz to

say if you have any deference with the meaning of that term, it is too narrow, that markets are the main focus, that if all you're doing is deciding that you have to see whether consumer surplus is lessened, and then there's no antitrust enforcement, you have a very weak, toothless antitrust.

And I actually think there's more of an agreement on that point than might come out at first glance, because I see both Bill and Joe saying antitrust is about defense of markets, and we have to do what we can to defend the market in a good and administerable way. I agree that consumer welfare, as it is used, is misguided, because on the one hand it's either too big and everybody gets in under the tent and it means nothing, or else it's too narrow in the way I said before.

I think that we have to move to a more robust and dynamic sense of defense of the market, and I think, in fact, that we are, and our enforcers are, in their rhetoric, they're saying now this is good for consumers in the market or it's bad for consumers in the market, so I think this is very important.

Now, this leads me to the second point. Chicago School is a distraction or Chicago School is the problem? I was in the Supreme Court room on the

day of the argument of Brooke Group, because I was one of the lawyers in the Hartford case which followed it, and if you recall, Phil Areeda argued for the Plaintiff, and Bob Bork argued for the Defendant.

Phil Areeda had a rule on predation that was very clear, and he lost; and Bob Bork, who didn't want any rule on predation at all but had to go with some rule and put in the recoupment scenario, he won. And Phil Areeda pointed out in that particular case that the defendant had a kitty of $18 million that it set aside to try to get rid of Liggett's attempt of a new, no-frills product in the market, and it basically succeeded in the end in compromising the new no-frills product. So competition was lost. Dynamic innovation was lost. Phil Areeda had a simple, good rule and he lost.

So one of my points is it is Chicago School or what we put into that term, because we know what we mean. It means premises markets work very well; Government, don't get in if you can help it. It was Chicago School that drove that decision to be a very pro-defendant decision. So maybe we do need some presumptions in the other direction.

And maybe it's not the case that Chicago School rhetoric is disruptive, but it shows how use of a very

narrow consumer welfare standard has made the antitrust law, except U.S. -- and except for cartels and except for straight horizontal mergers -- U.S. has lost resonance because we're not dealing with the monopoly problems today.

Thank you.

MR. ABBOTT: Thank you. From a practitioner's point of view, Eric Citron, what are your thoughts?

MR. CITRON: Sure. I mean, the one thing I certainly agree with is that it's hard to offer any meaningful response to such interesting and long presentations in three minutes, but I guess what I would say is two things.

One, I definitely agree with Professor Kovacic's point that a lot of what we see in modern antitrust doctrine in the courts is driven by concerns about administerability and by a difference between judges who aren't really economists by training and enforcers who tend to be.

And I think that this is a problem, you know, because as Professor Stiglitz was pointing out, there is a lot more nuanced thinking available in economics than most of the judges know or are taught, and it's an interesting feature of the Phil Areeda treatise or the Posner book or whatever you want to use as your

antitrust tome, that they give you, like, one chapter on how to understand economics from the perspective of an introductory student, and then they teach you everything you need to know about antitrust doctrine.

Those simplifying assumptions are driving the doctrine, and we know they're false. If we were trying to land a spacecraft on the moon, we wouldn't use the assumption that, you know, it all happens in a vacuum, like you do when you first learn physics. We would use complex, thoughtful, modern economic doctrine, driven by what we know also about human behavior. That would be my second point.

If you remember that both the law and consumer behavior are things not that perfect, idealized consumers do, but that human beings do, judges who make mistakes and don't know very much about some topics and consumers who don't make decisions with prices and quantities or whatever, they make decisions with information, and firms can control the information and how it gets to them. We need both our antitrust thinking and our thinking about legal institutions to reflect how human beings actually do their jobs.

And I do agree, for example, with Professor Kovacic, that when you look at how judges are making decisions. They're definitely influenced by things

other than the merits, like are a bunch of plaintiffs' lawyers going to make a bunch of money off this case, or something like that, and I don't like them. For that reason, you may want to tweak the institutions so that we can get more trust in more complex thinking, government enforcement, and less blow-back from the distrust that judges have towards private rights of action and the like.

But the really important thing is that we have cutting-edge, forward-thinking enforcement and not radically simplified enforcement, which I think leads to underaction, underenforcement generally.

MR. ABBOTT: Okay, thank you.

Let's turn now to a number of specific questions for the panel. We've already heard a couple of mentions of the consumer welfare standard. I was going to start by asking, is the consumer welfare standard adequate to deal with the competitive challenges of the new economy? And in assessing consumer welfare for antitrust enforcement purposes, what should we be concerned about?

Keith, do you have something to say about that?

MR. HYLTON: Well, the question that I start with is, what are the alternatives to a consumer welfare standard? I think Bill reflected on this

briefly, that we tried alternatives before. If you go back to Judge Hand in Alcoa, he relegated consumer welfare and efficiency to secondary status under the Sherman Act and seemed to promote atomism as a goal of Sherman Act enforcement, or you could go to the other extreme if you wanted to. You could say complete freedom, maybe that's an alternative to the consumer welfare standard.

I don't think there is a realistic alternative to it or at least one that's worked very well in the case law, and if you recall the Alcoa case, Judge Hand held that Alcoa had violated Section 2 for preemptive capacity expansion, which would be a pretty unusual theory for a court to accept today. So the consumer welfare standard I think has provided a good template, a good line for judges to use.

It's pointed to the empirical issues that judges have to take into account in looking at antitrust cases. It's certainly different from what Judge Hand was using, but Judge Hand's standard was too ambiguous and too structuralist and provided few guidelines for courts. So in the end the consumer welfare standard has been a big improvement.

I would say it's something like a foreseeable consumer welfare standard, because courts are taking

into account efficiency gains, and consumers often don't get to benefit from the efficiency gains immediately. They don't get to eat the efficiency gains right away, but in the foreseeable future, they often do get to eat -- "eat" -- the efficiency gains. So that's what we have.

You could move from the consumer welfare standard, but I'm not sure what you would do, what it would be. You could try to take externalities into account, but if you do take externalities into account as a reason to move away from the consumer welfare standard, you have to have a good sense of what those externalities are, and you have to structure then a set of rules for courts in weighing those externalities.

One of the issues is how do you implement the consumer welfare standard, and at least in the Section 2 area, we see two ways in which courts are implementing the consumer welfare standard. One is as the balancing test, just a balancing of anticompetitive harms against procompetitive benefits. That's the rough language, loose language that we have as a result of the Microsoft decision, and you can call that a neutral balancing test or a court's attempt to balance.

Another approach that you see is kind of a biased approach coming out of cases such as Brooke

Group on predatory pricing or Trinko or LinkLine, where judges are saying in a sense that as long as there is an efficiency gain, as long as there is an efficiency basis for the defendant's conduct, for the dominant firm's conduct, then it's okay under Section 2 to have anticompetitive harm under an efficiency basis, and the Ninth Circuit said it specifically in the Allied Orthopedic case, looking at a charge of predatory innovation under Section 2.

So those two approaches, this sort of neutral balancing approach under the consumer welfare standard or biased balancing approach, and that seems to be the biggest question in the case law, just which issues should be allocated to what sort of standard.

And right now what courts have done seems to be a pretty sensible allocation. You know, the predatory pricing area -- cases are in the sort of biased balancing approach, largely on the basis of error cost arguments that the court has accepted. Then there's a general default standard in Microsoft, but as time passes, courts will have to think about what kind of cases go into what kind of balancing standard using the consumer welfare test goal as the backdrop.

So I think those are the major issues. I don't see us moving away from the consumer welfare standard.

I don't see a plausible alternative that's, as Bill would say, administerable as well. We have tried it before, and the other tests throw up a great deal of confusion for courts. So I think that's where we stand on that one.

MR. ABBOTT: Eric, as a practitioner, do you see any alternative to the consumer welfare standard?

MR. CITRON: Well, let me say one thing first, and then -- I mean, just as an initial point, it is odd that antitrust is the one area of the law where we insist that the rule be perfectly administerable and have only one overriding policy goal. You know, nobody thinks, like, U.S. tax policy has to have one policy goal and the law will not work if we try to incorporate others or anything like that. The working pure of antitrust, I'm not sure that it's necessary.

I think, though, we do have a problem, which is courts have to make decisions; they need a decision rule. You can't have the decision rule be, "Let's look at a million things; you'll make them up when you see them." The decision rule will, therefore, have to be, I think -- the one we have is consumer welfare focused and probably should remain consumer welfare focused. That doesn't mean the law can't incorporate these other concerns, and it's the effort to banish the others that

I disagree with.

So we can be more concerned -- we can be less concerned about Type I or Type II error, for example, or we can be less concerned about false-positives if this is a market where there is going to be big informational distortions associated with missing, because this firm controls not just price but also information about prices or information about consumers' alternatives, or we could be more concerned if they think there is going to be democratic institution disruptions from the size of this firm.

You know, people are scrambling right now to try to be the city which will have the highest negative tax rate for firms to locate their businesses there. That's a big distortion. It's one that's relevant economically and politically. When you see size like that, you can be more concerned but still focused fundamentally on consumer welfare.

So you can move the bar a little bit by incorporating other concerns. That's not to say, you know, what we're going to have is some nonconsumer, welfare-focused standard. That's not what we have right now. We have a single-minded, obsessive focus on consumer welfare, and that tends to make antitrust enforcement in the courts very myopic.

MR. ABBOTT: Okay. Regarding -- thanks, Eric -- single-minded focus, what about looking at additional policy concerns? We've already discussed this a bit, but such as corporate size or wealth, income distribution, labor and employment considerations, other policy issues? We've heard Professor Kovacic talk about that a bit.

Dennis, your thoughts?

MR. CARLTON: Well, I think antitrust is designed to promote the process of competition, period. It's not designed to solve important problems that may well exist. It's just not suited for that.

Now, if you start asking questions, well, isn't poverty an important problem? Isn't investment an important problem? Isn't unemployment an important problem? These guys are going to merge, and to achieve efficiencies maybe some people will lose their jobs. If you start worrying about those problems, you will distort antitrust decisions, and it will lead to a lot of inefficiency, it seems to me.

It's like I have a hammer. It's good for banging in a nail. It's not particularly good if I have a screw and I say to someone, "Put the screw in the wall," and they take a hammer and they try to put the screw in the wall. It's just not going to work.

And I think there's an even greater danger, and that is this: If you start asking yourself what happens when you have multiple goals -- and Bill touched on this -- you get a lot of discretion. So judges would have a lot of discretion, antitrust enforcers would have a lot of discretion on which cases to bring. That seems pretty undisciplined. How are you going to tell whether someone's doing a good job if they can weigh a million things in their decision? I think it will lead to inefficiency and bad policy.

Even worse, it will lead to -- when you have wide discretion, no one can tell whether you're doing a good job or a bad job; that is, whether you're adhering to the criteria that you're supposed to be. That puts you subject to lots of outside influence. It could be political influence, could be -- God forbid -- corruption, it could be the incentive of firms to lobby, or it could be -- and Joe touched on this and I agree with it -- the incentive of very profitable firms to sponsor legislation that says, "Listen, it's not so bad. We are within this. You have this huge discretion. Why don't you do this."

And, in fact, the FTC has I know in the past -- and I believe continues -- to examine proposed legislation for its economic effects but at the state

level. What Joe is saying from his discussion, what he suggested is national policies can distort competition. That's a slightly different problem. Regulation can distort competition and serve special interest groups. I think the more you defuse the goal of antitrust and competition policy, the more likely you open our society up to distortionary policies that will serve private interests.

MR. ABBOTT: Eleanor, do you have some additional thoughts?

MS. FOX: Yes, I do. I think that this question comes up the way it does because of what has become a very common rubric today. Either you take consumer welfare or you go down the dangerous path of public interest and populism, and I think that's a false dichotomy.

So what I want to do is I want to mention three of the list of public policy concerns, and I want to show you how they're very relevant to the market working. So, one, bigness; number two, distribution; and number three, equitable access to markets. And I am working within the market paradigm. I'm not making any argument to say that antitrust ought to be compromised by any value you have.

So number one on bigness, remember the

Holcim-LaFarge merger, this huge merger of the two biggest cement companies in the world, which everybody knows that's one of the top two of the most cartels in the world. It was cleared with lots of conditions by every authority and every established authority in the world, and then the developing countries just had to live with what they got.

Why isn't it relevant that these companies have a very big track record of getting legislation to prevent low-priced imports from coming into their countries? If you check Google and LaFarge, you will see the companies are at this cutting edge of protectionism, and the company now becomes so huge that it's bigger than countries, and its political power has to be greatly increased.

All right, number two, distribution. There's a very interesting question about distribution of wealth. Joe has said before and he's said now, antitrust ought to be for the people. So we have something, as in American Express, where one way of looking at it is if you go for the holding -- this is below -- that this restraint that allows American Express to prevent merchants from giving a discount if they go with the cheaper card or telling them anything about a cheaper card, if you go with that is anticompetitive and

presumptively ought to be enjoined, you also are going with the notion that discounts are good for people.

They are especially good for poorer people and the masses of people, and is it possible that we could balance what is lower prices all over the -- in the stores for people against some people getting more frequent flyer miles? And even to go with the presumption that firms need to take actions like gagging the discounters to protect against free riders, as Justice Breyer pointed out, is not clear at all, that there was a free rider problem.

Equal access, I want just to say a word about Cal Dental. A dentist rule that wouldn't let dentists advertise, "I'll give you a better deal, I'll give you a big discount," so-called because the dental profession had to regulate professionalism, doesn't that idea -- a restraint -- it's hard to see that it's not a competitive restraint, although the Supreme Court so found, and that the distribution would be in favor of the people who don't have money, who don't have access to dentists, also for dentists who need to get into the market?

So there is so much room today, because our law is so conservative, for thinking equity issues along with efficiency issues going together, not separately,

and I think that's where we ought to focus our public policy concerns.

Thank you.

MR. ABBOTT: Okay. I think I'll skip by the question of industrial concentration and increase in price-cost margins. It's already been alluded to. Let me go to a point that Bill Kovacic made about administerability.

About 35 years ago, Judge and Professor Frank Easterbrook offered "Limits of Antitrust," an article which called for structural rules and presumptions to guide antitrust analysis. Related to this is the application of decision theory, which seeks to minimize the sum of error costs and administrative costs in antitrust enforcement. Should decision theory be employed by enforcers in selecting cases and in evaluating specific facts? Should judges apply decision theory and what are the limitations and possible problems with its application?

I might mention, there's an article in 2015 by Professor Jon baker in Antitrust Law Journal that's a critique of decision theory.

Keith, your thoughts on decision theory and antitrust?

MR. HYLTON: Sure. It's been mentioned

increasingly in antitrust opinions, discussion of error costs, rationales for decisions. Breyer has used that reasoning in a number of his opinions, but it's been in antitrust for a long time when you think about it, because if you go back to the Trenton Potteries decision on price-fixing, supporting the per se rule against price-fixing, the rationale offered in Trenton Potteries for the per se prohibition of price-fixing is mostly an error cost rationale, mostly an argument about, well, we could use a more fine-grained, granular rule, but we're likely to have a lot of mistakes, and those mistakes are going to be really costly. So it's better to have a per se prohibition.

So antitrust has been taking advantage of error cost decision theory arguments for quite some time. So in a sense they would be, I think, not very productive to try to avoid or, you know, sort of push down or get away from these error cost arguments. They will find their way back into the doctrine, because courts are going to realize that the standards are difficult to apply. Judges can make mistakes, and you've got to have a sense in the background, well, what are the costs of these mistakes? What are we messing up if we make mistakes and how bad is that? So the Trenton Potteries rule is based on an assessment of the cost of

these mistakes.

The Brooke Group predatory pricing standard is based on the same kind of rationale. It seems to me we've got error cost rules that are weighing in favor of plaintiffs, in favor of defendants in this field, and they are going to be part of the field. It's going to be part of the doctrine, because judges are -- and to me it's a wonderful thing that antitrust doctrine has developed to allow courts to make these sensible judgments, which would be unlikely to come out of a legislative process.

So, no, I'm actually quite favorable toward them. Are they perfect? I'm sure you can find mistakes. I'm sure there are areas where you'd like to see the error cost framework maybe changed slightly in some way, but for the most part I think the courts have taken the right approach.

And I can offer some suggestions myself of where I think the error cost framework could be changed a little bit, to make specific changes, specific improvements, but for the most part I don't see it as controversial. I think it's been there in antitrust for a long time. Since the Trenton Potteries decision, it's now sort of brought out to the surface, and judges are openly embracing the thought process and talking

about it openly.

MR. STIGLITZ: Can I just make a comment?

MR. ABBOTT: Yes, please, Joe Stiglitz.

MR. STIGLITZ: So, increasingly, people are always making judgments with priors and with judgments about the consequences of one type of error or another. What worries me a little bit is the persistent mistakes and the judgments about mistakes, which I think has been part of the concern, and there are two points I'd make.

The first is when hysteresis effects are important, then making a mistake that you will allow market power to increase, when you don't prosecute, can have -- will not be self-corrected. We know that markets are not self-correcting, so the agglomeration of market power is going to be persistent.

I think the error of saying a particular merger, say, shouldn't go through, the cost of that, you know, if you believe that the economies of scale and scope are relatively small, the cost of that is relatively small, and if there are real economies of scale and scope, then that error will be self-corrected in the future because some other firm is going to -- or that firm -- some other way of getting the advantages of those scale and scope economies will occur.

So the point is we know that there is in a sense one direction, and I don't think the courts in at least a lot of the decisions have not balanced that correctly, not taken into account the importance of hysteresis effects.

The second point I'd make is the magnitude of those costs depend, in part, on our legal framework. If we had a framework where we could go back and revisit these issues, if we could say, okay, you said that there wasn't going to be any agglomeration of market power, you weren't going to raise price, but five years later, we'll go back and revisit that, then that would put these errors in a different perspective.

So if we change our legal framework so it gave us more authority to go back, if they say, "Oh, don't worry about these anticompetitive effects, we are really not predatory pricing, we're really going to keep those prices low," and then you see three months later they act exactly the opposite, then you can go back and revisit it.

I feel very differently, and so the nature of your judgments of those errors has to be put in the context of what are the remedies if you make an error.

MR. CITRON: Can I just follow up?

MR. ABBOTT: Go ahead, Eric.

MR. CITRON: I agree with what you're saying, like asking whether decision theory should be incorporated in legal rulemaking is like asking whether we should get the rule right or wrong. Of course, you should incorporate anything that leads to more accurate legal decision-making.

The question is, is the organizing assumption of something like the limits of antitrust true or false? The organizing assumption is if we make a mistake that it's underregulating, it's okay, the markets correct themselves. If we overregulate, that's the only source of durable market distortion.

If that premise is true, great. I don't think it is true. We should probably analyze it using our modern economic tools to figure out if it's right or wrong. And we should be -- and on the ground, for lawyers, what you see is just decision creep, right? What this critique from Judge Easterbrook makes the most sense in is per se rules that might be way overbroad, a per se rule against vertical price restraint or something like that, but at the American Express oral argument, you have Justice Gorsuch asking, well, shouldn't we just not do anything in this case because of what Judge Easterbrook wrote in 1984? And this is a rule of reason case where a district court

has made a bunch of findings about the effect of the rule at issue.

The organizing assumption needs to be one that is accurate if you were going to incorporate decision theory in this way. If what we're trying to say is should we have a rule that we just favor underenforcement for its own sake, you know, I can't possibly agree with that.

MR. ABBOTT: Okay, interesting.

So we're hearing different views on presumption, so let me move forward and raise a new issue, actually an FTC-specific issue. FTC Commissioner Chopra has proposed that the Commission consider adopting competition rules through a notice and comment rulemaking process. Is this a good idea, and what about strengths and weaknesses?

Dennis?

MR. CARLTON: Well, I'm not a lawyer, so I can't tell you about exactly the legal implications of rulemaking, but especially in antitrust, having a rule strikes me as undesirable, especially after we just heard what Joe said about how the nuances of economic thinking and the economic circumstances influence the ultimate decision.

If you have rules, then you have a lack of

flexibility to adapt the rule to the particular situation. You know, maybe that's okay for consumer protection, maybe you want to have a different thinking about that, but at least for antitrust, that makes me nervous.

But having said that, what I am in favor of -- and I think the Commissioner's paper would endorse this -- is that the FTC should be doing -- and the DOJ, too -- studies of important policy questions in order to inform us of sort of the general findings that can influence how judges and state legislatures and, you know, maybe even Congress view certain practices, and that is related to the last question.

It's all about, you know, your projections of how long will market power last if I make a mistake; how long will an inefficiency last if I don't allow a merger. Those are empirical questions. Those presumptions don't need to have anything to do -- if you have the empirical evidence in an industry that there's never been entry, so why do I expect entry to solve a problem?

So let me just give you three examples. The FTC did studies of hospital mergers and I think had a big effect on showing the world or the U.S., people in the United States who were interested, that sometimes

hospital mergers can be bad. You shouldn't just say they're fine.

The FTC has a program where they go around -- I think they still have such a program, they did when I was in the Government -- in which they go around and they warn states about the harms from certain legislation that they're considering; for example, licensing. Licensing in the U.S. has gone up from something like 5 percent of the workforce to 30 percent of the workforce. They created an entry barrier.

And let me say one other important issue, merger retrospectives, very important to do, but a merger retrospective is not asking, "Ah, there was this merger. Did price go up?" That's important, but what you want to be thinking about if you're a decision-maker is, can you, the researcher, tell me something before I have to make a decision that will help me make a future -- that will improve my decision-making?

Everybody has 20/20 hindsight. You can't say, "Oh, that was a good merger, that was a bad one, you made a mistake there." As a policymaker I want to say, "Look, that's interesting information, but what did I do wrong? What should I have done differently?" And if the researcher says, "Beats the hell out of me," I wouldn't say that's particularly helpful research. So

let me give you a research program.

The research program is economists, when studying mergers, have merger simulation models, for example. When you look at a merger and you assess whether to allow it to go through, what did your model say? Now, let me compare that to what actually happened. I want to know when the models work, when they don't. That's not been done in a systematic way.

That's something the FTC and DOJ could do, could try to do. When I was at the Department of Justice, I made this suggestion. I would say it went over like a lead balloon, but I would suggest that there are studies the FTC can do that can inform us on important policy matters for which perhaps our priors are wrong, and those should be corrected, and that's a very important function of the FTC and DOJ to engage in.

MR. ABBOTT: Thanks.

Keith, do you have thoughts on competition rules?

MR. HYLTON: It's an old problem, the question, should an agency engage in rulemaking or adjudication, and it's sort of across -- this is a problem that's been across several agencies. The NLRB, National Labor Relations Board, for a long time that's been an issue.

Should the NLRB, you know, generate new rules through adjudication, through deciding labor disputes, or through rulemaking?

And for the most part it's worked through adjudication, and I think that's been a good thing, largely because of some of the points that Dennis touched on, that they involve intricate, tough problems. You need to hear from people with real stakes on those issues, what they -- you need to hear what they know about it and what the source of the problem is, and the same thing is true in antitrust.

I mean, so my point is that the NLRB process has actually produced better law as a result of adjudication than I think the agency could have produced through rulemaking. I think the same thing is true of the FTC. I think adjudication as the common law process generally has an advantage over the rulemaking process or civil law process, because of the information that litigants bring before the judge, private information that otherwise you can't get a hold of, or if you try to get it, you will get it from lobbyists who will try to distort the decision-maker's preferences.

Adjudication has the benefit that people are revealing important information, private information

about what's at stake, and they're honest about it. They're not just trying to push some program, or if they're pushing a program, it's clear what they're doing. It's not hidden in any way. So the adjudication question is like the question of common law versus civil law.

Plenty of important benefits come out of the common law process. In fact, you know, Judge Posner made a career off of talking for a while about the benefits of the common law process, the efficiencies created by the common law, not to say that rulemaking can -- not to say that rulemaking can never be good.

Sometimes there's an important big change, institutional change, and sometimes you can only get that through a rule, but generally that's probably not the best way to go for an agency or some tribunal that has to make fine-grained decisions on the scope of a right and sort of vary that scope depending on the interest on both sides of that question, which can vary a great deal depending on the nature of the dispute and the nature of the parties.

MR. ABBOTT: Joe Stiglitz, do you have thoughts on possible competition rules?

MR. STIGLITZ: Yeah. Well, first, I think the way that Keith put it is right, that there is always

going to be a mixture between rulemaking and adjudication, but I think we don't have the right balance right now, and this actually in a way interacts with the earlier question about administerability.

