FTC Hearing #2: Competition and Consumer Protection in the 21st Century
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Segment 1
Transcript

[MUSIC PLAYING]

[SIDE CONVERSATIONS]

SUZANNE MUNCK: Good morning and welcome to the FTC 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'd 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's participating today. We're 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're 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, etc.

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'd be very grateful.

If there's 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.

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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 on site that closes at 3:00 PM.

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

[APPLAUSE]

KELLY 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 policy makers 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 '80s. 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 pre-determined 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 consumer protection staff also grapple with the implications of technology when tackling cryptocurrencies, online marketing, data throttling, tech support scams, FinTech and even robocalls.

On the competition side, we've 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 separate agencies to address privacy, consumer protection, and competition missions. The FTC is somewhat anomalous by having these issues sets housed under our single umbrella. It is incumbent on us to take advantage of our structure and our 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 the CCPA closer to home provide excellent natural experiments for us to see how long standing 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 abusive dominant 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 panels 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 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 Advisers 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 Economics 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]

JOSEPH 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 Advisers.

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 work 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 reasons that I think the time is ripe really for a rethinking of competition policy.

We have a market problem, 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 anti-competitive 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 when I say that Chicago School is it's 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 brought 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 everybody 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, it will have broader political benefits. But I think we've really gotten the narrow economics very badly wrong.

The failures of competition show up at the macroeconomic level. Growing inequality, lower investment, decreasing entry in growth of small businesses. I want 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's been just a rethinking of the consequences of these inefficiencies. When I was a graduate student, Al Harberger's work talked about the triangles, the Harberger triangles, the inefficiencies associated with them, being relatively small compared to the macroeconomic consequences insufficiency of aggregate demand. But there are new studies by Fahri and his co-authors at Harvard, which showed that the loss of GDP, of national output, as result of market power, of the markups of price over marginal costs 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 case of perfect discrimination, the attempt to extract more consumers our producer surplus distorts the economy. It 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 is in the long run as 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 Schumpterion model, as 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 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 a lack of competition in a lot of the old sectors as well, and that are our antitrust standards have not worked out 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 are 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 is a broader evidence of increases in market power. Data increased concentration across a wide range of sectors, increased markup in many sectors, typically linked to increase concentrations. Some interesting kind of metric work that solves the identification problem that plague 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 cumulative value of investment, both in physical capital, but also intangibles. And if you impute an appropriate risk adjusted rate of return, the share of capital is going down.

What does that mean if the share of labor is going down, the share of capital is going down? The shares have to add up to 1. That's one thing economists can agree on. And the residual is what we call rents. And some of that is increase 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 margins of 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 across sections 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 you might call neighboring, where the same kinds of technology would seem to be relevant.

Of course, we know that firms have strong incentives to engage in anti-competitive behavior in the absence of government constraints. So we shouldn't be surprised. Anybody who believes in economics, believes in incentives. And if you look at what are the incentives, there are incentives to behave in an anti-competitive way.

I joke that in our business school we teach our students how to be anti-competitive. 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 longstanding presumption dates back to Adam Smith. All of you know, people with 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 anti-competitive 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 of 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 school years really understand this. Peter Thiel said competition is for losers. Warren Buffett said the single most important decision in evaluating any business is pricing power. And he described in a way the economics. We think in terms of an interbarrier like being surrounded by a moat. And the ability to keep it with an impossibility to 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 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 structure demand towards local services in which competition may be limited. There are changes in technology. I've mentioned the network platform economies, industries with large upfront costs and big data.

Sometimes, though, there is 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 will 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 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 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 in price discrimination. There are innovative contracts with restraints, bundling and nonlinear pricing. These are ideas that 50, 60 years ago were not in the tool kit 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. There are 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 innovativeness. I wish it were directed to increasing the productivity of our economy rather than creating entry barriers. But it does demonstrate that somewhere in 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 understanding of economics. Most importantly, there's a greater understanding of the limitations of the competitive equilibrium model that really was the workhorse model, the fundamental paradigm that was taught 50 years ago.

The model is not robust. When an economist says a model is not robust, it means slight changes in the assumptions destroy the conclusions, conclusion about the fishing season market, the conclusions about the presence of market power. So for instance, information economics showed that even very small asymmetries of 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 said, 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 that 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 when at the time Bork was writing and others were writing, we already understood 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. 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 market imperfections can be generated in multiple ways. I already mentioned asymmetries of information.