A rule of law is a statement that you know with some degree of predictability what kinds of actions are legal and not. There are some cases where you can write down a rule. I don't think there's any problem saying that some of the fraudulent -- you know, it -- if you misrepresent what you do, if you're engaged in fraud, that should be illegal. I mean, you can say there's subtly. Well, there might be some circumstances in which freedom of speech is important, and I have the right to lie as a part of my freedom of speech. Well, okay, but as a business practice, you should outlaw it, and you could come back and make some defense, but it's rebuttable presumptions.

It seems to me that we could write down rules that say if you have a very large market share and you engage in a vertical merger -- and there are those cases -- or you engage in particular kinds of restraints that we could write down, the presumption will be very strongly that that's anticompetitive.

And, you know, that goes back in some ways to the issues Dennis talked about, the importance of

preserving the process of competition. If you have clear cases of monopsony where consumers might benefit, because some of those benefits of monopsony power are passed on to consumers, you would say, no, that's still interfering with the dynamics of competition.

So having rules that make it clear what is admissible and what's not -- and there's always going to be things that are outside of the boundary of the rules -- and those are the things that you are going to have to adjudicate. So even in common law countries, you have adjudication. So it's the balance, and I think we haven't gotten the balance right.

MR. ABBOTT: Interesting.

Now, let's go now from some broad conceptions to a specific case, which has already been alluded to by a couple of people, the AmEx case. A few months ago the Supreme Court held 5-4 that the lower court erred in failing to apply a two-sided market definition in evaluating so-called antisteering agreements between American Express and merchants accepting its credit card. The antisteering agreements basically prevented the merchants from revealing that another card -- that other cards might offer certain advantages to consumers.

Now, this raises several questions. Now, first

of all, this two-sided market definition, although there's been a lot of research on the concept of two-sided markets where you will have a -- sort of an equilibrator of a platform, say a publisher or a restaurant owner who's dealing with two different sets of transactors, a newspaper, say, dealing with consumers and advertisers and so forth.

The idea of a two-sided market definition has been discussed by economists at some length but was a novelty in judicial decisions, as pointed out in a dissent by Justice Breyer. Will this holding have a significant effect in high-tech platform and other markets? In particular, the concern raised about durable monopoly, say, by the big digital platforms, the Googles, Facebooks, and so forth.

Is this sort of decision -- does it make it harder to submit to apply antitrust scrutiny to the activities of the big platforms? And if so, is that problematic? And let me ask Eric.

MR. CITRON: Yeah. I mean, I don't want to say too much about AmEx, lest my head explode here, but I will say, you know, you have a situation where you have enforcement agencies from both parties -- you know, active during both political parties' occupation of the administration and a huge number of the most respected

antitrust scholars and the economists saying that the rule that AmEx is seeking is incorrect, and then you get the Court saying that the rule that AmEx is seeking is correct, and that's a problem. It is inaccurate antitrust enforcement, and the question is what you do about that afterwards?

The Court says we're not really going to do a two-sided market definition all the time. We recognize that we do it one side at a time in the newspaper space. We're not overruling that decision or anything like that. This is something special about American Express.

Now what happens is a contested point, and it's for antitrust enforcement agencies and for thinkers in antitrust who relentlessly criticize the Supreme Court for making this mistake. And that's okay. You can say, look, we recognize that case came out that way. It shouldn't go any further than that because it is not correct.

So I don't know what the consequences of the decision will be, but they should be narrow. The Court was only able to write a very narrow opinion, but it is really up to the thinkers in this room and at the agencies to say, look, there are some times two-sided market definition might make sense, like in the

predatory pricing realm, but when you're asking questions about restraints in trade and market power in a particular relationship, like can a card company get merchants to do what it wants or not, you don't really need another part of the market to know whether or not there's power in that relationship. That's what every antitrust law professor would have told you, and there's no reason for the agencies to abandon that view just because the Supreme Court has come out a different way in one particular case.

MR. ABBOTT: Dennis, do you agree?

MR. CARLTON: Yes. I should add I've worked against the credit card companies for many years, both here in the United States as well as around the world, so I have a paper that's coming out with Ralph Winter in the Journal of Law and Economics, and it explains why rules like those in American Express can harm competition.

The no-steering rule was basically that a merchant can't, when a customer is checking out, tell him, hey, why don't you use this card. It's also the case that American Express doesn't -- the rules don't allow a merchant to surcharge an American Express card if it's a more expensive card for him to use.

Now, the Court relied on saying it's a

two-sided market; it's much different than one-sided markets. We know one-sided markets. When there's a promotion, we know how to handle it. I will let you read my paper with Winter, but we show that there is no basis for that. We can actually show that rewards to the card consumer can be treated exactly as promotional effort in one-sided markets and you get the same conditions. I thought Breyer's dissent was exactly right in bringing out the criticisms.

So my own view is that having different rules for one-sided verse two-sided markets, so the three-part test and who has the burden, that just strikes me as based on faulty economic logic. The Court is very unclear on how it would define two-sided markets. I think it's going to make it harder for plaintiffs to win cases when the defendant can say he's a two-sided market, and given the vagueness of the definition of "two-sided markets" in that Court's decision, I guarantee you everybody's going to say I'm a two-sided market, you know -- right, you know, so I think it could impair the administration of the antitrust laws to preserve the process of competition.

I hope Eric is right that it's so narrowly interpreted to apply only to cards that are green or whatever, that it doesn't apply to anything else, but

I'm more -- and I should add, it's part of a -- these no-steering rules appear in many different guises. Joe mentioned this, and I agree with him, and I've opposed rules in these other guises where a platform -- there are restrictions that one platform places on someone who's selling, for example, products on their website that says you can't sell at a different price anywhere else.

We have got to examine those rules. I'm not saying they're always bad, but they raise difficult problems about competition, and those are going to be increasingly important as these platforms continue to grow because of the internet.

MR. CITRON: I just want to say -- because it's really close, I think, to the mission we're talking about here -- I mean, Dennis and I don't agree about a lot of things, but, you know, the agreement that you have there, it's an opportunity to say, okay, what can we do about it when the Court makes a mistake?

We were talking about the agency's rulemaking authority. We don't have to let courts that aren't necessarily experts in the realm be the last word. You can publish papers and do other sort of soft power things at the agencies, try to continue to move the law in the right direction, try to show judges where they

made mistakes, and you can use the rulemaking authority of the agency to try to address areas where the decision rule in the courts doesn't end up being the correct rule.

MR. ABBOTT: Joe Stiglitz?

MR. STIGLITZ: I just want to say, I very strongly agree with Eric, and this is really an illustration of what we were talking about earlier, the scope for rulemaking by the FTC, and it's a really good example where you can step in and make a difference.

MR. ABBOTT: Okay. Let's move to a very hot area that's generated a fair amount of literature in recent years, the interplay between intellectual property laws and antitrust laws.

In general, does antitrust do an adequate job at considering innovation incentives when evaluating IP agreements? And I've got a number of followon questions.

And certainly, as you know, there's been a lot of discussion about so-called standard essential patents and refusals to license or restrictive licensing terms by standard essential patent holders and as to whether those should be subject to antitrust scrutiny.

But let me start on the very general level as

to whether antitrust does an adequate job in policing agreements, licensing and related agreements involving intellectual property and, in particular, patents.

Let's see. Dennis again.

MR. CARLTON: Okay. So there are a lot of complicated issues associated with the intersection of IP and antitrust. Part of it has to do with the adequacy of the granting of patents. If you are overgranting patents, creating patents that have a high probability of being invalid, you're just creating problems, and, in a sense, the antitrust laws are there to try and fix things as best they can, but the right way to fix things is to really go after the intellectual property laws.

In terms of, say, standard essential patents, it seems -- and I have several papers on this -- it always seemed to me that the issue with standard essential patents is that a standard-setting organization, an institution is existing to allow collaborative efforts to create a standard that supposedly is going to benefit everybody, and the people involved signed a contractual commitment saying I'll charge you something that's reasonable, and then they never say what that means. It's reasonable and nondiscriminatory. And then if you wind up in the

courts, everybody's definition of "reasonable" is, you know, it depends on which side of the bargain you are.

It seems to me the institutions, the standards-setting institutions, should play a greater role in trying to resolve those issues, and I would suggest that standard-setting organizations pay much more attention -- I know they don't like to get involved because they're fearful of triggering antitrust violations on their own part, and they want to leave that out of their bailiwick of responsibility, but it seems to me if you're the responsible institution to allow collaborative effort, you should be also responsible for the consequences of that collaborative effort.

If it leads to someone saying, well, that standard essential patent is exercising market power, and the only reason it's exercising that market power is because you let them be in the standard, and he's violating the contractual commitment, it seems to me the institution should try and resolve that. I think it's a very hard problem for courts to resolve. My experience is it's a big mess when you have to litigate, and I think compelling arbitration from a standard-setting organization itself would be a superior resolution. There is no easy answer to this

question.

MR. ABBOTT: Eric, anything to add on that point?

MR. CITRON: I've been talking a lot, so I won't say very much. I mostly agree with Dennis. The only thing I would add is that we have to have continued vigilance to make sure that standard-setting organizations mostly do standard-setting and don't do price-fixing and its various kinds of alternatives, which is like you have to do business this way, under the guise of a privacy, you know, regulation or a security regulation or something like that.

The test should be pretty relentless. Was this a necessary -- was this necessary to secure an efficiency or is this unnecessary collaboration between competitors? And this is just an area where I think courts are becoming not vigilant enough, and the agencies have to maintain their vigilance.

MR. ABBOTT: On a somewhat different aspect of IP antitrust, do you think antitrust is doing an adequate job in dealing with assessing mergers and contracts in high-technology sectors and, in particular, digital platforms? Say a dominant digital platform acquires intellectual property of a small startup firm, that sort of thing. Anyone want to

comment on that?

MR. HYLTON: I mentioned the kill zone problem earlier. Maybe I'll come back to that. So the kill zone problem has been out there for a long time, where startups are afraid that, well, you know, it's Microsoft and their platform, the desktop. A startup wants to create their software that could be on the Microsoft desktop, and Microsoft comes to them and says, "Hey, we'll buy you out for $1, or we'll just do it ourselves." And so, you know, you sell out to Microsoft for $1 in that case. And, of course, once people are aware of that problem, no one wants to innovate in the platform space.

So that strikes me as a problem, and I don't know what antitrust can do about it at this stage. It seems to me it's an empirical issue, whether this is having, on net, a negative social welfare impact. I would like to see what the studies show, and people are doing empirical work on this question right now.

But maybe it needs some -- if there is a problem, maybe it needs some specific kind of scalpel-like solution. Maybe it's closer to one of these unusual cases like salvage contracts in the high seas where, you know, courts say we're not going to enforce -- you know, we are going to put an arbitration

process over this, because the problem with the kill zones is that the platform owner always has the credible threat to say, "Well, if you don't sell out to us for $1, we will just do it ourselves," and you'll never see any money out of that venture.

So maybe there's some way that we could structure the arrangement so that the credible threat can't be made to an innovator on the platform to get around the kill zone problem. I see that as sort of an example of one of these specific problems generated by platform markets and mergers in platform markets that antitrust hasn't solved, or at least we're not sure that the antitrust solution -- which is, I guess, not to do anything -- is the right solution. And since I'm reluctant to intervene in markets, I'd like to see what the studies show on this, but if they show something, maybe that's an area where there's a tweak that needs to be made.

MR. ABBOTT: Interesting.

Let me -- yes, please.

MS. FOX: I think there is a problem in this area, and I agree with everything that Keith said, and just to take it a step further or maybe a step back, actually, I think that many authorities who passed favorably on Facebook's acquisition of Instagram are

sorry they did, that they did not think hard enough that these two companies that did not look like direct competitors actually were in the same future competitive space.

And I think as a result of that, I think there's going to be more care, and I think there definitely should be more care, so that the dominant platforms don't swallow up the new entrants that could be challengers.

MR. CARLTON: Can I say one thing?

MR. ABBOTT: Yes, Dennis.

MR. CARLTON: I kind of agree a bit with both of those. As Keith points out, it's an empirical question. If you don't allow the dominant firm to buy the people with the great new ideas, and they may be better generators than the giant firm, there could be a harm, because those ideas -- you might not have an incentive to create those ideas. That's the hard problem. So that's why you need an empirical study.

But there's another problem, and I'm not sure -- although I partially agree with what Eleanor said about, you know, potential competition, I want to just put a finer point on it. If I produce Product A and Eric produces Product B and we say we're not in the same market, let us, you know, merge, that sounds

right, but let's suppose we both use data sets and have different data sets.

Well, maybe it's not Product A and B that's important; it's the merger of those data sets. And when you say future competition, I can't even predict what those two data sets, combined, are going to be used for. So maybe there's another market we haven't paid enough attention to -- namely, the market for the use of data -- and do we want to allow combinations of data? Maybe it's efficient, maybe it's not, I don't know, but I might be worried that that is creating monopoly power in something I hadn't thought about before.

MR. ABBOTT: Right, but before -- and I have a number of audience questions --

MR. HYLTON: Joe wants to --

MR. ABBOTT: Go ahead. Yes, please.

MR. STIGLITZ: And that's one area, by the way, where the FTC's consumer protection interact and privacy concerns interact with antitrust, and those combinations of data give -- can be a very big barrier to entry for other firms. It is a tool for -- I suggested for extracting consumer surplus and producer surplus, so having negative social value and engaged in distribution.

And it's related to, you know, what I said. You have to make judgments about the future effects on the dynamic process of competition. So I really agree with what everybody said, except one qualification. I'm not sure that doing studies of what's happened in the past is going to be very dispositive about a particular example, like Instagram.

I think you're going to have to use judgment on that, and those are areas where we'll make mistakes, but when you have a platform that is already dominant, I think one ought to be particularly wary. And so that's sort of the frame of mind that one ought to go into, that almost surely you're not -- at least as I make the judgment, that the anticompetitive effects, the effects on undermining the dynamic process of competition, that risk overwhelms the possibility that some idea -- and if you look at some of these ideas, like having pictures sent over electronically, that's not -- you know, that's not a breathtaking idea, and somebody will invent it maybe a week later, but the world will survive.

MR. ABBOTT: Okay. We've talked about big data briefly. What about the implications of data protection and privacy, typically viewed as consumer protection problems? Should -- since consumer

protection looks at those issues, should antitrust also try to assess them in particular cases?

Who would care to comment, say Eric?

MR. CITRON: Yeah. I mean, I just would -- when it comes to big data, privacy, and other, I think, related areas of consumer protection, I like what Professor Fox was saying earlier about thinking about consumer welfare by also thinking about the health of markets, right? You know, if data is going to allow -- if ownership over a very large set of data, consumer data, is going to allow firms to distort the markets in which they operate, that's a problem. It's a competition problem in addition to a consumer protection problem.

If a lack of price transparency in how you deal with your consumers or contract transparency in how you deal with your consumers allows you to distort the market in which you operate, that is both a competition problem and a consumer protection problem. And I think we should be thinking about data concerns particularly in that way, because I think data is an important barrier to entry in a lot of new technology markets and spaces, and those markets are unhealthy because of very large agglomerations of data in some hands and its inability to reach others.

MR. ABBOTT: Eleanor, any thoughts?

MS. FOX: Right. So I agree with Eric. Bill Kovacic made the point earlier, and Joe endorsed it, that this is a really good area for the Federal Trade Commission to combine its expertise in antitrust consumer protection, bringing in data privacy.

Europe is way ahead of us on thinking about these issues. I think we have to think more seriously about them here. I think we have to think more seriously about an issue that I know many would not like to, but it is a big platform that has a lot of power that is both the gatekeeper and is one of the people on the platform always preferring itself.

And in addition, as the European Commission is just investigating right now, whether Amazon is taking all the data, being both a customer and a platform, and whether it's taking all this great data that it's getting and preempting the next new big idea that you can discern from analyzing all that data. A very complicated question.

I'm not signaling that I know an answer, but I think that there are problems, clearly problems of unfairness, where there may not be an inefficiency in catching the problem. And in Europe I think the Commission will think that way, and I think that it's a

test that we ought to put ourselves to, also, first to see, is there a market obstruction? Does it lessen innovation?

But second, I would be all for also saying, well, if you can't quite put it into antitrust, is it a problem of preferring your own that is so unfair and inequitable to the people using your platform when you are both the gatekeeper and one of the people on the platform.

MR. CARLTON: Could I just add?

MR. ABBOTT: Dennis, yes.

MR. CARLTON: There are really, I think, two additional points I would like to make. The first is this issue about data. Although I agree it's both a privacy issue and an antitrust issue, there is an overlap, no question. The key issue in data is property rights, and that's what you have to ask. Who has the property right in the data?

If I am on a platform selling my goods on Amazon, does Amazon have the right to my property, as to who my customers are? That's a property issue. That should be defined.

And so we have different laws -- and you know I'm not a lawyer, but I have a general understanding -- and I have a property right to my healthcare data. Do

I have a property right in my search engine data? Well, I think we should ask the questions. What does the individual or a firm have in terms of property rights in its data? That's one question.

Second, we have only talked or I have only talked about sort of mergers, when you're merging data sets. That's not the only antitrust concern you want to be concerned about. If I'm a dominant firm and I'm using -- a third-party website is relying on me for something, and Alden's my competitor, and I say to that third-party website, "You want to deal with me? You better not give Alden any data." That strikes me as something we should be concerned about.

So I think those are new antitrust issues that are going to arise more and more, I think, and I do think antitrust has the tools to deal with it. I don't think antitrust necessarily has the tools to deal with who has property rights in data. That might be outside antitrust, but I think it's important to define property rights correctly; otherwise, we will get an inefficient outcome.

MR. HYLTON: Alden, both Joe and I -- maybe I will yield to Joe first.

MR. STIGLITZ: Yes. Well, even after we assign property rights, there is a consumer protection issue,

because firms may induce people to sell that property right at a price because they don't really know the value of that property, so that actually poses, I think, a really challenging question for the FTC about what is the transparency in the transaction. And since the sum of the values of -- by combining property -- the value of the data to the individual may be very little, but when you combine it with other data, it becomes very valuable. That was the first point.

And the second point is this misuse of data that's generated another way is a problem that is confronted in other areas. For instance, in some of the -- Goldman Sachs, when it was processing transactions, a standard thing is front-running, and that's illegal, but one of the things that happened in the flash trading was we allowed them to engage in that until we stopped that, and that really distorted the market.

That was a really good example where the use of data, when you were in multiple roles, gave you an advantage over the people who you were supposed to be serving, and it distorted the market, because through this what is effectively front-running, it took away all the extenders for other people to gather information, because the value of that information was

being appropriated.

Finally, I would just mention that -- I want to mention that other countries, Europe in particular, is ahead of us. For instance, some of the European countries just don't allow you to combine data sets, and they're -- you know, so you face a restriction that has an efficiency loss, you might say, but the competitive benefits may well outweigh the efficiency losses, and the efficiency gains in most areas are probably very little. They are just allowing people to exploit you a little bit more.

MR. HYLTON: So I just want to one say and then I will be quiet, that the property rights issue that -- I think Dennis is entirely right, that it's a property rights issue, and to some extent underneath there is a market structure issue, because if we had competition among platforms, I think property rights would develop naturally.

So for sort of an example, you know, Bing, I guess, has a bidding system already. They offer rewards, I guess, or something if people search on Bing, but I don't think anybody takes advantage of it. But to the extent that you had competition among platforms, a platform would be forced by competition to protect privacy, to protect properties rights, but we

don't have that, and so as a result the dominant platforms can just abuse the users.

And so the ideal solution would be competition, would be other multiple data brokers and platforms. We don't have that now, and so we have got to worry about, you know, the property rights issue and what can be done about it.

MR. ABBOTT: I have a few audience questions, and let me very quickly ask about an important issue. Joe Stiglitz had discussed briefly vertical mergers and new learning, and are the enforcers doing an adequate job in assessing vertical mergers and, perhaps more broadly, vertical restraints? Anybody else on the panel want to comment on that?

MR. CARLTON: Well, I won't say anything about vertical mergers because of the AT&T case that I was involved in, under appeal right now, but I will say something about vertical restraints. Vertical restraints of the form that I mentioned, similar to those in the American Express case, in which the vertical restraints is what I call a vertical most favored nations clause, in which one manufacturer says to a retailer or a platform, "I don't want you to price my product any higher than my rivals," or there is some condition in which you are telling the retailer how to

price relative to your competitor.

I think those raised subtle or maybe not so subtle issues that hadn't been well thought through. A very simple example. Let's suppose Eric and I are two manufacturers, and he's the retailer, and we have a most favored nations clause, a clause just like we said. If I raise -- if I lower my price, Alden can't lower the retail price. If I lower the -- my wholesale price to him, he can't lower the retail price. Therefore, I am not going to get a whole bunch of customers over. So I don't have a real incentive to lower my price.

What about if I raise my price? If I raise my price, I don't have to worry that my retail price at Alden's store is going to be higher than Eric's and that I'm going to lose customers. So it creates an incentive for both of us, instead of to compete by dropping our wholesale price, to compete by raising our wholesale prices together. It eliminates competition. It's a striking phenomenon, very simple to understand, and I think hasn't received enough attention.

MR. ABBOTT: Anyone else?

MR. CITRON: The only thing I would say about vertical mergers -- and I think it might be true of what we sometimes call conglomerate mergers, too -- is

we just aren't thinking creatively enough about potential competition. It's a really big issue. It's a really big problem.

The Instagram-Facebook example is one particularly good one. It strikes me, you know, nobody thought Netflix was going to be a content maker. Everybody thought Netflix was going to be a distribution company. It turns out it's now a big content company. That's because access to capital is important, access to markets is important, access to expertise is important, and a lot of vertical mergers are adjacent companies that could be expanding into those spaces vertically on their own and generating new competition, and instead they don't.

It's a merger between potential competitors that we don't see because we're so focused on what the companies do right now. I think that's something we should worry a lot harder about, both in the vertical space and in the conglomerate space.

MR. ABBOTT: Eleanor?

MS. FOX: Yes, I think we do need clarification on vertical mergers and vertical agreements. I agree with what Dennis and Eric said. I would love to see vertical guidelines. I think we ought to have them.

I think there's going to be so much kind of

philosophical dissension of trying to get to an agreement on vertical guidelines that I am not predicting that they will happen in the end, but I think that it's a very important exercise to go through and see if agreement can be reached.

MR. ABBOTT: Can't hurt to try.

MS. FOX: Yes, can't hurt to try.

I also think in the vertical space that we haven't given enough attention to leveraging problems, because it often is the case that you have one firm that is functionally related in two markets and can discriminate against those that are not its own firm, and I think that this can create problems. It doesn't always, but it certainly can create real competition problems.

MR. ABBOTT: Okay.

Keith, before we turn to our audience questions, do you have anything to add on vertical?

MR. HYLTON: Not much. I mean, AT&T-Time Warner, that seems to be largely a question about evidence and a case, you know, based on evidence and proof, and the litigants seemed to have a lot of opportunities to make arguments about anticompetitive effects, which, you know, the arguments were put out there, and, you know, the trial court judge just

thought the evidence weighed in favor of the merging parties. So I don't see a big problem here.

I mean, I don't see how you're going to -- how antitrust can do anything about the evidence and proof issues. That's not really an antitrust matter. That's an issue of how a judge weighs the burdens and weighs the evidence that's produced under those burdens, which is everything that, from what I could see, that AT&T-Time Warner involved. I don't see an antitrust issue there.

MS. FOX: Oh, so, can I just add one more? There is possibly a question that for so many years in the past -- well, since 1980 -- there's been this very strong assumption that if it's vertical, it's got to be good and it's got to be efficient. Joe, you raised this in your initial presentation. Maybe we should rethink that.

MR. STIGLITZ: Yeah, and particularly when you have oligopolistic markets. You know, if these were all very competitive markets, I think our attitudes would be very different, and we would say there are probably some efficiency gains or something else going on, but when you're doing this in an oligopolistic market, it's very easy to show that those vertical mergers do result in less competition, and not only in

the dynamic way in the potential competition, but actually, if you write down a model, any model of a Nash equilibrium, a game theoretic model, it is very clear that that will happen.

And the problem as I saw it in the AT&T case is that the judge didn't understand the analytic framework. It wasn't the evidence. It was actually the analytic framework through which he could interpret the evidence, and that's always going to be a problem, because we have mental models through which we have to process the data, the evidence that we have, and the mental model that's in the minds of a lot of judges is the wrong mental model.

MR. ABBOTT: Okay. We're running short of -- it's about seven more minutes. Here are a few audience questions.