Search costs, the work of Peter Diamond, showed 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 be amplified and extended in multiple ways. And we now know that there are serious problems of monopsony especially in the labor market.

I want to turn to a minute on the dynamics, because obviously innovation is important. We've learned three things. One, potential competition is not a substitute for real competition. And the second is the Schumpterion doctrine that monopolies are only temporary, competition to be the monopolist drives innovation are also not robust. Monopolies can and 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 this is these changes in the way our economy functions, changes in our understanding of the economy requires new presumptions, new criterion tools, new remedies. And 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 competitive equilibrium model, which is not a good description of many sectors in the economy and I think of the economy as a whole. And that means we have to rethink the presumptions. We ought to be thinking more about new rule making, 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 of those predicted by the theory, no attempt in incidence theory, pretend that price imposed on a merchant is not shifted to consumers as it would be in the case in any competitive model. There's a kind of intellectual incoherence in a lot of the argumentation. No attempt to analyze the impact and restraints across platform competition. That there are horizontal effects of vertical constraints. 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 of 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 a monopsony power passes on some of the gains to consumers, there's a distortion in the economy and society 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 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 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 anti-competitive. For instance, persistent profits with no entry for an extended period of time is a symptom-- 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 cases where one can reliably ascertain incidents without full general analysis. Then when Brick puts a constraint on antitrust enforcement. And going beyond that would enable one to attack some obvious cases of anti-competitive 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 anti-competitive 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 that market power once established can persist.

So there's a view that sometimes had that we don't want to make a mistake and stifle a merger that might be good for the economy. And so there is a lack of-- the type 1 and type 2 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's both theoretical and empirical evidence in support of that.

And we have to recognize that firms have an 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 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 commission 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 consumers-- 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 a 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. 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 going into a new area, but it seems to me an important one for our society.

So in conclusion, the time is ripe I think for a reexamination 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 in 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]

ALDEN 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. I'm pleased to introduce now Professor William Kovacic to make an address.

Professor Kovacic is professor at George Washington University Law School, where is director of a Competition Law Center. He is also a non-executive director of UK's Competition and 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]

WILLIAM 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'm going to give you my own views, not those of the Competition of Markets Authority in the United Kingdom, where I serve as a non-executive director.

Today, I want to talk about what I think is an epidemic failure to understand the foundations of modern US 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'm 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 '60s, '70s, hijacked US 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.

40 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'm 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.

Antitrust paradox is quite famous, especially for its single minded emphasis on consumer welfare, which Bob Bork basically defined in terms of allocated 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 in the community. That is if Bork's book alone had been the only source of insight that changes could not have occurred in the way that they did. I'm 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 was 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 multi-goal 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 the administrability. 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 multi-factor 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 pricing, you see the central ingredients of the modern US 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 a judicial system in which cases are tried before juries, generalists judges, where notions of intent, multi-factor 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 in a matter of concern. And one author after another attack theory the Areeda 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 quote 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 in 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 non-intervention 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 trade-off? What's the exchange rate between the efficiency that comes from scale economies and the limited opportunities for SMEs.

If all you are 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, administrability is a crucial consideration. And that view, by the way, has been adopted by many, not just those on the right, but a jurists 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 different goals structure, the administrability challenge must be met and 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? And 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 administrability. It's faintly unconstitutional.

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

What about doctrine? Is it just the ideology? No. It comes back to this question of administrability.

Is it just a blind faith in the market working the equilibrium model that Joe offered? No. It's a matter of administrability.

And what element of administrability in the predation case did 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 writes US style are a menace. Mandatory trebling, one-way fee shifting, class actions, contingent fees, they said in the close abusive dominance case, that's going to over deter.

They said, well, you can't change trebling. That's in the statue. 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 over deterrence. It is the false positives. So err on the side of raising the doctrinal bar.

And that's what the courts do almost immediately after the publication in 1975 of the predatory pricing paper, and they've continue 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 is the Areeda Turner rule more than any other. Bork didn't win that argument. Much as Chicago one very few of the arguments on basic doctrinal principles, it's much closer to the Areeda and 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 the 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 DC 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 over deterrence by private rights. They were all private cases.

Footnote, when was the last time the US government was before the Supreme Court as a party in for 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 over deterrence are magnified.