We haven't talked about antitrust immunities, but one question for Professor Fox -- others can chime in -- could antitrust and competition law have something to say about lobbying by large firms in light of the issue of economic power translating into political power through lobbying or other forms of influencing our lawmakers, which contributes to maintaining market power?

So the issue of anticompetitive activities,

lobbying, questions of the petitioning antitrust exception doctrine, but in general, are these issues worthy of additional thought and analysis?

Professor Fox?

MS. FOX: Right, thank you. So I would say two things. One is Noerr-Pennington, which provides what looks like a really robust defense that allows lobbying and puts it outside of antitrust violation, is too broad a defense, and the Federal Trade Commission has been doing good work on this point over the years with Tim Muris, for example, doing really great work in trying to narrow the exemption, and I certainly support the Federal Trade Commission in trying to narrow the exemption.

There's no good -- in my view, there is no good reason to allow the competitors to get together to lobby. If you want to keep the channels open, you can allow individuals to come before the decision-maker, governmental decision-maker.

All right. So the second is the other place which I mentioned earlier fit into an existing competition problem. It wasn't its own problem of just saying lobbying is anticompetitive, and that is where I mentioned it in -- also in LaFarge, that I thought it was really a merger that looked so anticompetitive and

also so huge, I thought it was a good idea to take the whole picture into account, which included an awful lot of lobbying against cheap imports coming in.

MR. CITRON: Yeah, I just think we have to recognize, one reason why big can be bad is because big leads to rent-seeking behavior at governments, and we can't address that directly because the First Amendment is a bar to it. We just have to be aware of that, the way that power can be used at government to get what you want.

MR. CARLTON: And it seems to me -- unless it violates some law, which I have no idea if it does -- that a responsibility of economists, especially at DOJ and FTC, is if they see protectionist legislation being proposed, they should say so.

MS. FOX: Yes.

MR. CARLTON: And I understand that may have political risks, it may even be illegal. I don't know if DOJ and FTC can do that, but if they can't, they should be able to.

MR. STIGLITZ: Just let me add, the analytics of what are the effects of various regulations should be within your remand. I mean, and the way in which a whole set of rules and regulations affect bargaining power and oligopolistic markets, markets with imperfect

competition, would be an important contribution to try to bring that out.

MR. ABBOTT: Okay. Let me ask one more question. You know, to what extent, if any -- and this is probably primarily for Professor Fox, but others should chime in -- to what extent, if any, should U.S. policymakers and antitrust enforcers look to the EU for guidance on competition issues?

And I would go beyond the EU to additional agencies, such as mentioned by Professor Kovacic, the UK, Canada perhaps, Australia. Are there specific things that they are doing now that perhaps we should consider adopting?

MS. FOX: So I'll start out on that. I think the United States does not look enough at our counterparts all over the world, and even within our own country, and I think Bill was entirely right to bring up the UK experience and the market inquiries experience as a great tool.

As for EU, it's a little complicated because EU does sometimes lean a bit far in imposing duties on firms, but we lean a bit too little in imposing duties on dominant firms, and I think that there's a lot that we can pick up by watching the EU, but with a -- with some skepticism, but with some receptivity, and we

ought to realize that we're out of step with the world in imposing so few restraints on our dominant firms.

MR. ABBOTT: Okay. We have got three minutes left. Let's have, very quickly, closing thoughts. Let me go back to Professor Stiglitz.

MR. STIGLITZ: Well, thank you. Maybe I'll begin by picking up on something that Eleanor just said, which is that because we don't take as active policies on antitrust and competition, it may have macroeconomic effects. While we all deal with individual cases, cumulatively, when you don't deal with them sector by sector, it winds up in leading to a less competitive economy, and that has macroeconomic consequences.

The second observation I want to make that we haven't been able to talk about, which is the strategic question, which is some of this, I think, may be able to be done through case by case. Some of it can be done by FTC rulemaking. I think some of this will have to be done eventually by Congress, and I think there will have to be a judgment -- you know, have we gone down -- have the courts gone down in a particular direction so far that to reverse it will take another 20, 25 years? Because of the nature of dynamics, you know, the damage that will be done in that 20, 25 years

could be very large.

So I think that one of the issues that I think our society needs to confront is how much can we do within the existing legal framework and how much do we -- where do we begin to start saying we have to redefine the law?

MR. ABBOTT: Okay.

Keith Hylton?

MR. HYLTON: Sure. I guess I'd begin with the statement that, in general, I think antitrust is in pretty good shape. I mean, the platform markets are generating new problems, and there are questions -- the data privacy issue, the kill zone problem that we have talked about -- that antitrust doesn't seem to have a solution for right now, and we need to do some research to figure out the extent to which the problem requires something, requires a solution.

As far as the rulemaking/adjudication divide or going to Congress, you know, my inclination is I prefer the adjudication approach that we've taken and rulemaking where it's codification of principles that have come out of adjudication that are pretty well established or where there's a need for a big change. I would be wary of seeing the FTC shift toward rulemaking as a general matter.

I'm wary of Congress, too, because the Sherman Act, if you've read the statute, it's pretty sparse, Section 1 and 2 are just two paragraphs, and if you imagine Congress producing some statute like that today, no way. It would go to 2000 pages, and it would have little exceptions in there for this company and that company. There is no way Congress would produce a competition law statute today that would be as useful as the Sherman Act is now, because the Sherman Act has been left to largely judges to figure out how to do it, and they have done it case by case, and they have generated very useful rules out of that approach.

So I think -- I think we -- I think our framework is largely sound, though the platform markets that the new economy has generated have some problems that we still need to look at more carefully to try to figure out how to solve these things.

MR. ABBOTT: We have technically run out of time, but if anybody wants to add anything very quickly.

MS. FOX: Oh, can I add?

MR. ABBOTT: Eleanor.

MS. FOX: I'm sorry, I have to disagree. I do not think antitrust is in very good shape, and I think that the problem is -- and with apologies to you,

Bill -- the problem is Chicago School and the philosophy that's carried it way off the mark. So I just want to say two words about -- I mean, this is Bob Pitofsky's book, and it was ten years ago, How the Chicago School Overshot the Mark: the effect of conservative economic analysis on U.S. antitrust. It's not Republican/Democrat. It's a large span of really important scholars. Everybody should read it again. And this was ten years ago.

The Chicago School philosophy keeps even way more overshooting the mark as shown in American Express, and what we have got to do is we need a new center of gravity, and I want to invoke sort of the legacy of Bob Pitofsky. Think Bob Pitofsky. Read his work again. Read his opinions, maybe combined with Justice Breyer -- and Justice Breyer often cites Bob Pitofsky -- Cal Dent, Leegin, American Express.

Breyer tries to get back to the mark with clearer rules that respect the forces of competition more than we respect the forces of competition today. And read the Second Circuit opinion in Trinko, which was the law and in my view was correct before the Supreme Court in Trinko, because the Supreme Court in Trinko changed a huge amount, and the Federal Trade Commission, with Section 5, in my view, can take up the

slack.

MR. CITRON: I would just say very, very quickly, a lot of the things I've said today I think are things that the agencies already do better, already think about, and the courts don't or are missing, and when that's the situation, all I can encourage the agencies to do is to keep pushing.

If you have to go to court and lose, lose out loud so that we can go to Congress and say this is a problem, or you can go to judges and say this is a problem, it's something that we have to change going forward. Because if you lose quietly, we have the situation where we continue to overshoot the mark in the same direction among judges who don't really recognize the scientific, economic, policy consensus is against them.

MR. CARLTON: And I'll be brief. Five things I would recommend:

Don't misuse antitrust by trying to fix problems that antitrust enforcement is not well suited to fix and has little to do with their creation.

Second, I'm against rulemaking in general, but I do favor studies of policy areas to enlighten us about our prior beliefs about what works and what doesn't. Do retrospective studies of economic models

to tell us which ones work, which don't.

As far as whether antitrust is up to the task of dealing with new problems, I think it is, but there are new problems. Pay more attention to data and how control of it can affect competition. View attempts by dominant firms to deprive rivals of data in a harsh way.

Pay more attention to what I call the vertical most favored nations clauses. They can be sometimes justified, but we have not paid enough attention to them.

And, finally, both agencies should evaluate the competitive consequences of existing and proposed state and federal laws. Thank you.

MR. ABBOTT: Thank you. That ends our panel. We have a ten-minute break. Be back in ten minutes, sharp. That would be ten minutes after 12:00. Thanks.

PANEL 2: THE STATE OF ANTITRUST LAW

MR. ABBOTT: We are about to start again, the second panel on The State of U.S. Antitrust Law. We are going to cover a lot of the questions we did and get a variety of new perspectives, which is very valuable. Again, I am Alden Abbott, General Counsel of the FTC.

Before proceeding, I want to again announce that two of our FTC interns will be handing out questions -- little cards, and people may submit questions. If we don't have time to address the questions audience members have, we are keeping them and we will consider them as we prepare the record, and so don't be concerned. Do feel free to write up your questions. Also we have a cafeteria next to the auditorium that is open until 2:30.

Let me start out right again and announce the new panelists. So the next panel will have Debbie Feinstein, who is a partner and head of the Global Antitrust Group at Arnold & Porter Kaye Scholer, LLP, a former director of the FTC Bureau of Competition, and also an Assistant to the Director and Attorney Advisor at the FTC.

Michael Kades is the Director for Markets and Competition Policy at the Washington Center for

Equitable Growth. Previously, he worked as antitrust counsel to Senator Amy Klobuchar, and previously he was an attorney at the FTC, including as Attorney Advisor for Chairman Jon Leibowitz. I might mention that Mike worked on a number of important pharma matters while he was at the FTC.

We welcome again to the panel Professor Bill Kovacic, again, Professor at GW Law School, former FTC Chairman, currently a nonexecutive director of the UK Competition in Markets Authority.

Diana Moss. Dr. Moss is President of the American Antitrust Institute and an adjunct faculty in the Department of Economics at the University of Colorado, Boulder. Prior to joining AAI in 2001, she was at the Federal Energy Regulatory Commission where she coordinated the agency's competition analysis for electricity mergers.

And last, but very certainly not least, Professor Robert D. Willig, Professor of Economics and Public Affairs, Emeritus, at the Woodrow Wilson School, the Economics Department of Princeton University, and senior consultant at Compass Lexecon. From 1989 to 1991, Professor Willig served as Deputy Assistant Attorney General for Economics in the Antitrust Division of the Justice Department.

So we are going to follow a very similar format to the first panel, and just for starters, I would like to -- and try to keep it brief -- but get quick reactions to what you've heard. In particular, you know, the keynote addresses, but also some of the commentary on the keynote addresses.

Let's quickly go down the ranks. Debbie Feinstein?

MS. FEINSTEIN: Well, thank you very much for having me here. This has been an absolutely fascinating morning so far. You know, listening to everybody, it was fascinating because I expected there to be a lot of discussion about all the ways in which antitrust isn't getting it right because they aren't considering all of these other factors.

In fact, what I heard is that antitrust does cover all of these things; there's just a huge divergence of views as to whether or not the courts are getting it right. So on the one hand you could completely agree with Professor Hylton that the state of antitrust law is strong in the sense that all the cases we're talking about and complaining about are all ones that are in the courts. They are not getting knocked out on motions to dismiss as being unrelated to the antitrust laws. They are antitrust cases.

On the other hand, you could agree with others, including Professor Fox, who says it's wrong in the sense that the decisions didn't come out the way some folks would like them to, but for all the discussion about whether or not antitrust should take into account other factors, something we'll talk about later, the discussion this morning was almost entirely about simply things that are within the box of antitrust.

I think that's where we should stay, frankly, for reasons I'll explain later, and I think there's plenty to talk about there, but when you hear the things that we're talking about, that the rules on predatory pricing are wrong, that we should focus more on combinations of big data, well, that can be taken care of by monopolization.

When you think about whether we should be -- whether, you know, we should be thinking about two-sided platforms or a one-sided platform, that is an antitrust case. It made it to the Supreme Court. That is within the role of the antitrust laws.

So to me the question is if antitrust is getting it wrong, if the Supreme Court is making decisions that people don't think are in the best interests, why and what can be done about it? And I think that's something that we'll talk about as the

panel goes on, but I think that's where the focus ought to be, which is, you know, if there's a view that we're getting it wrong and that the economy is suffering, how do we right the course?

And I have thoughts on that that we can discuss later, but, you know, in focusing the discussion on that rather than should we recreate the body of antitrust to take into account considerations that are far beyond and really didn't end up being what the first panel ended up talking about, I found that fascinating.

MR. ABBOTT: Mike Kades?

MR. KADES: Thank you, and it's a pleasure to be back at the Federal Trade Commission. It's somewhat like my second home. I'm very honored to be part of this panel.

I guess I sort have taken away two things. First, from Professor Stiglitz's presentation, it seems to me he really put out a challenge to the antitrust community and said there's a monopoly problem in the United States, and the failure of the antitrust laws are contributing to that problem. And to me that immediately begs the question, how do you decide whether an institution, the antitrust enforcement institution, is succeeding in protecting competition?

So you might sort of -- this might be called, like, the trial lawyer's assessment, which is if I won my last case, clearly the antitrust laws are working, and if I'd lost my last case, clearly the antitrust laws are to blame. We can certainly look into scholarship, and there's lots of articles sort of talking doctrinally, but I think that sort of misses the larger point that Professor Stiglitz is making, which is that there's something gone wrong in the American economy, and we need to think about what the antitrust's role is in that economy.

So I am going to propose the water is wet test, which is if plaintiffs and the Government are consistently having to prove water is wet in court, if they are fighting over the most obvious, very simple, straightforward antitrust matters, then probably the antitrust enforcement laws are underdeterring.

And when you look at the Supreme Court in American Express, if you look at the implications of Trinko, if you look at the implications of, just last year, the FTC spending four days, 1600 exhibits, to block a physician practice merger that went to near monopoly in Bismarck, it looks to me like that's where the antitrust action is in litigation.

The cases the Government is litigating are not

on the frontier, therein what we call the homeland of antitrust, and that seems to be a very strong indication to me that the antitrust laws, as they're interpreted today, are failing.

MR. ABBOTT: Okay, the antitrust laws are failing. Interesting perspective.

Professor Bill Kovacic.

MR. KOVACIC: Yeah, I enjoyed the earlier segments. They were terrific. I especially liked the second keynote. That was a real highlight for me. So I'm just giving you a quick assessment.

One thought about the discussion of aims and what the agencies do and how they think of things, and I've spent time looking at the budget requests of the two agencies going back about 50 years, where each year they have to go before Congress and justify the sums that they'll be given to enforce the law, and those requests, I think, say a lot about the agency's own perception of what their aims are.

They're certainly interested in basic questions of economic performance, innovation, pricing, but there's always been a component involving distribution and equity to them. To take the FTC as an example, how do you suppose the Commission has sought funds from Congress to carry out its competition program?

It's always identified what were called at different times market basket issues. We're interested in energy, food, healthcare, and a set of other concerns. There's never a budget request that says "We're really concerned about the overpricing of luxury yachts, so we're going to focus a lot of attention on the yacht sector."

All of the budget requests of the Commission and certainly those of the Department focus fundamentally on delivering good results to average citizens. So embedded in that I see a basic concern about distribution, about equity. The major program that the Department developed over time involving public procurement, the principal beneficiaries of improvements in public procurement performance that would have come about as a consequence of the Department's anticartel program are for the most part people on the second half of the income distribution.

So if we ask, has competition law been concerned with equity, with distribution, I would say the way in which the agencies have allocated resources over time would say decisively yes. Now, they have done this in the context of the admittedly amorphous consumer welfare standard, and if you were skeptical of that, you would dismiss it as a slogan that's

deliberately designed to obscure difficult policy choices.

But under the framework of focusing on consumers first and foremost, they built programs that in many ways encompass a fundamental concern with equity and distribution, without labeling it as such, but that has been the overwhelming center of attention when it comes to formulating budget approaches.

The agencies, when they have brought cases outside of that zone, have invariably done it to establish a doctrinal point. Polygram deals with concert performances. Is that a key distributional impact concern? Well, I suppose wealthier people tend to go to those concerts and get tickets, but there was a crucial doctrinal aim there, which was to rehabilitate a rule of reason that had taken a serious blow in California Dental, followed up by other cases to do the same.

So if you look at the wide range of cases that the agencies have brought over time, especially those within what might be called their larger zone of discretion for setting priorities, this has always been in the back of their minds, and I think competition law priority-setting has done a good job of having that first and foremost in their minds in deciding what to

do, even though the technical tools that are used might focus more and more specifically on this large category of concern called consumer welfare.

That attentiveness to the concerns of average citizens, especially those with perhaps less than average means, I think has been a perhaps not explicit but a very visible element of what the agencies have done.

MR. ABBOTT: Okay. Diana?

MS. MOSS: Yes. Thank you very much for inviting me here today. It's been a terrific discussion so far, and I'm actually surprised but heartened to hear more consensus on some key underlying issues, but still some areas of disagreement. So I view that as progress being made in our community and the antitrust community, the policy community, to deal with these issues moving forward.

I guess a few take-aways from this morning's conversation. One is, you know, I think that we have a debate going on in the antitrust community over the perils of high concentration. These warning signs have been around for a long time, as Professor Stiglitz noted, back even to the seventies. There is a very interesting debate going on between economists in the antitrust community about whether more aggregate

measures of concentration are actually relevant to antitrust analysis.

So, you know, my view on that -- I have just written an article coming out in The Antitrust Magazine on this -- is for the IO economists who engage actively in this debate not to be naysayers or to put their heads in the sand, but to actively engage and figure out ways we can map over high levels of aggregate concentration to what's going on in antitrust markets, because relevant markets in antitrust, many antitrust markets are very highly concentrated. We should be figuring out ways to add to the debate, to develop a constructive agenda moving forward. The labor economists and macroeconomists are way ahead, way ahead of what's going on in the IO field.

Second, what I'm hearing today really fits nicely or neatly, if you will, into a concept of the antitrust laws that has been driven by static analysis versus dynamic analysis. If you count the number of times you've heard "dynamic" up here already today, it's a lot, and that says something.

So we have approached antitrust in this country for many years in a very static way, but we have lost track of the dynamic effects of mergers, in building market power, in accumulating market power. We have

lost track of the fact that avoiding false-positives and using decision theory is a very static approach to doing antitrust.

There are many other examples, even down to looking at mergers and looking at static price effects on one hand versus dynamic efficiency effects on the other hand. So these things don't match up, and I think we're seeing the tension and the adverse outcomes that are coming from a misalignment of using antitrust in a static way, with a static vision, versus a longer term dynamic vision.

And then, finally, I think there are definitely policy needs and prescriptions on the table here, absolutely. We need to be asking, what lines can we no longer cross? Lines have been crossed. That's why we're having the declining competition problems we're having now.

So do we want to think about requirements, requirements, for example, to show efficiencies, to require companies to show efficiencies in merger cases? Do we want to think about requirements that savings, cost savings, be passed on to consumers? Do we want to think about the effectiveness of remedies? And this links back to the importance of doing merger retrospectives, as Dennis was saying.

And do we want to think about a broader set of presumptions in addition to the structural presumption, for example, a vertical merger structural presumption? There's a whole -- presumptions on predation? There's a whole host of lines I think that have been crossed where we need to give some deep thought to policy prescriptions for addressing policy responses.

MR. ABBOTT: Bobby?

MR. WILLIG: Oh, thank you. I'd like to use my opening moments to respond more granularly, I think, to Professor Stiglitz -- henceforth, Joe, I've known him forever -- and I know that he is wildly prolific and wildly stimulating, and so it would take me and the rest of us days, if not years, to fully respond to his 30 minutes presentation, and that's sort of the rate of exchange between him and the profession. He upsets a field, and he fixes it, and then he moves on to another field, and he just takes days to do what the rest of us take an entire lifetime to do. So I need to rush through this, but I'll continue on these themes for the next hour, if I'm allowed to.

So big themes. Joe says that changes in the economy and changes in economics as a field have progressed very importantly in the last, he said, third of a century, and those changes should be reflected in

changes in antitrust. In a way, that's the biggest theme that I took away, and I would like to comment on those first.

So a major part of the changes in the economy from my point of view have been the increasing prevalence of economies of scale, also economies of scope, and I would like to point out that this is not a bad thing in itself, because increase in scale economies is really a concomitant of the fantastic innovations that we've seen, the increases in productivity, the technological progress, the infusion of technology into a wide variety of sectors.

It also means -- and here I think Joe and I are on the same page -- an increasing inapplicability of the old-fashioned, beautiful model of competitive equilibrium, which Chicago did not invent but respected more than others, perhaps. So it's only a bad thing in terms of if you still want to rely on your old competitive equilibrium theory when it comes to policy.

Joe, are you still -- are you here? Yeah, hi, Joe. The lights are blinding. Joe, this means that the law of one price is dead. You know that. You probably taught that to me. It means we can't expect marginal cost pricing, and it's not even a desideratum any more because you can't cover the fixed cost that

underlies scale economies if we hold ourselves to marginal cost pricing.

We know, as a matter of economic theory, that in the presence of important economies of scale, nonconvexities in the economy, which arise from scale economies and also from information problems, as Joe has taught the rest of us, means that we need price discrimination or at least differential pricing. We need nonlinear pricing. We need some of the very kinds of business practices that at least some of us, in too easy discourse, we think should be desiderata for competition pricing, but now complex pricing is an absolute necessity to undergird industries that rely on innovation, that rely on all kinds of fixed costs. And these are good things, not bad things, but we have to recognize the role that complex pricing plays in the modern economy that we have. So more on that later.

Second, Joe says changes in economics as a field have not been fully reflected in antitrust, and in a way I agree and in a way I don't agree. I mean, it's amazing how our field -- you say IO is a dead field, but, of course, new, great ideas are coming out all the time, and, of course, there's a small lag between the ideas and them being testing academically and their influences on policy, although it was just,

what, one year ago that the idea of merger analysis through bargaining theory hit the American Economic Review, and here's the Department of Justice fully embracing it in the AT&T-Time Warner case?

I mean, talk about fast adoption of new ideas, to the credit I think of the Department of Justice for picking up on that idea. By the way, also congratulations to the judge for fully understanding the theory and then doing his own weighing of the evidence. So I think he did all that appropriately, because the process was good. I don't know about the conclusion, but the process was surely good.

In the 1990 Guidelines, Joe, information as the perspective totally underlies the 1990 -- a long time ago -- perspective on coordinated effects, all that information, in part thanks to the prior work of Joe Stiglitz and others, so policy staying abreast of new economics.

Unilateral effects in the Guidelines? That's certainly 2010 as well. They started game theory on the basis of Nash equilibrium and how that would be disturbed/altered because of merger effects. Relevant markets in the old Guidelines based on price discrimination, this is not new to antitrust policy. Antitrust policy tends to keep up with economics as far

as I can see it. So I'm disputing Joe's point of view on that.

Many more modules, but one more. Joe said -- and I'm quoting -- that "anticompetitive practices should be presumed illegal unless there's strong cognizable efficiencies" -- he didn't use the word "cognizable," but we know what he meant, "cognizable" is important -- but how does Joe think that he knows or administrative processes know what is anticompetitive without a holistic analysis of the effects of the conduct?

This will be a theme that we'll come back to, but it seems to me that the Supreme Court in AmEx, for example, got right that there's lots of situations where the assessment of anticompetitiveness has to be holistic. Call it a two-sided or an n-sided market, I don't know, but this is not a fresh thought.

We have been doing this for a long time with the approval of the community when it comes to RPM, when it comes to exclusive territories, when it comes to Kodak concerns about the after-market, holistic effects, and if you read the Court in sort of a pleasant mood, that's what they're urging when it comes to two-sided markets as well. So I will leave it at that for now, but thanks.

MR. ABBOTT: Okay. Thanks very much.

You've heard the responses to questions from the first panel. I'd like to briefly touch again on the consumer welfare standard, which has been discussed in various matters. Does it make sense to talk about the consumer welfare standard as a dominant guiding lodestar for U.S. antitrust? Anybody have any additional things to add to what's already been said?

Mike?

MR. KADES: I guess I will sort of in some sense maybe question the premise, which is sometimes I think this debate over the consumer welfare standard obscures larger issues, and part of that's because the more I hear it talked about, the less I know what it means. Are we talking about the way Judge Bork said it or the way Judge Posner, the way Professor Hovenkamp? And this matters, and so then people are talking at cross-winds.

Are we talking about how the consumer welfare standard in theory is used or how it applies in practice in cases? Those are two very different questions. And so I kind of go back to the way I -- so I think a better question is where I started, which is how do we decide whether or not the antitrust laws are affecting competition? Because one thing, I think the

antitrust laws, when properly defined and interpreted, they're good at stopping the unjustified accumulation or abuse of monopoly power.

I think that question is focused and can be answered, and I think the evidence weighs heavily that the answer is no. But I do want to end with one part about the consumer welfare standard. Also, I think it also leads to confusion. So there's a big debate right now, if you have a merger, for example, that creates monopsony power and lowers wages, is that covered by the consumer welfare standard? And people, like, argue over this.

I think the answer should be absolutely. You're creating market power and reducing competition and creating dead weight loss. I don't understand how that is not encompassed by the antitrust laws, but the very fact that we have spent 40 years talking about the consumer welfare standard means for a long time people like me -- maybe I'm a group of one -- that's what we just sort of thought about consumers.

So back in 2008 or 2009, Peter Carstensen came into my office when I was an attorney advisor and he tried to tell me about the problems about buyer power, about labor monopsony, and you know what, he was right, and I should have listened to him, and I didn't,

because I think the -- and I think it's important as part of these proceedings, which is something Commissioner Slaughter talked about, is an honest self-assessment, particularly for of those of us in government, of what we did right and what we did wrong.

And so I'll sort of just leave it there, but I do sort of think that the consumer welfare standard, I think that debate actually obfuscates the real issues often more than it illuminates them.

MR. WILLIG: Alden?

MR. ABBOTT: Yes, Bobby.

MR. WILLIG: Yeah, thank you.

I'm a little confused about that phrase. "Consumer welfare" is a good pair of words, and to me if it means neglecting monopsony issues and worker welfare in labor markets, then it's a misnomer, because it's the wrong term then.

In I think both sets of Guidelines, 1990, 2010, there is a small paragraph that says all of the analysis in these Guidelines, which is written as if it's about the product market side, should be applied as well to the buyer side when it comes to monopsony power. So at least in the Guidelines, there's the right respect shown for worrying about mergers' effects on buy-side markets, and I would like to see the phrase

"consumer welfare" be extended to the other side of the market with the same full force. And if it doesn't do that, then I agree with those who think there's a failure of embracing the consumer welfare standard too narrowly.

On the other hand, if consumer welfare and worker welfare mean let's not pay attention to the accretion of more jobs as a good thing because the economy needs more jobs, well, then, I applaud holding us to a consumer welfare and worker welfare standard, because I think that is a misuse of antitrust, a misuse of economic policy.

If it means let's not pay attention to political influence in doing merger analysis, I applaud that as well. Let's stick to the welfare standard.

If it means worrying about inequality, well, more about that later, but monopsony definitely is an appropriate challenge to equality because the inequality that results from monopsony power is the bad kind of inequality, holding people down instead of the good side applauding it when people enrich themselves by providing better products and better productivity. So I'm confused about the term, but those are my feelings about it.

MR. ABBOTT: So an interesting observation, and

I have heard it from others as well. I think the term, "consumer welfare standard" may mean different things to different people and perhaps, therefore, is not terribly helpful to debate.

Does anybody have any final thoughts on that?

MR. KOVACIC: Alden?

MR. ABBOTT: Yes, Bill.

MR. KOVACIC: I think if you took from Bobby's comment, you would have a good set of specifications that I think clarify what a very useful definition of the term would mean, and your emphasis, Bobby, on how concerns about monopsony have, indeed, featured in earlier policy guidance, they are there, along with the cautions about what a notion of worker welfare might mean if you included it to protect and freeze in place all employment possibilities that exist now and shield them from changes that might take place in the face of a merger.

As you know, one discussion today about taking on worker welfare and employment effects suggests that that should be, front and center, a consideration in a whole range of cases. I mean, here's an argument that's made in a common cartel case.

Small -- relatively small businesses, they get together to rotate bids or to set output levels, and a

defense that they would raise would be we are trying to make sure that all of our small businesses can stay in business and that there is a relatively even flow of work across the span of the sector. And who are we doing it for? We are doing it for our workers.

At this point, in a DOJ criminal case, that defense would be stricken as irrelevant, and the Supreme Court has said a number of times that we don't take that into account. If you took on that argument, you'd fundamentally change the examination of cartel cases. You would change the prohibition on cartels to take into account defenses based, for example, on employment effects or other effects as well.

I'd add to Bobby's list, you know, again, an emphasis of what's dropped out of sight, and that is the larger concern about SMEs as an end in itself and the way, since the 1970s, the Supreme Court has abandoned the language of egalitarian antitrust, as expressed perhaps best in Alcoa.

Imagine how the American Express case might have been litigated differently. Dennis puts in his testimony. His colleagues advance all of the efficiency arguments related to the transaction. And the Department stands up and says, "Judge Leon, I want you to read the last page of the Brown Shoe merger

decision from 1962, here it is, where the Court acknowledges that there can be real benefits economically from vertical integration and vertical mergers.

And the Court says, "We acknowledge those," then comes to the famous phrase, "but we cannot overlook the clear intent that Congress had in 1950 to preserve a more egalitarian business environment and, at the cost of some efficiencies, to disregard the benefits that we've just described."

The Department might have stood up and said, "Your Honor, we want all of the efficiency arguments stricken. Brown Shoe is still binding."

The Supreme Court has never repudiated this in a merger case. Maybe its point of view has been questioned.

But if the Department wanted to go all in to prevail in the case, they might have said, "We bring you back to what the Supreme Court had to say about efficiencies as a defense and about the preservation of other values. All of this discussion about efficiencies is beside the point."

And as a matter of jurisprudence, that wouldn't have been a crazy argument to make. It would have repudiated a lot of government policy-making since, but

the bare terms of the text are right there.

And the DOJ could have said, "I just want to remind you, in the hierarchy of authority in the United States, the Supreme Court is at the top of the pyramid. You, Mr. USDJ, you're at the bottom. You're obliged to follow them."

Would Brown Shoe have knocked out all of that evidence? That view of the aims of the antitrust laws has changed dramatically.

MS. MOSS: Alden, can I just add one comment on the consumer welfare standard? The reason we were up here talking about consumer welfare -- and the community has been entrenched in discussing consumer welfare for the last two or three years -- is because there were some very public statements made early on that consumer welfare only goes to price effects. That's just wrong. It's wrong. It's a misinterpretation or misunderstanding of what the standard does.

The standard is actually quite flexible and appropriate in many cases. It goes to price effects, nonprice effects, quality, variety. It could go to choice. It could go to innovation. It can be applied at any market, anywhere in the supply chain; an output market, an input market, a labor market. It can address a great deal of scope along the supply chain

and depth within markets in terms of price and nonprice dimensions of competition.

The problem is this, that the consumer welfare standard has been interpreted in a cramped way in many cases, and it has also been interpreted in a very static way, which goes to my earlier point about the need to consider more dynamic effects, using a consumer welfare standard, and looking at the effects of successive mergers in creating concentration and harming consumers over a longer period of time. And there are a lot of other examples that go to the dynamic use of the standard as opposed to the static use.

MR. ABBOTT: Thanks for that.

Let's jump forward to the issue of presumptions. On the last panel we talked a little bit about this issue of structured presumptions, the limits of antitrust, and structured rules. We have on the panel today someone who has long experience as a practitioner and as an enforcer at the FTC. Perhaps, Debbie Feinstein, do you have any thoughts on presumptions?

MS. FEINSTEIN: Sure, and I think it covers some of the issues that we have been talking about. You know, is there a presumption that vertical

transactions are procompetitive? You know, in the sense that there's certainly a recognition that there can be efficiencies from them, it's something that people look at, but when we come to any particular vertical transaction, when I was at the agency, there wasn't a presumption that it was procompetitive and we had to overcome that presumption in order to bring a case.

It was, look, lots of vertical transactions are unproblematic. That's fine. We're not looking at lots of them. We're looking at the one before us, and we are going to look very hard at whether or not this is actually procompetitive.

You know, Diana said, you know, should there be a rule that we require parties to prove up their efficiencies? There is a rule that we require parties to prove up their efficiencies. The agencies are -- you know, look very, very hard at that issue, and when you look at how the courts have treated it, the courts have totally bought into the notion that efficiencies better be real in merger cases, and they better be passed on, so that the notion that we're somehow missing that just sort of puzzles me.

MS. MOSS: Hey, Debbie, can I just interrupt for a sec? I want to clarify that.

When I say "prove up efficiencies," I don't mean in the merger investigation context. I mean when the companies consummate their deal, then make them prove up their claimed efficiencies, that they actually materialized in their business practices. That was what I meant.

MS. FEINSTEIN: Yeah, and that's something that we do by looking at, you know, the next transaction. I mean, that's -- you know, another point to be made is I am all for merger retrospectives. The agencies do many merger retrospectives all the time just in the course of their business, of their work.

So I can think of an example of a particularly controversial case that occurred before I got there -- I am not going to say which one -- but there was a lot of consternation about whether or not the merger should have been challenged, and there were a mix of opinions on it.

Fast forward to the time I got to the agency, and the same industry was before us, and we were very prepared to hear that we had gotten it wrong last time, and we're talking about, okay, if we hear that we've gotten it wrong last time, what are we going to do about it? Are we, you know, going to go back and challenge that? What are we going to do not only about

the case before us, but the case that we had?

And what we heard is customer after customer saying, you know, "We told you we thought that it was going to be good for us. It's been better for us than we thought it was going to be. It shocked us. We didn't expect that." And they said, "And we can show you. Let us show you what our contracts and our terms looked like beforehand and what they look like now." And we learned that, okay, we had gotten it right. At a time when I wasn't there, they had gotten it right beforehand.

So the notion that the agency isn't reflective or isn't able to figure out whether or not efficiencies are occurring, whether or not past transactions are a problem, doesn't mean that they get it right every time, but it does go to this notion of is there this constant learning.

Finally, one other point just to weigh in on the consumer welfare standard and the worker welfare standard, and that's -- you know, worker welfare is one issue that arises out of monopsony, but there are lots of others that are counter to at least short-term consumer welfare, right, because there are lots of monopsony problems where it's a wealth transfer. It doesn't affect the output, and, you know, to block

something like that might lead to not having a passdown of prices that would go to consumers.

Is that a problem/is that not a problem is an issue worth discussing, but the notion that monopsony is only about worker effects on monopsony isn't right, and you have to think about all of monopsony if you're going to incorporate all of that into the consumer welfare standard.

MR. ABBOTT: Bill, any thoughts on presumptions?

MR. KOVACIC: I echo Debbie's observations about how actively, over time, I see the agencies working to shape those in the right way. I go back to Bobby's observation about Merger Guidelines. In many ways Merger Guidelines have been a soft law device to change presumptions, and you see the dramatic change over time in the way in which those have been cast.

In their own way, in 1982, then again in 1992, 2010, each a major adjustment in the way in which things were formulated, and that reflects to me a constant effort to upgrade the existing product by taking on new theories, new learning, but to provide a very manageable framework in which it can be applied. And I'd say the broad adoption and emulation of those documents over time is a testament globally to how well

the agencies have done that.

I can think of other areas in which the same kind of reflection and adjustment has taken place. California Dental put a big hole in the framework of the rule of reason. That was a serious setback. What was the institutional response at the FTC? To reclaim that ground. How? By choosing cases and thinking about cases as vehicles for moving the boundaries that had been set.

The first vehicle was Polygram, a second parallel vehicle was Schering, the third vehicle was RealComp. When you take the amalgam of those over time, you have a formula for -- call it the quick look, call it inherently suspect -- you have a way for ordering the examination of evidence and data that allows you to sort out behavior that arguably has detrimental effects and condemn it without looking at the universe and all it contains. So I think the agencies have been attuned to doing that.

I would underscore, though, that it doesn't happen simply by accident, and if there are areas in which you want to move the boundaries, the stakes of the law to take account of existing doctrine or to incorporate new thoughts, that has to be a program of conscious effort where you sit down and ask, "Where

would we like to move the fence? How do we do it?" That should be a common conversation between at least the Department and the Commission, to decide what those boundaries are, and to think about choosing cases that enable you to do it.

In short, it has to be a conscious process of evolution and change, very conscious in guidelines, very conscious in a number of routine merger decisions, certainly conscious in the case of Polygram, Schering, and RealComp. It doesn't happen by accident, and it starts by thinking about where you think you have to make adjustments and looking for the specific instances in which you can do that.

MR. ABBOTT: Mike, do you have anything to add on presumptions?

MR. KADES: So I think it's important to sort of distinguish agency practice and where the law is. So I entirely agree with both what Bill and Debbie are saying, and I think Dennis said it last time, about the importance of the agency pushing back on rules and doing studies, trying to develop the right rules.

At the same time, it's important to acknowledge the three cases Bill just mentioned were three cases that should have been easy to decide. There wasn't a real efficiency defense. In Schering, there was not a

market power defense. There was not -- and yet, let's take Schering -- and as a disclosure, I worked on Schering, and --

MR. ABBOTT: You worked on Schering.

MR. KADES: -- and lots of pay-for-delay cases, right?

When the Commission lost that at the Court of Appeals, it set off eight years where the predominant legal rule was that a patent holder in a pharmaceutical case can basically pay as much money as it wants to its generic competitor as long as they agree to stay off no longer than the patent expires. For eight years, the Commission had to spend massive resources to convince the judiciary that that should not be per se legal.

In that time period, there were hundreds of those settlements. Conservatively, the cost of those settlements probably were in the range of 30 to 50 billion dollars to consumers. Finally, in 2013, when it got before Justice Breyer, he was, like, "I don't understand. How is this so complicated?" And he writes a decision that says, "No, the rule of reason applies." What's happened since then?

There were all these concerns beforehand that if you had a too stringent rule, settlements would go away, generic companies would be afraid to even

challenge patents, and brand companies would stop doing R&D. This is all of the sort of standard Frank Easterbrook, we are concerned about overenforcement, not about underenforcement.

And what did we see post-Actavis? The number of patent settlements in the two years afterwards, records both years. The number of Paragraph IV filings has -- generics challenging patents has continued to go up. And this one I have not researched thoroughly, but I'm pretty confident no branded company has made a public statement to its investors that we have reduced R&D because the Supreme Court in Actavis took away our right to pay off our potential competitors.

So the very -- so the reason we had a ten-year battle with massive harm because we underestimated how bad the false-negative would be, how bad underenforcement would be, and overestimated how bad overenforcement would be, and that's where I see the problem with antitrust law today, that the courts systematically make that decision wrong, and, yes, the agency does a great job pushing back, but that is expensive, and those are resources, once used, can't be used anywhere else.

MR. ABBOTT: Okay, very interesting.

Let's move on to the question of rules,

competition rules, which as we mentioned in the first panel has been raised by Commissioner Chopra. One interesting issue somebody from the audience raised is this issue of so-called Chevron deference, judicial deference to agency interpretations of statutory ambiguities, which may be on the way out.

I don't know whether or how important that really is to the question, but does -- do our panelists have any thoughts on competition rules? And let's start with Diana.

MS. MOSS: Thanks, Alden.

So I think the jury's a little bit out on the advisability or the attractability of using rulemakings, FTC rulemakings to advance or codify rules that would bear directly on various competitive issues. I think one question is how could they even be done at the FTC level.

I'm a former federal regulator and probably went through three or four or five major rulemakings at the FERC in a really short period of time. They are massive efforts, and then the industry needs a lot of guidance on how those rulemakings should be interpreted, what's guidance, what's not guidance, and it creates an administerability problem, as Bill Kovacic likes to say.

I think there are other ways -- and I am going to agree with Dennis Carlton here -- on how the agencies can help shape and guide enforcement and provide transparency and input to the community, and that would be to use, to the full extent of their ability and their authority, to conduct market studies, the FTC certainly can do stuff like that; to do merger retrospectives where they study not only merger outcomes but also the effects of remedies and the effectiveness of remedies. The FTC already does that. They have now done two studies on their divestiture remedies. This is really important information that we're now in a position to really cull and consider when it comes to looking at the effectiveness of antitrust enforcement, particularly in merger enforcement, looking back.

I also think, as a more dramatic proposal, whether -- and I like Bill's idea, I am going to agree with Bill Kovacic now -- that having the ability to do market analysis and an agency to take actions to address market distortions that arise from anticompetitive conduct, where there are systematic problems or systemic problems, that is worth considering, absolutely worth considering. And as Bill pointed out, there are a number of other jurisdictions

who have this authority and who have significant authority under those regimes to actually affect how markets are structured and how conduct in those markets occurred.

So, you know, one thing the FTC might want to do is put out an NOI or a query on what people think about doing rulemakings. I think there would be really important input from the antitrust community on the pros and the cons, but more importantly the effectiveness of rulemakings and how rulemakings would factor into the enforcement process.

MR. ABBOTT: Bill Kovacic, as a law professor, how do you think an appeals court might react to some rule interpreting unfair methods of competition and applying it to a particular practice?

MR. KOVACIC: I think in practice Chevron deference is a mirage. I think that you get the deference you earn and that if you plan on tipping the court by walking in simply by saying, "We enjoy what the Europeans would call the margin of discretion," you're delusional. My view is that courts defer when they are persuaded that deferring is a good idea. So I would never bet a program on enjoying that element of -- that benefit of the doubt.

How do you get them to agree? I think two

ways. One is you do have to marshal evidence to support whatever your initiative is, be it a rule if you do that, and the FTC has defended countless rules before the courts on the consumer protection side, or you have to create a brand that is convincing to them.

I am convinced that agencies have reputations. They do have brands. In part, what they are doing when they go in is saying, "On matters of doubt or uncertainty, we are the experts, and the expertise is not imaginary or hypothetical, it is genuine." And how do you build that brand and that image so that when you walk into the courtroom, there's a halo above your head before you say a word?

It's doing all of the other things and using all of the other policy tools we've been talking about. It's doing empirical work, so you put it before the court and say, much more than you, we have looked at this. We have done the kind of work that Michael and his colleagues helped do on generics that helped turn the tide a bit, by gathering information and publishing data on what was happening with individual settlements.

You hold and convene events like this, where you ask the larger world, educate us about what's going on. You reflect on it. You publish articles, papers. You give speeches. I think every time the agency -- a

member of the board goes to speak or a bureau director, you have to realize that you are either elevating or depressing the stock of the agency. Everything you do shapes the impression, especially in this city with the court that we appear before here, they form impressions of the agency on bases that go well beyond the appearance in specific cases.

So if you build that brand and that reputation and you support the individual initiatives that you're working on with significant evidence, I think you can persuade even a significant group of intervention skeptics, of regulatory skeptics, that you do, indeed, have the benefit of the doubt.

But, again, that is not an accidental or spontaneous process. That requires a conscious commitment by the institution to pick the matter, be it a rule or a case, that you think is a good vehicle to proceed with, to think, have we built the surrounding, supporting evidence to gain support, and are we doing things day-in and day-out that raise the brand and create a reputation for capacity and knowledge?

I think in a lot of ways, my experience here at the FTC, the FTC has done that, but I think to go ahead and take on more difficult challenges, if you wanted to set presumptions with respect to when a dominant

enterprise can buy a promising new startup, and you want to go beyond looking at the records and files of the company, if you want to create such a presumption, there the court's going to say, "You have the power to do it. What's your evidence?" And what evidence will we put on the table to do that? And that will be the big challenge.

And you might want to start with a smaller prototype matter rather than the rule that changes the universe and everything it contains to show that you can do it, because the FTC, arguably, has never done it.

MR. ABBOTT: Anybody have anything to add on rulemaking?

MS. FEINSTEIN: Yeah, I just think what Bill is saying is the cart/horse issue, right? The Commission could have done a rulemaking on reverse patent settlements. I know there was discussion within the building on doing it -- not when I was there but because people in the building asked me what I thought -- and you have to pick the right time to do it. You have to have had enough experience, enough empirical studies, and enough examples where you studied them, but not so many that you have already gone to the Supreme Court and you're basically in a

situation where you're overturning the Supreme Court decision by rulemaking, because I don't think that would be well received.

So it's intriguing in principle how you would ever actually do it, because you have to have looked at a number of cases, and you have either brought those cases and won them, in which case why do you need a rulemaking because you're obviously having good success, or you have lost those cases, and if you're losing the case on the facts, how are you going to convince the court on the facts that they ought to abide by your rulemaking? So I just see a practical issue that it's hard for me to figure how you overcome it.

MR. WILLIG: I would like to vote in favor of not rulemakings now but more guidelines in the areas of conduct, exclusionary conduct, two-sided markets, n-sided markets, Section 2/Section 5 conduct generally. I think the economic profession is ready to contribute to that. I think the IO field is ready because we have a plethora of interesting theories, and we have gone partway toward looking for empirical evidence, signs that an exercise of intervention is needed or is not needed, and it's a tough job, but it's the job that I think we might all be ready to do.

It's necessary for business guidance. It's a good idea for staff guidance. It's a good idea to elevate the credibility of the agencies in this very murky area. And I think it is a murky area still.

MR. KOVACIC: Well, I would say amen to that. That is, if you look at the tremendous soft law influence that Merger Guidelines have had, I think you can replicate that in other areas. It happened with the 1995 DOJ/FTC Intellectual Property Guidelines.

MR. WILLIG: Absolutely.

MR. KOVACIC: There's an obvious feedback effect into the courts. Again, even courts that are skeptics about intervention but are faced with hard problems are interested in proposed solutions. They have no obligation, of course, to take on the solutions suggested or the framework suggested in the guidelines, but you can look at a number of significant areas where that would be useful.

The agencies tried it with competitor coordination, made some progress, but there was some sensitivity about saying too much about matters that were in the courts, so they hesitated. But you could imagine a number of areas where I think guidelines as a form of soft rulemaking can have tremendous effect, and to sit down and decide, where could we make the most

impact in doing it?

MR. WILLIG: And intra-agency cooperation, as you were speaking for before, Bill.

MR. KADES: So I just wanted to echo a little bit what both Bill and Debbie were saying. In some sense the answer to your question is utilitarian. Is there a rule out there that the FTC can do that is better than the enforcement option? And I think it's important to remember that in rulemaking, the FTC is going to have a lot of discretion.

It's not just that they can ban things. They can set burdens of proof. They can set presumptions. Does that rule have the right evidentiary basis that it's going to be persuasive? And here the FTC has the ability to do a 6(b) study to enforce that, but are there going to be risks? Yes. But as someone who, you know, spent a long time litigating antitrust cases, those have big risks, too, and maybe when -- you know, and, therefore, it's not a good enough reason to sort of abandon -- not consider a tool just because there will be risks.

MR. KOVACIC: I will give you my example of a missed opportunity to do this with respect to conduct, and that was resale price maintenance. Leegin takes place. Leegin says that there are instances in which

vertical restraints, resale price maintenance, could be harmful. We started an initial effort internally to say, can't the Federal Trade Commission elaborate this? That is, might there be a place here to do some guidelines? We have a set of hearings, a limited set of hearings, and then the thought was, can we draft our guidelines about how the Leegin screens and the Leegin factors might be applied going ahead?

Sadly, disappointingly, that fell through the cracks. That did not galvanize the interest of the entire board to proceed with that, but if you thought for a moment who might be good to provide that elaboration, that ideally I think would have been the Federal Trade Commission to do that.

And, thus, what have the two federal agencies done in the field of resale price maintenance since Leegin, which was a while ago? Chris Varney issued a speech when she was at the Department of Justice in her first year, and the FTC issued an order modification approval in Nine West, an RPM case. Otherwise, nothing. That's an area where the agency might have gone ahead with guidelines, might have thought let's bring the vertical restraints case to test what Leegin should mean. Instead, there's been nothing there.

Now, I realize that RPM does not -- certainly

by the discussion that we have had today and perhaps before -- does not seem to be the salient issue that's firing the imagination of the larger competition community, but it is stunning that since Leegin, that has been the sum of the response of the two agencies. That is an area where the FTC and DOJ could have said, what do we think the high ground is for RPM? And where might we go looking for cases?

MR. WILLIG: I have a slide deck that does that. I'll send it to you.

MR. KOVACIC: Okay, okay.

MR. ABBOTT: Okay. I think, unless anyone has something to add, the first panel we discussed AmEx briefly. There did not seem to be any support for the majority opinion in AmEx. Does anyone want to support the majority opinion in AmEx?