So what cases got quoted back at the FTC? There were cases like Descon, where the fear is ongoing deterrence because of private rights. The FTC had exactly no success saying, we're the United States government. We are not seeking treble damages here. We want an injunction, equitable relief. Treat us differently. That carried exactly no weight.

I'm not necessarily asking you to believe that the result that the DC circuit achieved in Rambus was incorrect, though I think it is. I am asking you to know 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 over deterrence 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 and Markets Authority markets regime, which allows the CMA to do a study and in selected instances to achieve remedies in order to correct any competitive conditions. It's not tethered to the operation of European doctrine dealing with abusive dominance.

Our system with this idea would not be tethered to existing limiting principles built in to the Sherman Act or Clayton Act juris prudence. That is unless you create a mechanism that gives the government freedom in a policy space to make more judgments-- and, yes, they'll 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 US that allows the government, in this case the FTC, to operate without the overhang of the limiting concerns about over deterrence by private rights is essential if Section 2 is going to work.

What's the alternative? You're going to have to go case by case through the courts. 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 you can do that to go back to the courts and say, please, change your mind 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're going to take on a broader agenda, there are areas worth doing. I think the Commission itself realizes that. I'm a little concerned in Joe's talk that there is 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 US is operating well inside the production 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'd like a markets regime in the US.

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 and sectoral areas with the Competition and Markets Authority. We have no network of that kind. And I've seen firsthand how they 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 up priorities, better setting of strategy to map out doctrine-- let's 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 '70s and look at the literature. That's just scalding about the failure of the US system to deal with concentration. And the massive literature that developed in the late '50s onward written by Don Turner and Carl Kazan about the biggest failure of US competition policies to deal with dominance and collective dominance.

The concern has been there a long time. There have been instances in which the agencies have tried to take those issues on. It's worth studying what 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, that ACCC in Australia, the CMA in the UK, which I've seen first hand, the New Zealand Commerce Commission, and indeed, the Competition Bureau in Canada have done. There are a lot farther ahead than their counterparts re, which have similarly situated portfolios-- that is this institution-- in achieving a genuine 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'd 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 fail. Thank you.

[APPLAUSE]

ALDEN ABBOTT: Thank you very much. Two excellent addresses. Makes me think of the famous article about two views of the cathedral by Calabresi and Melamed. And seen from different light, you have two very interesting perspectives.

Now, we're going to go to a panel. Our first panel is the State of US 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. 10 minute break? OK, well I'm informed that there is a demand for an exogenous shock here, a 10-minute break.

So I will follow instructions, and we will have-- and do keep it to 10 minutes, because we're running a little bit behind schedule.

[MUSIC PLAYING]

ALDEN ABBOTT: Please take your seats. Please take-- is this working? Testing. Testing. 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 US 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 and we'll try and think give at least 10 minutes for those questions, we will address some of those questions.

I'm about to move immediately into panel number one. Again, I'm Alden Abbott, general counsel, US Federal Trade Commission. Our second panel will feature one of the keynote speakers, Professor Joseph Stiglitz. Other speakers include today Dennis Carleton, who's David McDaniel Keller Professor of Economics at the Booth School of Business, university of Chicago, senior managing director of Compass Lexecon. Professor Carleton recently served as deputy assistant attorney general in the Antitrust Division of the Justice Department. And he also served on the US Antitrust Modernization Commission.

Eric Citron is a partner at Goldstein and Russell PC. Previously, he clerk on the US Supreme Court for Associate Justices Sandra Day O'Connor and Elena Kagan. He has also served as counsel to the assistant attorney general in the Antitrust Division of the Justice Department.

Eleanor Fox is Walter J Darenberg 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 is 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 AM, I'm informed. And before turning to that, I would like to devote up to 10 minutes, but no more, to reactions to the presentations by Professor Stiglitz and Professor Kovacic, both provocative and wide ranging reactions.

Professor Carleton, your thoughts.

DENNIS CARLETON: First, thank you very much for inviting me here. Pleasure to be 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 I 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. 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 2,500, which we would consider highly concentrated? The answer is less than 5%.

The other important feature people who've 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.

The price of cost margins, people have studied those recently. Good topic. Joe mentioned that they have been rising. That literature is still in a state of flux. I'll tell you later if I'm asked about what one of my students is doing in that.

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've gone up to. But what industries?

He ranks them. Number one, finance. Number two, utilities. Number three, health care. Manufacturing, hardly at all a trend in price costs 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 a central 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 US economy. It's been baffling macroeconomists for a while.