MR. WILLIG: I do. My support for the decision is a support for the idea of -- and I just came to this word in preparing for this -- holistic analysis. So we've got lots of different practices, vertical practices, and I think the AmEx practice is broadly in that category, and some element of that practice appears superficially to be anticompetitive or noncompetitive, like antisteering, that cuts off one form of competition at the cash register. Think about

in RPM, that cuts off a certain form of competition. Think about territorial exclusives, that those had their day in terms of debate. They do eliminate some forms of competition.

There's endless varieties of vertical restraints that have some elements of curtailing competition which also have well known positive effects on the entire ability of that brand or of that offering to be competitive in the broader marketplace, and we're used to that in a lot of domains.

And reading the Supreme Court decision, I wouldn't have written it quite that way, and our guidelines wouldn't write it exactly that way, and I wouldn't put quite so much emphasis on the two-sided nature of the market, because I agree that that's an easy slogan to throw around, but in my ideal guidelines, I would say the thing that makes the two-sided market something that must be taken into account is that the good side and the bad side are inextricably linked, and we talked about that in terms of Merger Guidelines and efficiencies.

If it is the finding of the agency or of the court that the good and the bad really have to go together, and you can't have the good without the bad, then the requisite analysis is holistic, and we

shouldn't be very quick to say, "Oh, I see a bad thing about this," and then the burden shifts to the other side to point out the good.

I think it's the agency's responsibility and the court's responsibility to take a holistic view of the practice, good and bad. And with a smile on my face, I would say a pleasant interpretation of the AmEx decision is a push in that direction.

MR. ABBOTT: So, Mike?

MR. KADES: I mean, I'm glad that sort of Bobby spoke up here, because I think this is exactly what's gone wrong with the antitrust laws. Let's be clear on where the Supreme Court came down. They came down in saying the Government failed to prove market power, because they didn't do the entire analysis, including showing an output effect.

My question is, when the Government had proved all that, what would be left to the antitrust -- what defense is left? If they proved both that prices went up and output went down, what's left to that case? But apparently the Supreme Court thinks there's still something the defendants could raise.

Second, American Express, through its nonsteering, restricted merchants accounting for 90 percent of all credit card transactions from engaging

in steering, and the Supreme Court, at the end of the day, said we don't really think that's a market effect, because that's what your market power determination is.

So we can argue about whether their steering provision was good or bad. American Express didn't want to argue about that, because they knew they were going to lose. So they found a way to argue a failure to prove monopoly power, and I think anyone who is not deeply versed in complicated economics and an antitrust technocrat would look at that decision and say, "That's wrong."

This is not a case about whether American Express was able to eliminate a form of competition from the marketplace. Check, it did that. It's about whether that type of restraint should be allowed or not.

MS. MOSS: Can I just add to what Michael is saying? And one observation from AmEx is that it really, in the worst form, creates a new rule for when to consider a two-sided market in an antitrust case, and, I mean, this doesn't go -- this doesn't negate the possibility that, in fact, we have two-sided markets in many instances, but the opinion sets up an impossibly vague test, which is, well, we'll consider two-sided markets when the tipping effects are strong, and we'll

consider one-sided markets when the tipping effects are weak.

Those are the kinds of rules that are almost impossible for antitrust enforcers and courts to investigate, to adjudicate, and to come to some sort of consistent outcome, and that's what the courts are all about, is creating some sort of consistent outcome.

So the economists, I think, are going to have to do a lot of work figuring out, well, what's a strong tipping effect and what's a weak tipping effect, particularly in the context of creating the assumption or the presumption that it should be defined as a two-sided market versus a one-sided market.

This decision has not done antitrust any good, any good whatsoever, other than acknowledging the fact that in some industries we have two-sided markets, and eventually antitrust will have to deal with that. But given that vagueness and impossibility of applying that rule, without creating a whole other set of debates, I don't think the extendability or the portability of the AmEx outcome to other two-sided market cases is going to go very far.

MR. ABBOTT: Anyone else?

Okay, let's jump now to IP antitrust. We have already heard a little bit on pay-for-delay, but there

are obviously other issues which were raised on the first panel, the so-called standard essential patent issues about refusals to license or alleged holdups, but there are other issues as well, including mergers and contracts in high technology markets, which may involve intangible intellectual property.

Does anybody have any general comments as to whether the state of antitrust law right now is dealing more or less well or adequately with challenges of intellectual property transactions, or are changes needed? And if changes are needed, in what specific areas?

What about Bobby?

MR. WILLIG: Thanks. So I have a peculiar idea, and this is a great forum to air it. The whole pay-for-delay area, which as we've all said is very complicated and hasn't been handled very well by the community, and if you read Actavis, talk about criteria that don't really exist in terms of administerability. Large payments, what the heck does that mean? The idea that I have is that most of those cases start with patent litigation, so there's a court that's involved in resolving the patent issues. Then there's a settlement of that case with lots of side effects.

Why shouldn't there be a public interest

standard for that settlement, that the court that's adjudicating the patent litigation should have to look at the settlement and decide whether that settlement is in the public interest or not? And there could be open hearings on that question, and the FTC could spend whatever time it chooses to taking a position on that, and the parties could take a position on that.

But why not adjudicate that in the same court that was hearing the patent litigation? Because you might think that that judge already has a sense about the facts surrounding the dispute and the strength of the patent and so forth. So I just wanted to throw that out when we had FTC people around here.

On the SEP issues, I was really interested in hearing Dennis on this this morning. He was saying he would like to see more of those disputes settled at the level of the SSO, the standard-setting organization, and that's an appealing idea to me except that I know that the SSOs are populated, when they're working well, by all sides of the markets, users as well as producers of the technology, and it's hard to see how the SSO could wind up in the adjudicative role when it comes to whether or not the SEP is performing up to the standards.

But I would like to see the SSOs take a more

detailed look at what FRAND means to them in their context and actually be pushed to lay out those criteria in a more complete way. I have seen some SSOs do that and others just say, oh, well, FRAND is the solution, without having any idea what that means.

And I personally would like to see FRAND standards take more recognition of the absence of the applicability of sort of a commodity market, so the idea of the way royalties and prices ought to work, and to take more account of the idea that, look, this is all about recovering or the prospect of recovering the fixed cost of the R&D.

And so what we mean by discrimination or nondiscrimination should take the need for differential pricing into account, nonlinear pricing, in ways that are more sophisticated and more attuned to the economics of those kinds of markets, and I would like to see the SSOs take that on before we get to the role of the antitrust agencies, which should not be cut off, but I'd like to see the SSOs take a stab at it first.

MR. ABBOTT: Mike, any reaction?

MR. KADES: I agree with everything Bobby said on pay-for-delay. No.

First of all, I don't think I said and I don't think people at the FTC think pay-for-delay is all that

complicated. In fact, when you come across any anticompetitive activity, the modeling is very strong that the incentives will always derive to anticompetitive results.

So, two, I don't think people agree -- I don't agree that Actavis is that hard to understand, and I think the proof's in the pudding. Like I said, Actavis occurred, the number of settlements went up dramatically, but the number of potential pay-for-delay settlements over the next few years dropped dramatically. I think part of that is due to the Supreme Court, and I think part of that is due to the strong settlement the FTC got in the Cephalon case, where we went back in, got disgorgement, and sent a signal that engaging in this kind of activity is going to be unprofitable.

I don't think it's the role of the FTC to have to police every single patent settlement, and I would like to just add on this point -- I mean, I have heard a lot about the FTC should be doing lots of studies, should be apparently judging every single patent settlement in court. Are we planning to increase the FTC's budget by 100-fold? I mean, right, part of the issue is every time when someone says the FTC needs to study an issue more, where are those resources coming

from?

And then finally, just on innovation, I just want to add, one of the things I think that gets missed in the innovation debate is that competition can drive invasion, and so I think it's interesting right now -- maybe right now or today, at the Searle conference, the big industrial organization conference at Northwestern, one of the papers being discussed is a paper called "Killer Acquisitions," a fascinating paper that seems to suggest that pharmaceutical companies are consistently buying potential competitors and shelving innovation, and that suggests that maybe there's another whole area of merger enforcement that we need to be much more concerned about.

But I have to say, again, the court's -- that's not the kind of theory I think the court's going to be particularly attracted to, so we are probably going to have to go through what Bill Kovacic says, spend a decade studying it and spending lots of time, and maybe by the time I retire, then somebody else can be explaining how that battle was worthy but shouldn't have taken so long.

MS. MOSS: Can I just add one more thing on this issue?

I do a lot of work in agricultural

biotechnology, and what we're seeing in ag-biotech with patented transgenic seed, crop seed, is a lot of what we saw in pharma, with patenting second-generation drugs -- or second-generation seed in this case -- making very minor modifications to the product, repatenting it, and then forcing consumers, in the case of seed farmers, on to the new product, the newly patented product.

So whether you call it product hopping, hard switches, soft switches, it's raising a really serious background issue in patent -- in the patent system and I think calls for a serious relook at how patents are issued and potentially questions for patent reform.

But this is one area -- because of the very important close intersection between IP and competition law and how patents can be used to shape or control competition to exclude rivals, particularly new entrants, I am stunned in talking on conferences and with people at how little the antitrust community is conversant with patent law and, conversely, how inconversant the patent community is about antitrust law.

And so there needs to be some effort -- and I think the FTC is a great venue for doing this -- of bringing those two groups together, because it's part

of a multitool toolkit, where you have got antitrust and you have patent law, IP law, and these folks need to sit down and talk together about how policies made on the patent side can potentially affect outcomes in antitrust enforcement.

MR. KOVACIC: Alden?

MR. ABBOTT: Bill.

MR. KOVACIC: I would like to follow on Diana's comment.

Fifteen years ago, the FTC had that conversation. Fifteen years ago, the FTC devoted a tremendous amount of effort, along with the Department of Justice, to doing a basic examination of the rights-granting process. It convened proceedings like this starting late in 2001, early 2002, examined testimony and presentations by a large number of experts in the field, and the purpose of the undertaking was to identify root causes.

There was a concern that competition law too often, especially in the form of abuse of dominance cases, monopolization cases, was following behind to correct problems that basically originated in the rights-granting process, and I recall Dennis' comment about how the scrutiny and the quality of the rights-granting process is essential to the proper

functioning of the IP regime.

The FTC, the Patent Office as well, and DOJ collectively convened these proceedings. The FTC ultimately ended up writing the report in 2003, called "To Promote Innovation," and it recommended a host of changes to the rights-granting process. A number of them have been taken on. Others have shown up in citations in Supreme Court decisions, which reflect a modification and adjustment of the interpretation of the existing patent laws.

This was a major investment in a couple of good practices, looking at root causes, soliciting this larger range of perspectives, and seeing how a tool other than simply antitrust enforcement might be applied. I hate to offer, especially with Michael's caution, glib recommendations to the FTC about other things you ought to be doing, but 15 years after this study, it wouldn't be a bad time to come back on this question and ask, are we happy with the way that things have unfolded? A lot of that expertise already exists in-house. It's present. It's available.

I would add, too, that I'm not sure in the larger community that the FTC gets any credit for that. That is, how does the community evaluate the performance of the agencies? Well, how many cases did

you bring? How many cases? How many cases did you win? How many cases did you bring?

This was an effort to achieve the kind of longer, deeper policy results that could not be achieved with a case but will never show up on the scoresheet as a litigation event. This was an effort to move the needle elsewhere.

I would suggest that the competition law community is mainly captured by flashy objects called big cases, and this kind of investment in research and development and policy change is not widely respected, but, arguably, this is where a major investment had to be made. I think it was a great investment at the time. It wouldn't be a bad time to come back on it 15 years later and ask, have things moved in the rights-granting process in the way that one hoped that they would?

And by the way, I think this is an example of how the agencies are really interested in dynamic innovation-related changes going back quite a while ago. This was a recognition that innovation really matters.

MR. ABBOTT: Let me jump forward quickly. Another topic considered by the first panel -- did you have anything to add, Debbie, or not? Okay.

So it was brought up privacy -- issues about big data, privacy, data security, data protection, which are being examined under consumer protection law. There's more and more talk in some quarters about applying antitrust law to these issues, particularly involving big platforms. Does antitrust have a role, and, if so, what road blocks, if any, exist to applying antitrust fruitfully in these areas?

Who would like to start?

MR. WILLIG: I have a simple perspective on this, too simple, I'm sure, but it seems to me it's pretty obvious these days that data sets and collections of information are important business assets. They're special assets. They have consumer protection issues surrounding them, which really ought to be worked by the FTC and others, but in the antitrust context, these are assets, and antitrust has treatments of assets.

When we look at combinations, vertical or horizontal, we worry about the use of assets and how they could be used more anticompetitively because of a business combination, and so those same concerns are applicable when those assets are data and collections of information. So I think we should use our regular principles on the antitrust side and be ready to apply

them to those particular and peculiar assets.

MS. MOSS: Can I just back it up one step behind what Professor Willig just said? And that is to throw out the idea that we need to give some more thought to what -- you know, what tool in the toolkit is -- where does the privacy problem really reside? What kind of problem is it? And then what are the tools -- if it's a multitool problem, then we can -- then we can then think about how to deploy antitrust or regulation or other tools to address it.

So if you think really from first principles, privacy could be an economic -- it could be a market failure, right? It could be asymmetric information, for example. The platforms have way more information on you through their data collection and processing capabilities, using artificial intelligence, than does the hapless consumer, right? If that's the case, then that may be a call for economic regulation. I'm not saying it is, but it's one frame in which to consider the problem.

Another way to think about it is as a social regulation problem, right? We just think of privacy as a basic protection, like health and safety, and we want to have basic protections in place to protect consumers, okay? Once we exhaust all those

possibilities or frame out those possible theories, then we get to antitrust.

Absolutely, data can be an asset; it can be a strategic competitive asset. So we have to consider data sets, but more important, it's the value added through data processing capability I think is where the real action will be, because data processing capability is where the value add in the supply chain is, and that's where the strategic -- that's where a lot of the strategic value is going to be in assessing the competitive effects around the consolidation of horizontal data sets in a horizontal merger, for example, or vertical combinations.

So I think we are going to have to step through this bigger analysis of, well, what is the privacy problem? It's likely to be a combination of a regulatory issue but also an antitrust issue, but given the framework we have in place, I think we have the tools for antitrust to consider data to be an asset in any type of combination or a conduct case, for example, using data to exclude or frustrate rivals from access to the market.

MR. ABBOTT: Debbie, do you have some thoughts?

MS. FEINSTEIN: Yeah, just a couple of things. One, I'm not sure why privacy is a competition issue.

HIPAA isn't a competition statute. We know how to deal with privacy issues quite well. We can do it through consumer protection. We can do it through statutes. I'm still puzzled. It could be a form of nonprice competition on which two companies compete and which could be lost. I haven't seen that case yet. Usually the concern is one company is good on privacy, the other company is bad on privacy, and the merger of them, the bad on privacy one might take over. I still don't see how that's a competition issue.

That's like saying a merger might defeat my favorite flavor of ice cream, but unless there are entry barriers to companies who do the same thing -- because we're assuming that there's not a competition issue that we're dealing with, that it's just companies who do two completely different things -- unless there is some barrier to entry that I'm missing, I really struggle to see why that's a competition issue.

On big data, I don't see the difference between big data and little data in terms of most of the competition issues. I can name you half a dozen cases where data was the issue, whether it be a horizontal case or a vertical case. The only thing that might be new is we might now be worried about conglomerate issues, where companies don't compete but they both

have big stores of data, and to the extent, as Dennis said, that that might lead to an entry barrier in something, but then it just seems to me we define the market as the data, and the company's got a monopoly over a certain kind of data.

So I just think the tools are there. We just need to figure out where the cases are that actually require us to take action, but I don't see as much new under the sun as other people seem to. Maybe I'm missing something.

MR. KOVACIC: Alden?

MR. ABBOTT: Yes, Bill.

MR. KOVACIC: I agree with Diana and Debbie, that the FTC does have all the tools. It's the one major authority that has the threefold mandate, the privacy mandate, the consumer mandate, and the competition mandate, and I think the challenge really is, as Debbie was just saying, to think what's the right tool. Diana was talking about this as well, to pick the right one.

I want to underscore something that would be a bad practice, and that's to use merger review to leverage decisions that arguably should come through separate privacy-related matters, and there are great temptations to do that, because merger control gives

you leverage. You can't make them wait forever, but they can wait for a while, and while they're there, you can pull out a list and say, "By the way, while you're here, I've got some other things I'd like to talk to you about. And if you work these out with me, you go through the line faster. If you don't, get back in line with the others."

There can be a real temptation to do that. There's a lot of pressure that has been supplied in things like Google DoubleClick, Google AdMob. There was enormous pressure from different advocacy groups to use the merger review as the occasion to impose privacy obligations that arguably would arise under a privacy regime.

A real concern I would have about what's taking place in a number of European jurisdictions is they are using leverage to effectuate privacy-related matters. That could change with the GDPR, which relaxes the need to do that, because it puts a much more robust enforcement mechanism in place, but to use the fines associated with abuse of dominance to say, "I want you to make changes or I'll land on you with this," and you ask, "Well, where are the privacy regulators? What are they doing here?"

I think that the great benefit for the

Commission is it has wonderful tools to work in this space, including information-gathering and data collection and analysis. The temptation to be resisted is to not be absolutely clear about which tool is being used and why, and not to use merger review, which creates leverage, to extract concessions. If a private firm used leverage like that, we would be very upset about it.

MR. ABBOTT: Anything else?

Okay, very quickly, I think we have ten minutes left, according to my watch, but I'd like to very, very quickly touch on the vertical issue. I think we've heard a bit about that.

Is there any support on the panel for a Vertical Merger Guidelines or Vertical -- new Vertical Restraints Guidelines, as was suggested earlier? Do you think that would help the quality of antitrust enforcement in that area?

MR. WILLIG: I'm all for it. Let's do it.

MR. KOVACIC: The Vertical Merger Guidelines expiry date passed a long time ago, along with the "best if used by" date. It is an important, valuable, crucial moment to step forward and renovate those guidelines, and I would do the same with -- I think a previous speaker mentioned retail price maintenance. I

would do the same there, too. That was a really good idea.

MS. MOSS: AAI is actually working on developing model vertical guidelines to the extent we can be helpful to the agencies and stimulate discussion in the community. I would add that any discussion of vertical guidelines, which is very appropriate in the wake of AT&T-Time Warner, and we will see what happens in CVS-Aetna, which in my view poses even more serious -- it poses the serious vertical concerns.

But part of any discussion about vertical guidelines I think should include a discussion of vertical presumptions, much like we have the structural presumption in horizontal mergers and actually more recent support for the structural presumption in denying -- where the agency is challenging large mergers, SYSCO-U.S. Foods, Baker Hughes-Halliburton, that was abandoned, the insurance mergers.

So the structural presumption is back. We will see what happens in Sprint-T-Mobile, but on the vertical side, part of the big question I think is the importance of setting the landscape in explaining why a vertical merger can be anticompetitive by looking at upstream and downstream market concentration, depending on the theory of harm.

So we are seeing extremely concentrated markets in many of the markets in which vertical mergers are occurring. I think it's high time for everyone to start thinking not only about the guidelines, but about what a structural presumption would look like in a vertical context.

MR. ABBOTT: Okay. I want to quickly switch gears just so we get one quick question in from the audience to the whole panel. Do you have any doubt that naked wage-fixing or nonpoaching agreements should be per se illegal, even if it's clear that no harmful effects will be passed on to end consumers?

MR. KADES: Before I answer it, can you just reread it?

MR. ABBOTT: Do you have any doubts -- it's about wage-fixing or no-poaching agreements, even if there's no effect to -- to -- on consumer welfare. Obviously there is an effect on the workers. Should those agreements be per se illegal?

MR. KADES: I mean, I'll go first. Absolutely.

MS. FEINSTEIN: Yes, yes.

MR. KADES: I think the agencies have both shown under the current administration a renewed -- should be applauded for looking at this issue and pushing cases in this area.

MR. ABBOTT: Okay, very good.

MR. WILLIG: When we have a per se rule, we need a characterization step first, right?

MR. KADES: Yes.

MR. WILLIG: I am always worried about the in-house training. So my employer teaches me a lot about the employer's own practices, I learned a lot about the business, and then I want to go to a competitor and use that same information against my first employer.

And presumably that causes problems, and that causes all kinds of restraints in my employment contract, and so I'm a little bit worried about just an offhanded approach that says you can't have an employer who constrains the employment opportunities of their employees without worrying about that kind of thing. So maybe that's a characterization issue.

MR. KOVACIC: That would certainly be, my presumption would be, an illegality, and with characterization, BMI always gives the defendant an opportunity to advance the plausible, cognizable efficiency justification. So if, as these cases are pursued, defendants have them and they come forward with them, BMI will give them a chance to talk about it.

MR. ABBOTT: Okay, very good.

In the last few minutes, let me give each panelist an opportunity to make some comments, add anything to his or her prior comments or make some general observations.

Debbie?

MS. FEINSTEIN: So I would like to answer the last question that was asked of the last panel, because I think it's the most important one, which is where do we go from here? What should we do?

I'd give the FTC clearer disgorgement authority. It best makes new law when it has the threat of a fine or monetary penalties, because otherwise it's too easy for companies facing a complaint to say, "All right, we don't want to go through a lawsuit with the FTC, we give," and I've sat in the room plenty of times where it's, like, "Dang, we really want to keep litigating this because we want to make the law on this issue clear." But when we've gotten all the relief that we can possibly get, that's a very hard thing to do.

If the threat of litigation were higher and, therefore, either we could get more benefit by getting disgorgement or parties would be more inclined to settle, either one of those would have a better

deterrent effect, enable the Commission better to get redress for consumers and/or force more cases into court. That could have some effect, and I think it's something worth thinking about.

The second thing is resources and resources and resources, and I think -- and I can say this now, I think the Bureau of Competition would have been horrified if they heard me say this when I was the director -- but when I was asked once, "Come up with a plan if I gave you another $2 million for the Bureau," I said most of it should go to the Bureau of Economics and not to work on individual cases. Although it would be great, the agency needs more economists, but to put a group together that could do more empirical studies using the 6(b) authority, because I thought it was, you know, a very important thing to do.

MR. ABBOTT: Mike?

MR. KADES: So in preparing for this panel and reading the comments, I keep thinking about this movie, which is somewhat timely relevant, because it's about World War I, which the 100th anniversary of its ending will be in a couple months, called "Paths of Glory."

All right, so this movie takes place in two places. You have this French infantry battalion on the front lines, they have been there forever. They charge

up over the hill, they all die, and then they get reinforcements and they do it again, and they're fighting -- their whole life is about these five, six square feet of no man's land.

At the end of the movie, Kirk Douglas -- so it's a great movie, you should go see it -- he goes to Paris to plead for his troops, and he gets to Paris, and the French general's staff is having this huge ball, just what -- you know, sort of classic Belle Epoque, everyone's happy, everything's fine, and that juxtaposition is something, I think, that I feel is what's going on in antitrust law today, that people are bringing up legitimate criticisms, and there's a tendency to either say one of two things.

One, well, no, no, no, antitrust law actually can deal with that problem; or two, we really need to study it even more. I think that's a danger, and I think if you look, yes, the Guidelines have talked about mergers that harm workers' wages, but until 2010, the agencies never looked at it. And that's not by way of criticizing the agencies. That just means there is learning to be had here.

In 2000, the agency -- Congress raised the level of HSR. There's another really important paper that's come out that's suggested that the effect of

that may have been to spur a bunch of anticompetitive mergers just below the HSR guidelines.

And to Bill's point, I think it would have been great if we had done something on RPM, but the problem is we were doing hospitals, we were doing pay-for-delay, we were doing IP. If we would make the law less lenient towards business conduct, the FTC would be able to do a better job on the more difficult issues.

MR. KOVACIC: I would like to see the FTC embrace, as it has in the past -- I find the -- there seems to be some notion that there was a golden era of antitrust, when it was all great and the concentration was under control. That's a myth. When you look at the criticism occurring from the very beginning, the dominant focus of criticism has been it has been a failure.

So we're not -- if we talk about how we're doing now, the question is, compared to what? And compared to what period was it a lot better? I think there are a lot of terribly unrealistic assumptions given the experience and the commentary about it that you're going to have a wildly more robust program than you have now, and it's going to be wildly more successful than it is when you put the experience in

context.

That said, that's the realism. The ambition is to take the tools that you have and do better, and there are distinctive tools here. As Debbie said, there are remedial refinements that could be useful. There's a better way to take the capability to do good research and analysis and bring it to bear on lots of these difficult issues and advance the doctrinal frontier.

There's the possibility of using the administrative adjudication mechanism to do that, and if that's not used robustly, the whole rationale for having the Commission disappears, and then you can peel apart the agency and parcel out the pieces to the others so that -- the U.S. has a specialized trade court. It's called the Federal Trade Commission, and that, arguably, should be an important forum for making the kinds of refinements that we're talking about here.

To do that effectively, my admin law suggestion is you have to change the Sunshine Act. The Sunshine Act disables the effectiveness of collaboration. I don't see how administrative adjudication, administrative decision-making, collective decision-making can succeed if that stays in place.

And ultimately, you do have to go and get --

for dominant firm stuff, you have to get people like Steve Breyer to change his mind. Barry Wright, joining Trinko as he did. Ocean State, Town of Concord. That's Harvard. Sorry.

MS. MOSS: So one take-away from this really good discussion today I think is that -- or one perspective -- is that, you know, the antitrust laws are pretty adequate. They're flexible. They're durable. They have been around for a long time. They're not super-specific. They have given significant latitude to adjust and morph over time or consider different situations over time, and couple that with the fact that the consumer welfare standard if, and only if, it is interpreted to the full extent of what the standard can capture in terms of price, nonprice effects, so quality, innovation, choice, variety, all these things, and it is interpreted in a more dynamic context to avoid the pitfalls that we are now suffering from from a very static view of or measurement or conception of consumer welfare.

If you put all that into place and then take it to the next major observation, which is the courts haven't done a good job of enforcing the antitrust laws, and so we've got okay laws, and we've got a good standard, but the courts aren't enforcing the laws and

viewing the standard appropriately.

So we now have a sick patient. We have a sick economy. We have sickness associated with declining competition, as measured by any number of metrics, high concentration, growing inequality gaps, lower rates of market entry. So we don't have a healthy situation here. Something clearly has gone wrong.

So whenever that happens, I don't think you don't -- you don't keep feeding the patient the same medications that have not brought the patient to health, but instead you start considering other options, other policy options, other types of reforms, and in this case reforms can be reforms lite -- L-I-T-E -- not reforms heavy, not junking the laws, not wholesale reforms, getting rid of the standard and putting in a public interest standard, but reforms that would be actually very effective.

And those reforms really cover the gamut on the use of the agencies and the agencies' resources, exploring Section 5, for example, unfair methods of competition, looking at doing more robust studies, merger retrospectives, and learning from those types of studies, but also considering taking the extra step and considering, are we ready to think about more presumptions, different presumptions that can be

embedded in how we go about looking at these cases, but also thinking about requirements.

Are we to the point where we should really be mandating the fact that a merged firm, once it consummates, should prove up its claimed efficiencies, and say, "Hey, I actually got my efficiencies from my merger." I think enforcers should see that. Enforcers should also see the fact that cost savings were passed on, actually passed on to consumers, as we've seen and many judges opine in many merger cases.

So I think these are -- that's one way to view the whole picture in terms of where we are now. There's certainly lots of room for policy research and for legal and economic and institutional multidisciplinary research to move this along, but clearly something has to change.

MR. ABBOTT: Okay.

Bobby?

MR. WILLIG: Yeah. Well, I am back on my theme of it's time to get serious about guidelines, and the reason I say that is in the past I think the economics community, when faced with a serious challenge, has more or less declined, in part because our toolkit of theories of templates was much more limited than the outpouring of feelings that people have about things

going wrong. We didn't really have models that could stand up to those feelings of the stress about business conduct.

I think that's changed. I think now we have a very broad toolkit, maybe too broad, for templates for how to think about the kinds of business practices that trouble the community, and it's time to sit down and shop through our library of theories and force ourselves, with the agencies and with the lawyers, to look for what the signs of evidence are appropriately used to call a particular template about bad practices into court, into interventional activity.

I don't think we've done that enough, but I think pushing ourselves to write guidelines that say this is the evidence that would make this theory be real and apply to that set of facts, put that forward will help to shape business conduct and also help to shape the activities, intervention activities of the agencies, and I think we're ready to do that now.

MR. ABBOTT: Great panel. Thank you, everyone, and I'll close by saying that that's all, folks.

(Applause.)

PANEL 3: MONOPSONY & BUYER POWER

MR. ADKINSON: Good afternoon. Welcome to the final panel of today, Monopsony and bargaining power in merger enforcement. Immediately following this panel, Commissioner Ohlhausen will be giving closing remarks.

I am Bill Adkinson. I am an attorney advisor in the Office of Policy Planning, and I am the moderator for this panel. I plan to ask questions and not make substantive comments, but to the extent that I say anything, it does not reflect the views of any Commissioner or the Commission.

We would encourage any interested party to submit comments on this or any other issue that we are having hearings on, and you can find information on how to submit comments on the hearing website.

We hope to have time for questions. If you have a question, please write it down on a card that is provided by FTC staff and then pass it to FTC staff.

The bios for our distinguished panel are provided in the announcement. I will simply identify them briefly. We have Mary Coleman, Executive Vice President, Compass Lexicon; Scott Hemphill, Professor, New York University School of Law; Joseph Miller, Partner, Crowell & Moring; Sandeep Vaheesan, Policy

Counsel, Open Markets Institute.

And to start us off, we have a short presentation on the treatment of buyer power in merger enforcement by Peter Carstensen, Professor of Law Emeritus at the University of Wisconsin Law School. Peter?

MR. CARSTENSEN: Thank you very much. It is a great pleasure and an honor to be here to talk about merger as affecting buyer power. I would note that unlike what would have happened in a discussion of this sort 10, 12 years ago, Professor Stiglitz, at the beginning of our discussions this morning, referenced monopsony issues. They recurred. And Michael Kades, my former student, finally confessed to error in not listening more ten years ago when I first tried to talk to him about buyer power.

And I think that is symptomatic that in the last decade, we have seen an enormous increase in recognition and awareness of these issues in health care, in employment, in agriculture, and I would say in input supply markets more generally, these issues are coming to the fore.

At the same time, there is still a great deal of what I would call ambivalence to be tactful about it for the moment, an unusual stance on my part. But in

the JBS-Swift/National Beef merger, the DOJ focused, I will say, on the buyer power issues, but they included a sell side issue.

In the Cigna/Anthem case, they included a major buyer side issue. The judge did not consider it. Judge Kavanaugh's -- I almost called him Justice; I guess that is not quite the case yet -- dissent focused on that issue in ways that I found a little disconcerting. On the other hand, it is really interesting to go back and look at the Justice Department's brief on the buyer power issues at the trial court level. Very impressive.

At the FTC, in both Sysco-U.S. Foods and in Albertsons-Safeway, buyer power was not referenced in those cases at all, as far as I can tell. Although I know it as a matter of fact to have been a major concern of competitors of Sysco.

In the Scripts-Medco and the Caremark cases on pharmacy works, the FTC statements rejected any significant concern over buyer power by employing what I think of as a narrow consumer welfare definition.

Now, interestingly, when it comes to gas line cases involving the collection services, which involve almost a pure wealth transfer issue, remarkably enough the FTC saw a problem. Again, the ambivalence of what

is involved.

And this comes in part, I think, out of the discussions that went on all through the morning of what are the goals of antitrust and is there something -- there is something that people keep talking about as a consumer welfare standard. I understand a consumer welfare goal. I began really to wonder what is this standard that is out there that people were talking about because I sure have not heard about it. Certainly, narrowly-defined consumer welfare would say that a specific Supreme Court case like Mandeville Island Farms was just plain wrong.

Only in a consumer welfare frame, narrowly-defined, would one be concerned if there was exclusion from the market as in Toys"R"Us or such pervasive monopsony that overall supply, not just a particular supplier or a submarket supply, but overall supply was adversely affected.

I think we are seeing a sea change now. And we heard it on the panels this morning. Herb Hovenkamp, for example, has discovered that buyer power -- who discovered, I should say, he has discovered buyer power issues, especially in labor. So in his defense of the consumer welfare goal or standard, he has now said, well, it is actually a term of art, by

which I think he means it should not be taken literally. It means something else, which we are not going to define.

Scott Hemphill has used the idea -- and his co-author used the idea of a trading partner welfare. I, along with Eleanor Solomon and others, have talked about protecting and enhancing the competitive process as better ways to think about it.

My point here would be that having goals that recognize the potential adverse effects of buyer power is important in terms of striking the right enforcement balance. If you are concerned, as I think the FTC has been for too long, only with consumer effects, you are not seeing the whole picture.

I would end this discussion of goals by pointing out that antitrust law was adopted in substantial part because of concerns for the way farmers, in particular, were being exploited by the beef trust, the railroad trust, the wheat trust, and even the whiskey trust. So that from the get-go -- and I am thinking now of cases as early as the 1905 Swift case in the Supreme Court down to, thank goodness, Section 12 of the new merger guidelines, there is a recognition that mergers or conduct that causes adverse effects on the buyer side are themselves subject to the

antitrust law.

The articulated goals of antitrust need to be made to fit that. And that becomes a problem when we start looking at merger analysis because it has undermined, I think, a willingness to focus more generally on the nature of the issues that are presented.

We have fundamentally a continuum from classic monopsony, a single buyer, through various kinds of oligopsonies to what I would characterize as unilateral buyer power. Some of this is called bargaining power. But -- my page is in the wrong number. I do not know why.

One of the problems, again, is adjusting business reality to the theories of economists. I love economists. But they do not always seem to know that businessmen are rational actors. So a monopsonist will not act irrationally by exploiting the monopsony by driving down output if it can get the same benefits from its monopsony power from other ways.

So, again, the abstractions of economic theory do not help when we have really not worked through how particular kinds of buying practices are carried out in ways that may harm producers, even if they do not have a significant adverse effect on

consumers. This leads to our standard kind of framework.

Initially market definition -- again, the new merger guidelines are helpful on this. They point out that these -- our market definition has to focus on the choices the seller has.

Product markets can be very narrow as a result of sunk costs. If you own a poultry house, I got to tell you, there is only one thing you can do is raise chickens in that poultry house. And if your buyer goes away, you are going to be bankrupt. Some producers maintain the capacity of having multiple product lines. That is a really important way, when it is feasible, to accomplish the right kind of goal.

Geographic markets can be quite different from the downstream selling markets. They can be much broader. Some inputs can travel thousands of miles at very low costs. Other products -- inputs can only travel a short distance. Again, my favorite topic right now, poultry. A chicken can live about 100 miles. After that, you have a serious problem on your hands. On the other hand, once the poultry has been processed, it can be shipped long distances.

So you need to have markets that are relevant, you need to consider the possible adverse

effects. The first is the problem of exploitation. Lower prices is the usual one that is considered. I think it is very important to understand that those effects will vary substantially depending on the options.

A monopsonist in one market that has access to supplies -- competitive supplies in other markets may be very, very exploitive in the market where it has its monopsony power in which that would look totally irrational in terms -- if you thought it had to get all of its output from that particular location.

Risk transfer is relevant here. Make your supplier incur other risks rather than telling them you are going to cut purchases. There is what is called a waterbed effect. Illustrated, Standard Oil forced the railroads to not only give it rebates, but forced the railroads to compensate it for its competitors' shipments. Remarkably enough, Standard Oil wound up as a monopoly. It used its buyer power of railroad services to adversely effect its competitors, as well as enriching itself. And indeed, the exclusionary practices, the Toys"R"Us type of factors, are an additional concern, the capacity to engage in fairly wide spread collusion among buyers to allocate producers so that each buyer creates more unilateral

buying power.

Lastly and very significantly, individual buyers with more than 20 percent of the market of an input market are likely to have significant unilateral power, regardless of the structure of the rest of the market. We know this from the Toys"R"Us case. We know this from an E.U. study, U.K. work and French studies in retailing.

So my suggestion here is that we have a series of concerns that need to be addressed where if you stand back and look at what buyers can do -- it is called bargaining. There are all kinds of ways to structure those transactions to exploit producers and to advantage the buyers.

There are reasons for additional concern in my view. One is the durability of buyer power. It was discussed a little bit in one of the morning panels about seller power, but it is even harder to overcome buyer power because the producers that are the victims need to vertically integrate downstream in some way, need to call forth new entry in ways that is going to be very difficult.

There is also a related problem of the weak incentive of buyers to -- I am sorry. No, I said it right. The weak incentive of buyers to challenge each

other's exploitive behaviors. That is, they have a major incentive to collude. There are very few reasons not to collude because what you are doing is you are driving down the price of the input. What market you are selling in, lower input costs increase your potential profit.

Another thing that bothers me is the fact that the impact is often in remote markets. You ask cheese producers, do you care that the price on the Green Bay Cheese Exchange is being manipulated, they say, well, no. Why? Because when the price of cheese goes down, the price of milk goes down. The people who bore the burden were the dairy farmers.

So my suggestion, and this is a somewhat stronger one than in the article I published a few years ago, we should be presuming illegal mergers that involve an HHI above 1600 and a change of more than 200 HHI. The higher the post-merger HHI implies a lower need for a change in the HHI.

This means that I do not buy into the mirror image nonsense that I hear. Buyer power -- I mean, the mirror, if there is one, is the mirror in a fun house, the thing that distorts figures. You got to understand the nature of the incentives, the way buyer power operates in order to have rational and reasonable

standards.

And that leads me to my second policy prescription, which is we should be presuming illegal any buyer merger resulting in a more than 400 HHI post-merger. That is roughly 20 percent of the supply market. Any such buyer is going to have substantial independent power. And, again, I may be told, certainly some people have maintained, that there may be relatively few mergers that would involve that level of concentration in a supply market. Any such merger should be challenged. That means you need to get input data of a sort that we do not always have.

Assuming that we have -- or I should say the problem with detailed proof is that it is hard to get in buyer side cases. A seller is going to look at the situation and not be willing to testify for two reasons. One, if the merger goes through, it is going to have a seriously irritated major customer. And if the merger does not go through, it is going to have two seriously irritated customers that undermines your willingness to testify.

There are also some serious data issues. Theory -- empirical data may suggest that there is going to be very little negative impact on output initially. That is the consumer welfare standard, and

I put that in quotation marks, tells me that I should not be concerned about that. To make that case to courts is going to be difficult until we get some more general understanding of that problem.

I want to end up by suggesting a couple of what I think of as hard cases. Consider two firms that want to merge that are either not direct competitors in downstream markets or are minor competitors and for which this merger will be in some way a significant step forward in either economies of scope or scale, but because they both buy the same input in some relevant market, they are going to have significant adverse effects in that market.

How much tradeoff do we do? I think that is, for me, a very difficult problem. I tend to be of the school "shoot first and worry about efficiency later," but that is, again, not going to be favored by a lot.

There is also -- and I adverted to it earlier -- evidence that you can expand production or will expand production or promise to expand production by driving prices down and this is -- the example is, if you cut the compensation of farmers or workers, one of the things that they have to do in order to sustain their income is to increase their output. Rather perverse result it seems to me, but, again, it is a

major problem in these cases.

I am absolutely delighted that the Federal Trade Commission, ten years after I was telling Michael that we should have more focus on this, has included not only this session, but there is going to be a later one specifically on the buyer power in labor. And I think that it is very important that this have a broader salience in antitrust and competition policy.

Thank you.

(Applause.)

MR. ADKINSON: Thank you. Not only an excellent introduction but on time.

Now, we are going to have opening statements by each of the other panelists, starting with Mary.

MS. COLEMAN: Thank you, Bill, and thank you for inviting me to participate on this panel.

I think a good starting point to keep in mind when we think about these issues, and I think colors is how people think about these issues, is that typically in the antitrust world we think sort of simplistically, you know, lower prices are good and higher prices are bad. So, you know, as we will talk about in this session, as Professor Carstensen has discussed and others will, you know, it can be the case that while mergers may drive input prices down, that can be bad

and it can result in competitive harm. But we also know that generally lower input prices will provide incentives for firms -- downstream firms to lower prices and potentially expand output.

So I think at issue here is that there is a distinction here between the buyer side and the sell side, in that when you are looking at sell side mergers, if you are thinking about harms versus benefits, the harms cause prices to go up; the benefits cause prices to go down. So they work in different ways. It allows you, in some sense, to distinguish them a little better.

Whereas on the input side, typically, you are thinking about prices going down either from a competitive harm or from potentially competitive benefits. It makes it a little more difficult, I think, to distinguish the effects.

Now, if we think about a merger where we have evidence, assuming we do, that it is likely to result in lower input prices, the question is, how do we decide whether it is good or bad? And what side would we want to err on if we have uncertainty?

One could think about this and say, oh, well, if we have evidence that efficiencies are what are driving down the input prices and that is good; if we

think it is lost competition, that is bad. But I think that is a little too simplistic. One, I think it is frequently going to be difficult to distinguish between the efficiency and the sort of lost competition effects. I also think that, in many cases, you may also have an issue as to what extent do you expect it to result in lower prices downstream and maybe expanded output in that sense. So I think it requires a little bit more of thought on how you look at things.

For an economist point of view, you know, when we look at antitrust issues, you frequently start, you may not end there, but from sort of a total welfare standard, and at least many economists would. On that sort of a standard, you really would on output effects. And if you felt that there were not likely to be reduced output upstream, as part of the transaction, then you probably would not worry about it very much.

But, you know, as Professor Carstensen said, we talk about some this consumer welfare standard, which has a somewhat broad -- or people think of it as having a broader distinction than a total welfare standard. If we think of it on the sell side, a lot of times what we think on that side is we think, okay, we will worry about a merger if prices are going to increase, and if they do not -- and so we focus more on

efficiencies, for example, that might cause prices to decrease, but not pay so much attention to ones that might cause prices to increase.

However, on the buy side if we try and apply that, it is a little trickier because, again, you have prices going down in sort of both situations. I think even a consumer welfare standard would sort of say output up, that is good; output down, that is bad. And the question would be, if you are not -- if you do not think there may be any effect or you are not really sure, which way do you go? I think a lot of that has to do with the priors of whether you think it is very likely that these input prices caused some sort of harm, the types of things that Professor Carstensen is saying, or it is more likely the lower input prices are going to be passed along and they sort of increase output and expand sales downstream.

Finally, I just want to quickly talk about is the session and one of the questions as posed by the session of whether we think there need to be significant increased enforcement efforts in this area and sort of along the lines that Professor Carstensen is proposing and whether particularly you have a need for vigilance at much sort of lower levels of concentration than we are typically used to.

I think a big question there is, what evidence do we have that we have broad-based sort of competitive harm occurring, that we are missing mergers that are causing competitive harm? There will be some cases we are going to capture them because there is a down sell side issue as well, so then we do not really have to worry about it. It is really only when there is a unique buy side issue that we have to worry about it. And what I -- you know, there is a lot of literature out there on sort of harms. But there is not any real consensus on how big these harms are. And so until we sort of have a better sense of how broad-based it is, I think we need to have some concern about moving resources to this.

And I think one last point is, a big issue is one, there is no free lunch, that basically if we take more resources into the buyer side, we are going to take resources away from somewhere else. So having an idea that there is actually something to go after I think is important.

And two, we really -- a lot of the tools we use on the sell side are not necessarily going to -- some will move to the buy side, but a lot of them will not particularly if we are looking at things like labor markets and stuff like that because they work very,

very differently than a lot of the sort of product-type markets that we look at.

Thank you.

MR. ADKINSON: Thanks, Mary.

Scott?

MR. HEMPHILL: Great. So first, thanks to the FTC and the organizers, Bill, for the opportunity to talk about these important issues together.

First by way of disclosure, I have been retained as an expert in litigation where anticompetitive harm has been alleged due to enhanced exercise of monopsony power.

So with that out of the way, I would like to start by just emphasizing something we have been talking about, the consumer welfare standard, and my view that as it now stands, it is fully adequate to handle mergers and other conduct that is harmful to sellers. Now, for that to be true, you have to come along with me with the second proposition, which is that the phrase “consumer welfare” should be taken as seriously but not literally. After all, we recognize harm all the time to parties that are not consumers. If competing producers of an intermediate good decide to merge, we worry about the harm to purchasers of that good without necessarily worrying about whether there

is a follow-on passthrough effect to final consumers.

Or closer to the subjects of this panel just think about a bidding ring. It is the seller who is harmed in the first instance, not any purchaser. Yet, we would have no hesitation, I hope, in sending the conspirators to jail when they get together in their bidding ring.

Our interest in the harm to sellers is confirmed by, as Peter mentioned, the merger guidelines and by Supreme Court cases like Mandeville Farms that was mentioned and the old buy side predation case, Weyerhaeuser.

Now, all of this is to say that no one should take references to consumer welfare in a judicial opinion or elsewhere as a limitation to harm to consumers. And so the upshot of that is that defendants are just wrong when they insist that some harm to final consumers must be demonstrated in a particular case. I think this is a form of misdirection that is inconsistent with the long-standing traditions of antitrust.

This also means that when analysts criticize antitrust for being narrowly obsessed with consumer prices, they are off-base, too. I think that is attacking a strawman. Antitrust already has that

broader focus.

Now, I think these mistakes arise in part because admittedly the phrase “consumer welfare” is a bit confusing. It works well for the typical case where sellers are getting together and thereby harming their trading partners, in that case the buyers. As Peter mentioned, I would propose that to handle the atypical cases, we should consider a different phrase, “trading partner welfare.” This is not novel to the paper with Nancy Rose. This is something that has been kicking around for a while. But I think it is worth advocating and kind celebrating in a sell side case that the two coincide. Consumer welfare and trading partner welfare get you to the same place.

In a buy side case, though, the trading partner welfare, and I will say standard just because it is typical to do so, clearly labels the harm to sellers that it is attributable to reduce competition among buyers.

So taking a step back here. You know, what is at stake? Why should we be paying attention to monopsony? After all, in a lot of cases, there is going to be a sell side harm, too, in addition to the buy side harm and we will just resolve the sell side case without getting to the buyer side, I think, pretty

frequently and that has contributed to the relative absence of buy side case law.

But I think there are two reasons to pay attention. One, if we are not on the lookout, we are going to miss some important instances of anticompetitive harm. So I think it is great that Peter now has lots of fellow travelers trying to root out important cases to bring. I will be interested to see what the labor panel later in this series of hearings reveals in that regard.

But, second, I think it is important to recognize that in some instances the defense of a particular transaction, a merger let's say, is, in fact, premised on the party's enhanced monopsony power. It is premised on the enhanced ability to squeeze the sellers through reduced rivalry of the buyers. To me, that is the wrong approach. Where the enhanced ability to squeeze is premised upon reduced rivalry, we should immediately recognize and understand that that is a core antitrust harm, and we should resist transmuting that harm into a purported benefit in favor of the transaction.

And I anticipate we might not all agree on that particular proposition, so I will stop there.

MR. ADKINSON: Thanks, Scott.

Joe?

MR. MILLER: Thanks. And thanks, Bill, and the FTC for inviting me. This is a very useful discussion.

So when Bill first called to ask me to be on the panel he asked me to bring my perspective as a former enforcer. So I spent a good bit of time at the Justice Department, half that time as the Assistant Chief in the section that covered health care, and so brought a number of these cases, Arizona Nurses, one of the United monopsony cases. There was a case against Michigan Blue Cross that the deal fell apart, but these all had some monopsony concerns in them. And then there was, obviously, the Anthem-Cigna case that was after I left.

So as a former enforcer, now I am representing mostly health care entities before the agencies, I see a lot of these sorts of issues. You know, what to make of it? So as an enforcer, the theoretical discussions are fine. This was actually the most cogent set of remarks on this topic that I have ever heard. So this was really a well stated way to frame these issues.

But if you are investigating a merger, it is a little messier. So how do you tell if you have a

merger and you are looking upstream whether you are doing the world any good or whether you are potentially doing the world some harm? So if you look at a merger and you sort of assume or look or you have some testimony or evidence that it is going to reduce input costs, the price you pay for your inputs, that tends to flow downstream. Not always.

I think everybody understands there is a theoretical way that reducing prices paid for inputs can be harmful. But if you are looking at it -- and mergers tend to be messy -- in terms of the way the facts come out, not sort of in a tidy little appellate opinion, but you are talking to a lot of people who are telling you a lot of things, how do you know if you are doing the right thing?

The way that the FTC has looked at this in the PBM mergers is to more or less explicitly say they are more concerned with looking downstream. And so PBMs getting together, there is I think some concern that there would be a reduction in the prices paid for pharmaceuticals. There is obviously other potential efficiencies that can come out of that; same thing with health plans.

So they buy health care services. They can arrange them and they can selectively contract in a way

that is really the basis of the hospital program, right? The ability of health plans to selectively contract means hospitals are competing to be in the health plan, which means consumers benefit. So you are looking at that interaction and saying there is a way that our intervention could potentially harm that and how do you tell.

FTC has kind of taken a pass on all this in a statement on the PBM mergers. DOJ had treated it in a rather subtle way until the Anthem-Cigna case, by saying, you know, there is such thing as upstream harm, but they are very, very careful to say that is a predicate to downstream harm. So if physicians get paid less, they did not allege that as a count in and of itself. It said, instead, that will result in lower quality health care. There was always a quality count involved.

And so, you know, ask yourself why that is. I think it is because there is a concern to over-deter what is generally thought of as good, which is lowering input cost because it does tend to flow downstream. Again, you can look and say, you know, not in all cases, there are theoretical concerns that you may be doing harm. But there is a rough analogy here to, I think, a predation case, which I think has some

theoretical basis and, you know, will be recognized by a court as stating a cause of action.

Same thing with monopsony. You can go to a court and you will get past Rule 12. But you have to worry, as an enforcer, that you are doing the right thing, and I think this sort of explains it.

We will talk I think a little later about the Anthem case and how this is a little different. But I think that, as an enforcer, those are sort of some of the issues that get caught up in monopsony versus downstream.

MR. ADKINSON: Thanks very much.

Sandeep?

MR. VAHEESAN: Thank you to Bill and thanks to the FTC for inviting me to participate on this interesting panel.

One of the major and still underappreciated trends in American society over the past 40 years is the emergence of a major gap between labor productivity and wage growth. During the postwar era, productivity and wage growth track each other quite closely. So in a given year of median labor productivity increased by 4 percent, median wages also increased by approximately 4 percent.

Between 1973 and 2017, however, median labor

productivity grew 6.2 times faster than median pay. So in other words, we have seen a steady increase in productivity, but wages have only grown modestly. Workers have become substantially more productive, but they have been unable to reap the benefits. This is, in large measure, a story of strong employers and weak employees.

As significantly different trends in other nations show, this was not inevitable. It was a product of conscious, legal and political choices. I would argue, among others, antitrust enforcers bear some blame for this current power imbalance between workers and employers.

So, first, strong employers. Most labor markets in the United States are highly concentrated. Indeed, according to the Azar, Marinescu and Steinbaum article, a troubling number of local labor markets are pure monopsonies and that workers have only one actual prospective employer. This problem is especially acute in rural and ex-urban areas. Millions of workers, as a result, have few potential places to work and are at the mercy of employers. This concentration has material effects. Indeed, it is associated with significantly lower wages.

The monopsony problem extends behind the

confines of discrete labor markets as understood by antitrust enforcers and scholars. Concentration at one level of a supply chain can have ripple effects upstream, to the detriment of works. For instance, powerful retailers, think Amazon or Walmart, exercise power over their suppliers and apply downward pressure on input prices.

Under the thumb of large retailers, suppliers, in turn, seek to contain costs by cutting wages and benefits. And recent research by Nathan Wilmers has found that this ripple effect up supply chains explains at least some of the wage stagnation we have seen since the 1970s.

Unfortunately, antitrust enforcers have failed to grapple with this problem, and by all appearances, have assumed that labor markets are generally competitive. For example, a merger has never been stopped solely on labor market grounds.

Turning to the other half of the equation, weak employees. Most individual workers lack power in labor markets. The unionization rate in the private sector is under 7 percent today. In contrast, during the postwar era, collective bargaining was an important contributor to the egalitarian distribution of income and wealth. In our more recent three-decade period,

the big business-led destruction of collective bargaining rights is an important contributor to resurgent inequality.

And antitrust enforcements have compounded this problem. They have impeded organizing an important and growing sector of the labor force, independent contractors, who are estimated to be about 20 million in today's economy. Unlike workers who are classified as employees, independent contractors are not entitled to an antitrust exemption and legally cannot engage in many forms of collective action.

Exploiting this somewhat artificial gap in the scope of the antitrust exemption, the FTC has brought cases against, among others, ice skating coaches, public defenders and organists, and has also weighed in against collective bargaining rights for home health aids and ride-sharing drivers.

So at present, the FTC protects strong employers and targets weak workers. The net effect of the FTC's actions is to tilt labor market power further in favor of employers. Going forward, I hope the FTC, as well as the DOJ, invert these priorities and target strong employers, including through merger law, and allow all workers to organize.

Thank you.

MR. ADKINSON: Thanks very much, Sandeep.

I should give a plug for our -- I think it is October 16th, we are having a couple of panels that will continue the discussion on some of these labor issues and I encourage people to attend or watch on webcast.

So now, I would like to move to a discussion of some of the main issues in this area. There are three broad issues we are going to try to cover in the time we have. First, we are going to consider briefly the question of how merger analysis should address the potential for mergers to enhance monopsony power and whether current enforcement policy adequately address those monopsony concerns.

And I wanted to ask our economist to first start us off on that.

MR. COLEMAN: Sure. So I have been asked to talk about monopsony power and here I am talking about classical monopsony power, which I will define in a moment what that means. One of the reasons, we are doing it briefly is because I do not think there is a lot of controversy here, at least of whether if you found that a merger actually creates or significantly increases classic monopsony power would that raise competitive concerns? And I think there would be

pretty common agreement that, yes, it would and it would be something that you would want to go against.

And so basically, when we are defining monopsony it is essentially, from Peter, the flip side of monopoly, but it truly is. It is a situation where you have one or a few large buyers facing a large number of sellers and these buyers face what we would call an upward sloping supply curve, meaning this as prices go up -- I am sorry, you would need to raise prices in order to attract more supply.

So in that situation, the buyer will understand that if I actually restrict my purchases below competitive levels that will drive input prices down and I will increase my profits. And so the reason why there is sort of no real controversy here is that it is clear that restriction on output is like the restriction of a monopolist on output, that you are reducing output below competitive levels and you create a deadweight loss and you have reduced efficiency in the economy. And there is no real issue that there may be in other cases if it really is a true monopsony of worrying about, well, will prices -- those lower input prices be passed down because -- they will not because the whole notion is you have restricted output, so you would not then expect downstream prices to go down

because there is less product.

It may be that you do not actually see a downstream effect because the buyer may have sort of a small geography where it has input power buyer but does not have downstream buyer power. But that still does not mean there is inefficiency because even if this firm is an inframarginal supplier, the fact that it is reducing its output and replacing, by definition, by some with higher costs, then that is an inefficiency for the economy.

So I think in terms of whether there is an effect -- and, certainly, my understanding is, you know, whether you could bring it in the courts, it is not an issue. The main issue I think is -- goes to what Sandeep was saying and others were saying. It is a question of whether it is a significant issue. And you actually see a lot of cases that have monopsony power that we are sort of not picking up. But I think as just a practical matter of if you would bring a case, then I do not think there is a lot of controversy there.

MR. ADKINSON: Thank you, Mary.

I wanted to ask if other panelists would like to opine briefly on the monopsony as an area for enforcement cases, I guess, both in terms of whether

those cases are good cases to bring, as Mary describes, and also the question of how extensive we would expect them to be.

MR. HEMPHILL: Just briefly. If we can find some of those, we should definitely be bringing such cases. This is a softball to throw forward into the hearing next month with respect to labor, whether -- and this is a question that applies both to classical monopsony and to bargaining power. What is the killer case that should have been brought that was not brought because there has not been enough attention to these issues? Like what does that look like?

I take the point that there is not many of them that are brought. But what is the case that -- I mean, regular merger, sell side merger, all of us have ideas about cases that maybe should have been brought that were not. But on the labor side, what is the case that should have been brought?

MR. ADKINSON: Joe?

MR. MILLER: And to pick up on a couple of points. Again, from the perspective of a staffer of an enforcer, if you have got a case that has both downstream effects and upstream effects, so potential monopsony counts -- I mean, if the case is going to settle, that is fine. You can put it in and, you know,

sort of -- you do not really get to put your proof, the theoretical issues get, you know, perhaps a paragraph in CIS, no big deal.

If it is going to get litigated and you have a downstream case and an upstream case, the practical incentives are not to bring the upstream case. With the exception, again, maybe we will talk with about Anthem. You know, why is that? Well, you still only get one injunction. Even if you prove two cases, you still get the one injunction. If you bring more counts than you actually need to get the injunction, you are making your life a lot harder than it needs to be. You are confusing a judge who does not really care very much about antitrust law and, you know, that seems kind of obvious if you pause on it for a minute.

If you have only an upstream case and you are willing to litigate it, you know, that is the one that I think we are talking about, that is a hard case. I mean, you are walking in front of a judge, again you are asking for what, a month of her time when she does not have a month to give to you, never heard of antitrust before or maybe has seen one case, maybe some opt-out litigation, but it is going to be relatively unappealing for someone who has a docket

to move. You are going in front of the judge and saying, you know, good news, judge, we get to make some law together. I can point to no case that is like this one. None that has been litigated. And you can say -- point to the Court of Appeals and say, this is like that case.

You get to, instead, make up some standards, make up some laws, say this is really like the same thing as a downstream case except with a mirror and it is really the same thing and the economics are a little complicated and different. So, here, you know, let's go. You know, not that you cannot do it, but I think it helps explain why you do not see very much in this area that is not tagged along with a settlement.

Maybe you can say, Bill, when it is a good time to talk about Anthem because I think that is a special case worth some discussion.

MR. ADKINSON: Okay. Sandeep?

MR. VAHEESAN: So I believe going forward the agencies should examine the labor market effects of mergers. And we're not talking about a trivial or academic problem. Research shows labor market monopsony has tangible effects on wages and other terms of employment and so anticompetitive mergers can have adverse labor market effects.

One hypothesis I have heard is protecting product market competition could mean indirectly protecting labor market competition, but I think there are several reasons to be skeptical of this assumption. For example, in agricultural mergers, the buy side and sell side, as Peter alluded to earlier, can often indicate very different geographic markets. And in labor markets, given the limits on commuting distances, we should generally assume that labor markets have a smaller geographic scope than the relevant product markets.

I find the Silicon Valley wage suppression case to be an interesting example illustrating this point. So this case involved Adobe, Apple, Google, Intel, Intuit and Pixar, companies we typically do not think of as head-to-head competitors in product markets. But interestingly, in spite of that, these companies were competing for the same pool of labor and saw an advantage in conspiring to reduce wages. So I would argue that we do need to look at labor markets separately and apart from product markets in merger analyses.

MR. ADKINSON: Peter, could you offer some closing comments on this?

MR. CARSTENSEN: I hope so. First, data,

data, data. As I understand it, HSR does not ask for any data on input components in firm's sales and that some stuff I have seen suggests that many firms are in the at least 8 to 10 percent acquisition of relevant input commodities. I agree with Joe that if you are going to litigate a case that has a good sell side, no, I am not going to deal with the buy side, as well.

But, again, notice that there may be issues if you are going to settle that case with remedies where you really want to know things, especially the sort of things Sandeep is raising about where your labor force is coming from, where your inputs are coming from. We need to build the data to identify where we have potential cases or where the buy side issues need to be taken account of as you engage in some kind of a settlement.

MR. ADKINSON: Great, thanks very much.

Now, we are going to turn to the more difficult and interesting question of how should merger analysis address the potential for mergers to enhance bargaining power rather than monopsony power? And does current enforcement policy adequately address those concerns?

And I, again, would like to start off by asking the economist to explain a little bit about

bargaining power as a concept distinct from monopsony power.

MR. HEMPHILL: All right. So I think Mary and I are going to split this up. I am going to start on the sell side, because it is a little easier, and then Mary is going to get to do the buy side mirror image or symmetry or flip or however you want to call it.

So the first thing to recognize in the bargaining context is that we are no longer in the world of atomistic sellers. We are in a world of bilateral buying, a hospital with some power facing a payer, an insurance company, with some power, let's imagine. This kind of thinking bargaining theory is at the heart of the FTC's hospital merger program. ProMedica is maybe the most prominent example, but, you know, there are a bunch on this vein.

The underlying model here is a Nash bargaining model. Upstream and downstream firms, hospital and insurance company, are negotiating over whether the hospital's products are included in the bundle of inputs offered for sale by the insurance company and at what price. And the model supposes that the parties, the hospital and the insurance company, are bargaining over the division of surplus from

reaching an agreement, compared to the alternative of the deal failing.

This bargaining outcome is influenced by two factors. First, relative bargaining power. And that determines the fraction of the surplus from agreement that each party manages to hold onto. And it is common to assume that the surplus is split in half and so Nash bargaining is sometimes called the "split the difference" model. But the analysis is not reliant on that particular. Any split between zero percent and 100 percent is possible. The actual division depends on any number of factors, relative bargaining, proficiency, patience, and so forth.

The second factor, and where the action is, bargaining leverage. And as bargaining leverage affects the magnitude of the surplus and derives from each party's outside option, right, their BATNA, if you want, their walk-away value if the parties fail to strike a deal.

Now, this theory, as I mentioned, becomes very important for thinking about health care mergers. I said I am going to do sell side. So I am going to imagine a merger of hospitals where we would normally analyze this by asking whether the merger worsens the outside option of the insurance company and thereby

increases the hospital's bargain leverage in its negotiation with the insurance company, because the insurance company can no longer play one hospital off against the other to be the last hospital in the network.

Now, the outside option changes because if the insurance company fails to reach a deal, now it is missing two hospitals from the provider network instead of just one. So by worsening the payer's outside option, the merged hospitals are in a better position to push for a higher price.

Now, here is the important thing to notice compared to classical monopsony. The harm on payers here is imposed without necessarily reducing the payers' purchases from the merging suppliers. In the first instance, there is a transfer that we are recognizing without there necessarily being any output effect.

So I will stop there and then let Mary talk about the buy side.

MS. COLEMAN: So Scott has just laid out the sell side, and the buy side argument is pretty similar, except in this case -- and I had -- was using hospitals and insurance in my notes, too, not shockingly given some of the issues that have come up here. But the

idea would be instead of a merger of two hospitals, now you have a merger of two insurance plans. And prior to the deal, a hospital negotiating to come in the network might be resisting reduced, you know, reimbursement for its services that the insurance company wants to impose or maybe terms or conditions that it does not like beyond just the price because these are usually complicated contracts.

And one of the reasons it may be able to do that is, say, well, if I don't take you, insurance plan A, I can go to insurance plan B and that still gives me a lot of customers and I am an attractive option for plans and for patients. So that will work for me post-merger.

Now, I do not have B to offer. I may only have a couple of other options and that may make it harder for the hospital to resist these lower prices or terms that it does not like.

The issue here is -- and I agree with Scott that in bargaining models it is sort of uncertain what the effect on that could be. There could be no effect if you sort of had pretty efficient contracts to begin with. Lowering the prices can increase, you know, output or it could reduce output. And it is sort of true on both sides. You sort of think a little bit

more on the input side reducing prices, you may be more likely to have these differing effects on output. But it is unclear.

And so the other issue I wanted to address, too, is that, again, while the mechanism of sort of the effect is the same, you know, what the effect on the outside option is may be very different on the sell side. In some cases, it may be very similar because you are talking about the same sorts of products and the same sorts of options. In other cases, it may be the options that the sellers have for selling to outside of the buyer are very different from the options that the buyer has sort of downstream.

So again, while the mechanism is the same, sort of what you have to look at to figure out what the effect is is likely to be -- may be very different.

MR. ADKINSON: Thanks so much.

Now, I would like to ask more about the history of such claims involving bargaining power analysis in mergers. In particular, the extent to which agencies have challenged mergers based on concerns regarding enhanced buyer power, either explicitly or implicitly or the extent to which they have suggested that they are reluctant to do so.

I guess for that I would like to start with

Joe, please.

MR. MILLER: Sure. As I mentioned before, most of my practice right now is in health care. When I was at the DOJ, I did a significant amount of health care merger work there, too. So maybe I will run through some of that history.

So the first time you see this in a merger case, at least that I am aware of, is Aetna-Prudential in 1999. I think Marius Schwartz gave a very good speech about this to try to explain what it is, seemed like a really nice way to handle it. It is the first time this came up. DOJ explained itself, you know, as to what the concern was. The case settled. You know, did not have to get that sticky with it. So that was, I think, '99, something like that, '98, '99.

It goes quiet until there was a series of health plan mergers that I can promise you was getting everyone's attention. Not many of those cases -- not many of those transactions wound up being cases, but they all got seriously investigated around 2005, 2006, 2007. Settled some cases against United Healthcare.

One of those involved a monopsony or buy side claim for physician cases -- for, I am sorry, physicians. And so there you get the first time since Aetna-Prudential, DOJ talking about this. So I will

just sort of give you a little insight into that.

As you are going through from a staff perspective and looking at that, it is much less theoretical than this discussion. Calling doctor groups and saying these two plans would like to merge, if they merge and they depress your wages or depress the prices that they pay for you, the reimbursement, what options do you have?

Then you go through and you start doing a guidelines kind of analysis. Can you shift more toward some other set of suppliers, Medicare, for instance, to defeat that price increase? You do your market definition analysis. There is some geographic market stuff in there. You get enough people saying, no really cannot, they make up too big a percent of my practice, and then you sort of, you know, start thinking maybe a little more about a price discrimination market, you know, can they target these particular groups of physicians? You get to the point where nobody really wants to litigate that and it settles. Fine.

So there you go a little further than I think than you saw from, you know, Aetna-Prudential. Had some insight into it, maybe it was no further, but at least it was interesting to me.

The Michigan Blues case, so there they were doing a merger to something like 90 percent, acquiring a rival health plan, and I do not exactly know sort of what the thinking was, but the market definition seems to hold up. A merger to 90 percent is more or less going to get you sued. And, you know, the deal fell apart. So there was no complaint there. But if you look at the press release, I do not think there was a closing statement, but there was a public statement and there was a monopsony concern there, too. Again, that did not really get aired out all that much.

Until we get to Anthem-Cigna, and here this is really interesting. So when you look at all the history here, Anthem, Pru, United, the Michigan Blues case, all the public statements, what you see, as I mentioned a few minutes ago, is an allegation. It violates Section 7 because of the buyer power, because of the upstream harm, but the effect that comes from that is lower quality downstream. So harm to patients is really what they were talking about. That was the alleged effect. The lower reimbursement was a predicate fact, not stated as the harm itself. Downstream you get lower quality.

I guess we could have another separate discussion as to how you draw that causal line. Leave

that aside. But that seemed to be what you might think of as a policy that you could at least infer from what the DOJ had done.

Not so much in Anthem-Cigna. Anthem-Cigna was both a litigated case, had an upstream and a downstream count, willing to litigate the upstream count as a standalone when they did not have to. Again, they had two downstream counts, you know, only in Richmond and the national accounts that could stand on their own, yet still did the upstream count. They were facing the same incentives that I talked about before. Why? Why would they do that? I do not know; I was not there.

But what makes sense is, there were very, very large asserted efficiencies, in that case, so much so that if you did not have a way to combat the efficiencies you might lose the downstream counts, too. So you had to think of a way to deal with the efficiencies as a way to not lose the entire case, even though if you were to assume they had a strong structural case and they had more evidence, more refined evidence than market shares on the downstream harm to self-funded employers.

The monopsony count is a way to do that. So if you talk about the cost savings and you talk about

the efficiencies being, you know, less money going to physicians, and that is good, DOJ found a way to say that is not good, that is bad. You pay less to physicians, you pay less for the inputs, for the medical services of some sort. That is, in and of itself, a bad thing. That completely counteracts or, you know, seriously undercuts the efficiencies argument, even aside from the more typical arguments of merger specificity, and it is not going to happen here and, you know, you are not going to be able to both get the benefits of this and be able to pay them less.

The reason you get the benefits downstream is you are paying the physicians more to collaborate with you. So there is all that kind of factual fight that the District Judge found in favor of the Justice Department. But, you know, of course you cannot know if you are going to win that one. So that is potentially another explanation for why you saw it litigated in Anthem-Cigna where you maybe have not seen it before.

So those are sort of two competing hypotheses. One is that there is a change in policy now. DOJ is willing to look only at upstream and allege that as a harm, in and of itself with it being a predicate to downstream effects, you know, or this was

maybe case-specific as a way to deal with the efficiencies in that case, which they felt they had to do.

MR. ADKINSON: Sandeep, would you consider elaborating on the labor sector more generally with respect to that?

MR. VAHEESAN: Sure. So as the research has shown, labor market concentration is real and it is associated with lower wages. So I believe going forward, this should be a priority area for agencies. But, admittedly, there are some challenges. Since this has not been an area of emphasis, there are significant costs of learning. The agencies need to have a better understanding of labor market dynamics. So for example, what is the geographic scope of labor markets and what lines of work fall into a relevant product market.

Admittedly, the learning will take time, but the agencies can draw on external expertise, including from academics and other government agencies. And, also, I recognize that resource constraints are real, but I argue this is more about priorities. The agencies today investigate and sue ice skating coaches and public defenders for engaging in concerted action. I hope in the future they reallocate these resources

towards mergers with buyer side implications, including implications in labor markets.

MR. ADKINSON: And, Peter, could you elaborate more on some of the other sectors of interest?

MR. CARSTENSEN: Sure. Except to say, hmm, we have not done much, but it has been consistent. That is, I mentioned in 1905, a principal reason for the Supreme Court's decision was the cartel that was driving down the price of beef cattle. My grandfather was a beef cattle raiser and a victim of that oppressive buyer cartel.

And in other words, we have seen that going forward, 1918, there is a big consent decree in meat packing that works in part to facilitate market development, so that we have a continuing concern on this branch with exploitation of producers, period, full stop.

What Joe highlighted in terms of the health care is an interesting kind of split not just recently, but it is long standing. And I referenced in my more general comments, the tension in the FTC's view of gas collection, which is a pure wealth transfer puzzle, but they saw anticompetitive effect there. But when it is retail pharmacists, oh, the heck with them. Let them

be exploited because we think that the -- how they can believe this, I don't know -- that these huge pharmacy benefits administrators are going to share the wealth with the innocent little consumer. But I would leave that one to the FTC to explain.

We have had this -- this kind of tension really is post that wonderful consumer welfare standard, where we do not really look fully at a buyer effect. And in the ag area, there was the Continental Grain case in the '90s, the 1990s not 1890s -- I have not been around that long -- where again, the effect was strictly on wheat farmers in the Midwest, if you are going to eliminate competing buyers. And, again, it was settled by a consent decree which arguably was not very effective because of the problem of preserving a sufficient number of buyers. You know, my proposed standard of HHI, 1600 or more, you really have a problem you need to look at very closely.

They have done very little in poultry for various -- I know they have looked, but, again, the seller market in poultry is very, very competitive until the guys found a way to collude in large numbers recently. But they do not look effectively at the buy side of what it does to poultry growers who contract with farmers -- with integrators.

In pork, again we have seen a little bit of focus on the issue, but nonenforcement. So that I would say we are sometimes seeing examinations, but if the downstream market seems to be competitive, even though it is totally unrelated to where you are growing your wheat or growing your chickens, we are not seeing nearly as much focus on effects.

But where there is a focus on effects -- and this is the contrast with what Joe's talking about in terms of health care -- where there is a focus on effects, and I am thinking Continental Grain in particular, it has really been on the adverse effect on the producer, independent of any kind of buyer concern. And that was certainly the JBS Swift case, at least on the beef -- the beef buying side, was, again, pretty much a pure monopsonistic concern for how we are going to -- how the wealth will be allocated between producers and buyers and recognizing the need to increase the number of buyers, or at least in that case preserve the number of buyers as a way of ensuring a reasonable split of results.

I think that there are some issues, and, again, Joe has nicely framed them, that need really to be subject to more serious review within the agencies and more broadly about the scope of our concern.

I want to drop a brief footnote to my dissent on whether you should be separating monopsony, pure, from various forms of buyer power. Since the ultimate bargain power operator is the monopsonist. So that it is not -- and Scott knows this from a series of e-mails from me -- this is not, I think, a useful place to draw the line.

MR. ADKINSON: Thanks, Peter.

I would like to now ask the panelists to move to the policy and enforcement issues surrounding basically the question that Peter posed fairly starkly about what enforcement policy should look like in this area. What would be the benefits and costs of increasing enforcement? Or otherwise put, should we be more worried about under-deterring conduct or over-deterring conduct? What difficulties would enforcers face in determining the likely competitive effects of the potential for increased bargaining power by a merger to harm competition? Should merger enforcement policy focus on protecting consumers from market power or to protect all market participants from market power?

Those three interrelated questions and any others that go to the broad question of how we should change policy if at all in this area.

MR. CARSTENSEN: Do you want us just to go down the line?

MR. ADKINSON: Peter, you are already --

MR. CARSTENSEN: I have had my shot. I think others can shoot back.

MS. COLEMAN: So my basic view is, in terms of this area, is I think it -- Scott sort of said, well, what have we missed and is there evidence that there are significant mergers that have caused significant harm that are being missed. You know, without that, I do not see why there is a need to change standard practices. There are certainly mergers that both agencies have gone after that are concerned about buyer power. They recognize that issue.

But the question is, are we missing something really important? And I think the key thing is making sure that it actually ties to mergers. Sandeep brought up some of the literature on labor markets and monopsony power. I have looked through some of that. There are lots of critiques of that literature, to begin with, first, whether it actually really does show that monopsony power is causing lower wages in a significant degree in labor markets. But I think the other key thing is whether you can tie that to actual mergers that have occurred that have caused these

issues.

And the resource cost is a significant issue. It would be very -- and especially with knowledge of labor markets -- it would be a very costly endeavor to try in most mergers to figure out what are the right labor markets, what are the right ways to look at geography, product market, and how do we figure out quickly whether it is an issue or not? Because it is not something that you can actually say, oh, well, this town is a labor market. It may be for some industries, it is probably not for most. For some labor participants, they are going to have a lot of options because their skill set is not very specific and then in other cases, they will have very specific skill sets.

So I think without having a significant empirical record that mergers have -- we have missed a lot of mergers that have caused significant harm, invested a lot of resources into the area that would take away for others, I think, you know, raises an issue. And I would correct Sandeep further on this, if there is an issue then it will definitely take some time to develop tool sets because the ones we have in many of these areas will not work very well. Some, they will work well. You know, the classic bargaining,

they will work well potentially because it is the same issue. In a lot of other markets, the way that the interaction occurs is going to be very different.

MR. HEMPHILL: Okay. So taking the questions in reverse order, for those who are keeping score who remember the three questions, so the third one is enforcement. Should it be about protecting consumers or all market participants? My answer to that should be clear from earlier remarks. I think it is all market participants, not just consumers. I am interested in what other people think on that.

As to the difficulties in enforcement, I think there is a conceptual problem and there is a practical problem. The conceptual problem is, there is not a decided, broadly understood answer to the question, is a transfer enough, right? Or do you need an output effect in some downstream market or, in between, is it enough to at least have some quantities change in the -- some distortion in the input supplied?

Now, my view is that a transfer is enough, and I think that is the best read of the case law. But whatever the right answer is, it would be really nice to get an answer. And, right now, I think there is some ambiguity between the DOJ and between FTC. I do not think this is entirely nailed down.

There is a pair of practical problems, I think, that emerge. One we already talked about, which is when the compensation to a supplier goes down, what happened? Was it because of a true efficiency? Was it because of a squeeze attributable to reduced rivalry? Is it attributable to some third thing that's neither of those because those two are not actually exhaustive? That can make a difference in the analysis depending on what your criteria is to begin with.

Second practical problem, if it turns out that a transfer is not enough to state a harm, then we are in the complex situation where the saved resources on the buy side, when handed over to the sell side, is argued as a source of efficiency. And those cases can be, I think, quite complex indeed.

So the practical difficulties of enforcement depend, in an important way, on what we think the rule is. So being settled about what the right rule is, I think, an important goal.

And then, finally, in terms of costs and benefits, I cannot resist saying one benefit beyond deterrence is a clarification of the law. This is connected to my earlier comment. So I kind of want to invite everybody to take Joe's invitation, try to seize this opportunity to make some law together, the agency

and the judge in tandem. Because I think this is an area where having clear rules of the road would really provide a lot of assurance and certainty to parties going forward.

MR. MILLER: I was being facetious. Maybe it was a little subtle. Well, no, I am being facetious. So --

MR. HEMPHILL: I did not take you to actually invite everyone to take that opportunity. Your skepticism, I think, is probably well reflected in the record.

MR. MILLER: Okay, very good. So increasing enforcement, I think, you know, let's not lose sight of conduct cases and what the agencies have said over the last, say, year or two, put out a guide for HR professionals, which seems a little, you know, bland way to sort of describe it. But it contains some interesting policy statements, right? So, you know, it sort of signals to the world, we are starting to take this more seriously where we are going to be looking for this sort of case.

The cases that Sandeep had talked about, I think, you know, spurred some of this. Arizona Nurses I worked on a little bit. Same kind of thing. Those cases are relatively easier than merger cases if you

have the facts. So, there, you are less concerned about deterring potential good behavior if all you are doing is literally colluding to depress wages. You know, that, I assert, is not a hard case. So so much so that that DOJ has, repeatedly in speeches, said that they have grand juries open. They are now treating this as a criminal violation. And so let's sort of acknowledge and then maybe set aside conduct cases are maybe a different sort of discussion than merger cases.

With merger cases, the transfer point that Scott just made is kind of how it is teed up. So you ask -- one of the fun things about working at an agency is you have these lunchtime discussions, the economists sort of come in and draw welfare loss triangles and you have arguments whether transfers of wealth as a result of transaction are enough if you cannot think of any ^ welfare loss. So trying to come up with hypotheticals about where that is going to be the case. Demand is perfectly inelastic. There will be zero units, fewer purchases as a result of the price going up. Price goes up, everybody pays it. Everybody pays it.

And then you sort of struggle to say, well, we do not really have to deal with that. There are always going to be welfare laws that you can at least sort of say it may not be big compared to the transfer,

but it is going to exist, you know, fine.

And then you sort of think about, well, if it is only a downstream case, you know, and you do only allege a transfer, are you going to get kicked out of court? Would you win that on a Rule 12 motion? Not that you get them too much in merger cases. But, you know, I think most people in the agencies would say, yeah, I will fight that case. Transfer alone violates Section 7. You know, flip it. Is Peter right or is the idea of a mirror image really not true. You know, then it gets a lot harder.

And the reason it gets a lot harder is, you do worry whether you are going to take something that looks like it does state a cause of action and could be a violation and wonder what the other effects are going to be, wonder whether you are going to get downstream harm as a result of stopping this. I think it is a real concern. I think it is a real concern because, you know, as Mary said, I do not think we have great tools.

To take issue with something that Peter said in his opening remarks, HHIs of 1600, HHIs do not carry much water ever now, except as a screening mechanism. I mean, you cannot look at an HHI. I mean, you can say it to a court because that is what the law says. But I

think, you know, internally, I do not think that that is going to get you very far.

If you are writing a prosecution memo saying we should sue these folks, I have defined a product and geographic market, I have identified competitors, I have added up their shares, and guess what? It is over a threshold, let's go. I do not think that case gets out. I think you need much more sophisticated economics in practice than that. I am asserting this, I cannot prove it to you.

So if you think of it as the same thing even when the tools are not as well developed for monopsony or buyer power, except maybe in the case where you have the Nash bargaining model fitting very nicely, I do not know that the share presumptions, no matter where you set them, are going to be a great answer.

MR. ADKINSON: Thanks.

Sandeep?

MR. VAHEESAN: Responding to that point, the lower courts still respect the Philadelphia National Bank presumption --

MR. ADKINSON: Sandeep, can you get nearer to the microphone, please?

MR. VAHEESAN: Sure. So the lower courts still recognize the Philadelphia National Bank

structural presumption. So it is good law. I agree with Joe that enforcers need more than the structural presumption, but we should not discount the continued relevance of the presumption either.

As to who the antitrust laws protect, I think the legislative histories are quite clear. The antitrust laws are intended to protect all market participants. And Mandeville Island Farms, 70 years ago, said consumers, workers, competitors and suppliers are all entitled to antitrust protection. So legally, the question has been decided. And even a case like Weyerhaeuser, hardly a favored case of mine, said that injuries to sellers can be sufficient to establish antitrust liability.

And looking at a discrete point that has been brought up by several panelists, there is maybe an implicit assumption that maybe buyer side mergers can be saved if there are downstream benefits. But I would argue that the law is clear. Philadelphia National Bank, Brown Shoe, and Procter & Gamble said, there is no efficiencies defense. And Philadelphia National Bank went even further and said, there is no out-of-market efficiencies defense. If we care about the administrability of merger law, we should support rejecting an efficiencies defense because it calls for

all sorts of complicated quantification and balancing of often unlike effects.

And I also say there is a good reason -- a good policy reason to reject an efficiencies defense. I think too many contemporary business models are dependent on exploiting workers and suppliers. So Amazon, Uber and Walmart are some examples. So the assumption is, for example, it is okay to erode labor market standards provided some of the labor costs are passed through to consumers, at least in the short term.

So how is this relevant to merger policy? I think that the enforcers should expressly reject the idea that squeezing workers and suppliers through enhanced buyer power somehow redeems otherwise anticompetitive buyer side mergers. In other words, they should expressly come out against these business models that rely on robbing Peter to pay Paul.

MR. ADKINSON: Okay, thanks very much.

Those statements I thought actually worked very well as sort of bottom line closes on this issue as well. So what I propose to do, given the hour, is perhaps ask Peter to give two or three minutes on a response to the overall comments that were made and then ask for one-minute closes from each of the

panelists.

MR. CARSTENSEN: This has been, again, fascinating for somebody who has been laboring in this field for more than a decade but waiting for more serious discussion. Whenever I come in contact with really good minds, I have learned an awful lot here.

I want to go back to kind of those three issues that Bill raised. Are we concerned just with consumers or with all markets? Again, with Scott, it is all markets. You have to take that view. That leads me to then point out the risk you are concerned about, increased prices to consumers, well, it may occur because you have a market that is not functioning correctly.

And I pick up on Sandeep, but it is much broader than just labor issues. It is not an efficiency in any sense that public policy should concern itself with that you have driven down the price of labor below a reasonable market price. I concede I do not know what the reasonable market price might be. I am concerned then that we not confuse exploitation of buyer power, in whatever form, with an actual efficiency gain.

We turn then to the death of merger law as I learned it back from 1968 to ‘73. You figured out the

market shares and you went and condemned the undue increase in concentration because it was likely -- and that is what the statute says -- may substantially lessen competition; tend to create a monopoly. It does not say, prove that it will have a particular effect.

So the nice discussion here of, oh, I have to put in everything including the kitchen sink on top of the market shares is exactly the wrong way, it seems to me, to be looking at the problem. We don't know what the effect is likely to be, in any particular case. We know in general that if you increase concentration on the sell side, it is going to result in higher prices, a reduced output, loss of innovation. We know on the buy side it has the adverse effects that I have already discussed.

Let’s keep it simple and administrable. I honor Bill Kovacic on this. Let’s use some standards that will be workable, will be understandable, that even businessmen -- well, I should say even economists might be able to understand, and not get ourselves hung up in elaborate efforts to prove the existence or nonexistence of a particular competitive effect.

Most important of all, we really need more serious consideration of buyer power issues. I am on board with the fact that we do not have enough

information. I think revising the Hart-Scott-Rodino questionnaire to get some of that information would be extraordinarily helpful as you begin to look at these issues.

MR. ADKINSON: Mary?

MR. COLEMAN: There is so much to respond to that, I am not sure I could do it in a minute. But, first, I mean, just a couple of reactions to what both Sandeep and Professor Carstensen have said. I mean, the concept that we should ignore efficiencies in antitrust and merger analysis is astounding to me. It is the whole point of antitrust is to encourage efficient markets. So to ignore efficiency seems to be an amazing concept to do, especially in merger analysis.

In terms of going back to relying on market share screens, that ship has sailed and I do not think you are going to see that in court cases. So I agree with Joe that if you tried to bring a case just based on shares, especially in an area that has not been addressed before, it is just not going to work and I do not think it should because I think you should actually have a theory of what the actual competitive harm is and be able to show what you think the effect is. Whether it is we get to a point where we are just

focused on transfers at least then you are actually showing an effect or whether you are focused on output.

And, finally, to me, I agree you do not necessarily have to show ultimate consumer harm and that should be the fact. But I do think it should be sort of a guiding principle, what are you expecting ultimately to occur? You know, a lot of the bargaining models, we said both firms have market power. So if it is a transfer, you know, we should care about that in many cases, I agree.

But what if it is a transfer -- so someone really big and two smaller guys get together and create some bargaining power and actually bring prices down and then that allows you to reduce prices downstream? That might be something you want to encourage. The trickier cases are when they are sort of both big and then what do you do?

MR. ADKINSON: Thanks.

Scott?

MR. HEMPHILL: So just to underline one or two things that have been said. The main thing I want to leave you with is that when we think about buy side harms we should stay focused on a central issue that sellers are worth protecting under the antitrust laws just like buyers and we freely acknowledge this in

really simple cases, like a bidding ring, and that we should equally acknowledge this in more complex cases.

And that, you know, though it is very frequently, maybe always the case, as we have heard from Peter, and in a different way, to some degree from Joe, it is very common, maybe always the case, that there is, in addition, some output distortion or input distortion or some other harm beyond the transfer that economists could parse for us that is not an essential part of the case any more than it is an essential part of the case in a sell side case.

MR. ADKINSON: Thank you.

Joe?

MR. MILLER: So I think this is the right forum for this sort of discussion. So I think bringing a lot more of these cases before the theoretical underpinnings are really clarified is not going to be particularly helpful. I think the FTC has the power to do this. And I am glad that it does.

So, you know, out of this I expect more research, more discussion, more publications, and maybe we will sort of find in all that that the enforcement level is just right or maybe we have been missing something. But I do not think we have the tools right

now to really answer that question.

It reminds me a little bit about when I was studying law. Raising rivals' costs was a theory that had not really taken hold. It was much debated. There were some rather sort of enforcement-minded folks who really thought that it should be pushed; others were skeptical. Over time, more literature worked its way into cases. Now, I think it is relatively accepted by courts and part of mainstream.

Last time I was at one of these fora, I heard a panel on cross-market mergers in hospitals, which is you are a market participant seems to be something that everybody believes. But, you know, you cannot demonstrate economically. Maybe that will be the same thing, maybe it will not. I think of this as the same thing. More discussion, maybe not ready for more vigorous enforcement, but a worthwhile panel.

MR. ADKINSON: Thank you.

Sandeep?

MR. VAHEESAN: So I believe calculating monopsony systematically going forward requires jettisoning consumer welfare. At a minimum, the language of consumer welfare is very hard to square with buyer side concerns. How do workers and suppliers fit under consumer welfare? They are not consumers or

purchasers. They acknowledge that there may be an accepted term of art among specialists, but it is deeply confusing to a lay observer.

And since we are talking about public law advancing public ends, goals that only specialists can understand should give us real pause. And, furthermore, I feel that so long as we are in the consumer welfare framework, antitrust will continue to be used against independent contractors and others trying to organize against monopsony power. After all, workers' collective action can lead to higher prices for consumers.

So I believe if we want to take the monopsony threat seriously, we require new language and new philosophy that antitrust is antimonopoly; a body of law that, as Congress originally intended, controls the power of big businesses over consumers, workers, competitors and suppliers.

MR. ADKINSON: Thanks very much.

Please join me in thanking our panel for really an excellent discussion.

(Applause.)

CLOSING REMARKS

MR. ADKINSON: We are honored to have closing remarks now by Commissioner Maureen Ohlhausen. Maureen's extraordinary career at the FTC began as a member of the staff at the Office of the General Counsel, including heading up the Office of Policy Planning and culminating in serving as a Commissioner and then Acting Chairman.

Thank you for your service, Commissioner Ohlhausen.

(Applause.)

COMMISSIONER OHLHAUSEN: Well, thanks so much for having me here to close out a very interesting day. I am also about to close out a very interesting career at the FTC next week. After six years as a Commissioner and more than 12 years in other roles at the agency, I can offer some broad perspectives on what the agency is meant to do and how to tell whether we are succeeding in that role the way Congress intended at our creation.

Now, these are issues that I have spent many years thinking about from my early days advising Commissioner Swindle to my time working on the FTC at 100 report as Director of Office of Policy and Planning under Chairman Bill Kovacic, to my time as a

Commissioner. In particular, as Acting Chairman of the agency, I had good cause to reflect seriously again on what we do at the FTC, our institutional strengths, and how to leverage successfully those strengths for the good of consumers and the country in the years ahead.

And I am pleased that Chairman Simons is also thinking deeply on these topics and getting wide-ranging input through this series of hearings. I sincerely hope these insights -- the insights the Commission gains through this process will help ensure the FTC future success.

But how should we define success as an agency? In an influential article, former Chairman Kovacic and Professor David Hyman identify the three most important factors to predict long-term agency success, consistent political support, policy coherence and capacity and capability to handle the agency's mission. I believe these factors are important as the Commission considers the path ahead.

As a threshold matter, an agency needs consistent political support, or as Kovacic and Hyman call it, political implications. They note that this is the most important of the factors for success. In their words, an agency is doomed if it lacks a supportive constituency or if the performance of its

duties generate crippling political opposition. More broadly, an agency will not be able to operate effectively if its structure raises serious doubts about its legitimacy or increases the vulnerability to political pressure that the performance of its duties will arouse.

Now, this first factor speaks directly to the FTC's origins and the stability of its structure as a bipartisan entity. Now, the FTC was born from early 20th Century dissatisfaction with the way the Department of Justice was enforcing or not enforcing the Sherman Act. And as many of you know in the Gilded Age years, preceding the FTC's creation, the country underwent a massive wave of corporate consolidation.

In the decades straddling the turn of the 20th Century, there were 42 deals producing companies controlling over 70 percent of their respective industries. During the peak of this merger boom from 1898 to 1902, at least 303 companies disappeared each year, and in 1899, over 1208 were merged out of existence. For several years, the government offered essentially no meaningful response.

Now, the leadership of the DOJ was not entirely to blame for this situation. It was a product of many factors, including an underdeveloped

understanding about the economic implications of corporate consolidations, political indifference and a Supreme Court that had expressly called into question whether the Sherman Act applied to mergers. These circumstances triggered an era of public agitation that aided President Roosevelt in expanding the antitrust laws, pushing to establish the Sherman Act's coverage of consolidations and culminated more than a decade later with Wilson's signing of the FTC Act and Clayton Act.

I believe the current debate about concentration and the role of antitrust reflects a similar era of public agitation. It also calls for a deep understanding of the institution, the FTC, that arose out of this similar era 100 years ago.

Now, interestingly, the turn of the 20th Century consensus for additional competition enforcement did not lead to uniform vision for a new competition agency. Rather, two camps formed. The first believed Congress should create a new agency to be a law enforcer similar to DOJ, but politically independent and with flexible substantive jurisdiction to allow it to proactively shape business behavior.

The second camp, on the other hand, wanted to move away from the DOJ model and create an independent

policy body similar to Roosevelt's new Bureau of Corporations within the Department of Commerce and Labor. This policy agency would have special power to work with the business community, research competition issues, then issue reports and regulations and guidelines that would help shape industry's conduct.

The FTC was created as compromise between these two views. We are an independent, bipartisan, policy-oriented, research-based enforcement agency. The bipartisan design insulates us to some extent from being buffeted by political winds. Combining this bipartisan leadership with the agency's research and policy functions results in a relatively steady and disciplined stewardship of our merger review mandate and conduct enforcement, which other than some notable missteps about 30 years ago, has often been a source of broad political support over the last few decades.

And I assume this support is at least in part because even the out-of-power party continues to have a serious voice in U.S. competition policy and enforcement decisions. Indeed, during my 15 months as Acting Chairman, the Commission could only take action if there was bipartisan agreement. And, notably, we were able to continue an active enforcement and policy agenda and had over 500 unanimous votes.

This leads me to the next most important factor for agency success: Policy coherence. The FTC's design offers strong policy coherence because of its dual mandate for competition and consumer protection. These are different but equally important complementary tools for the agency to help promote fairness in our markets and therefore promote consumer welfare. Each tool protects consumers in different ways and each has its limitations, allowing one to offer relief where the other cannot.

Competition is the first line of defense. A competitive market is a welfare-enhancing one for consumers. Aggressive competitors fight for consumers using price and quality as their weapon, including the quality of service. They work hard to protect their reputations because they know that a dissatisfied customer can easily turn to alternatives.

But there are limits to this. As former FTC Chairman Tim Muris once wryly observed, the commercial thief loses no sleep over its standing in the community. Some companies engage in fraud, dishonesty, unilateral breach of contract or other conduct that hurts consumers with little regard far their reputations or the possibility of being put out of business.

Because the competitive market sometimes cannot discipline these behaviors, we also use our consumer protection authority. But these missions are aligned, which allows the agency to apply them cohesively and imbues all Commission staff with the sense of common purpose, to protect consumers. I hope this singular focus on consumers will continue at the Commission in future years, particularly because it has been a proven linchpin of policy coherence and cohesion throughout the agency's history.

So we come to the third factor, agency capacity and capability. Now, capacity refers to resources, which in large part hinge on an agency's credibility with Congress. Capability, according to Kovacic and Hyman, is slightly different, turning on whether an agency has the tools to make good decisions and does so.

And I will focus the remaining few minutes of my remarks explaining why, based on our design protocol, the agency has been doing exactly what it was meant to do, identifying competition problems in the economy, developing proof of the problems, debating the evidence of harm and proper courses internally, and then leading by example outside the agency with every advocacy, enforcement, and regulatory tool at its

disposal. And our efforts have paid off, though sometimes it takes a while. But that is often the risk of leading.

The agency's design gives it the singular ability to identify a potential competition problem in the market, develop empirical research to determine whether the problem actually exists and then plan and execute a multi-year advocacy and enforcement agenda to rectify the problem. In other words, the FTC is designed specifically to lead others in the continuous development of competition law to accurately reflect changing economic conditions.

It is in the agency's DNA, so to speak, from the open-ended drafting of our statutory authority in Section 5 of the FTC Act to our research and report-writing authority in Section 6 of the Act, which permits us to gather and compile information and make public such portions as are in the public interest.

Now, the Commissioners sometimes disagree about how the agency should pursue its mandate, but that debate, too, and the necessary negotiation and compromise that come with the Commission structure is another invaluable part of our Commission design. It is among the reasons studies have shown that the agency's merger enforcement does not wax and wane with

the election cycles in Washington, D.C.

For example, although you may be surprised to hear it, the number of our competition enforcement matters actually tied historic levels during my tenure as Acting Chairman, despite it being a time of pronounced political change.

Using this process over the years, the FTC has made vital contributions in doctrinal gray areas. On the merger side, the agency has notably introduced new concepts or new ways of analyzing hospital mergers, potential competition issues, and dynamic markets. Now, our merger work involving cluster markets is one such example. The notion that hospital mergers indicate a cluster of inpatient services is now so widely accepted it is rarely litigated.

But the Commission has also recently challenged cluster markets outside hospital mergers, as in our 2015 successful challenge of the Sysco-U.S. Foods merger, and then again in 2016 in our winning challenge in Staples-Office Depot/OfficeMax. And while I was Acting Chairman earlier this year, we alleged, and the District Court subsequently found, that Wilhelmsen's proposed acquisition of Drew Marine likely would reduce competition in a cluster market of marine water treatment chemicals.

On the conduct side, the FTC has been at the forefront of developing invitations to collude, the proper extent of competitor collaborations in cases like Polygram and, of course, reverse payment settlement agreements. The agency also has had a major impact on developing the outer bounds of antitrust, particularly with respect to the scope of exemptions and immunities like Noerr and State Action, topics on which I have been particularly active.

Antitrust doctrine evolves and ideas can and should be debated in settings like these hearings. But debate alone is an insufficient ground for action. To make good decisions, the agency must test new ideas empirically and develop proof of actual competition problems in the economy. If there is such evidence, it should then consider the tools to best address it.

Notably, most of our doctrinal contributions have depended on the broad use of all of our agency functions, research, advocacy, administrative litigation and federal court enforcement. I thus urge the Commission to continue to strive to make decisions based on empirical foundations and to consider all of its tools if it finds evidence of harm to the competitive process that reduce consumer welfare.

So I will leave you with a few closing

thoughts on what guidance past agency experience can offer for the future. First, the FTC is well suited to play a leadership role in large part because of its design, which has played significant part in its contributions to difficult competition issues. It has afforded the agency bipartisan political support, a coherent policy framework to protect consumers with complementary tools, and the capacity and capability to invest in resolving novel competition issues with long-ranging plans relying on outreach, research, advocacy, and enforcement.

And also the real key to successful agency design, in my opinion, is the ability to attract and retain great people. And judging by the people I have met during my time at the FTC and the enthusiasm they all bring to the job of protecting American consumers, I feel very confident of the agency's success in the future.

Thank you very much.

(Applause.)

(End of Hearing 2.)

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.

s/Linda Metcalf
LINDA METCALF, CER
Court Reporter