Decline in startups, which he mentioned, you know when the decline in startups started? In the mid 1980s. It's not a recent phenomenon. It's a troubling phenomenon. We got to get to the bottom of it. I don't 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%. It's tiny. It's not explaining these major trends in the economy.

So let me just end by saying it's hard to respond in 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 decline in 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.

ALDEN ABBOTT: Thanks, Professor Carleton. Who would like to chime in now?

KEITH HYLTON: Sure-- do you want to go?

ELEANOR FOX: You go first.

ALDEN ABBOTT: Professor Hylton.

KEITH HYLTON: Yes, I'll 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. 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 a trust 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, on Bill's own theory, the private public distinction would not matter very much as the trend within the FTC continues. That's all I'll say as a reaction.

ALDEN ABBOTT: OK, and Professor Fox.

ELEANOR 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 administrability. And Professor Kovacic says Chicago School is a distraction. And Professor Stiglitz says, we have to recognize that whether or not we call it Chicago, and we don't call it a geographic location, but we have to recognize that part ideology, part whatever it has pulled has 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 for 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 an administrability 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.

And 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 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. 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 Brook 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. And Phil Areeda had a rule of 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 recruitment 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 legates attempt of a new no frills product in the market. And it basically succeeded in the end in compromising the new lows frills product.

So competition was lost. Dynamic innovation was lost. Phil Areeda had a simple, good rule, and he lost. So one of my point 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 US and except for cartels, except for straight horizontal mergers, US has lost resonance because we're not dealing with the monopoly problems today. Thank you.

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

ERIC 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 administrability 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, 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 it all happens in a vacuum like you do when you first learned 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 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. And 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 blowback 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 under action, under enforcement generally.

ALDEN ABBOTT: OK, 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?

KEITH 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 Adamism as a goal of Sherman Act enforcement. Or you could go to the other extreme, if you wanted to. You could say a 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 guideline, 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 structureless and provided few guidelines for courts.

So in the end that 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. I think 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, quote unquote, "eat" the efficiency gains.

So that's what we have. And you could move away 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're taking 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 a set of rules for courts in weighing those externalities.

One of the issues is, how do you implement 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 anti-competitive harms against pro-competitive 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 Brook Group on predatory pricing or Trinco and the link line where judges are saying in a sense that as long as there is an efficiency gain, as long as there's an efficiency basis for the defendant's conduct, for the dominant firm's conduct, then it's OK under Section 2. There's not going to be an effort after that to balance anti-competitive harm against the efficiency basis. And the Ninth Circuit said explicitly 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 pretty sensible allocation. You know, the predatory pricing area cases are the sort of biased balancing approach, largely on the basis of error cost arguments that the court has accepted. And 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-- the 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, administrable as well. We tried it before. And the other tests threw up a great deal of confusion for courts. And so I think that's where we stand on that one.

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

ERIC CITRON: Well, I mean, let me say one thing first, just as an initial point. It is odd that antitrust law is the one area of the law where we insist that the rule be perfectly administrability and have only one overriding policy goal. Nobody thinks like US 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 1 or type 2 error, for example. Or we be less concerned about false positives if this is a market where there's 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 we think there's 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 ones 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 what we're going to have in some non-consumer welfare focused standard. That's not what we have right now. We have single minded, obsessive focus on consumer welfare. And that tends to make antitrust enforcement in the courts very myopic.

ALDEN ABBOTT: OK, regarding single-- 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?

DENNIS CARLETON: Well, I think antitrust is designed to promote the process of competition. Period. It's not designed to solve important problems that 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 an investment an important problem? Isn't an unemployment an important problem. These guys are going to merge and to achieve efficiencies maybe some people lose their jobs. You start worrying about those problems, you will distort antitrust decisions and lead to a lot of inefficiencies, it seems to me.

It's like I have a hammer. It's a 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 and put the screw in the wall. It's just not going to go 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 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. It 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 a very profitable firms to sponsor legislation that says, listen, it's not so bad, we're within this, you had 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 do exam proposed legislation for its economic effects 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 diffuse the goal of antitrust and competition policy, the more likely you open our society up to distortionary policies that will serve private interests.

ALDEN ABBOTT: Eleanor, you have some additional thoughts?

ELEANOR 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 we 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 very relevant to the market working. So, one, bigness. Number two, distribution. And number three, equitable or equitable access to markets. And I'm working within the market paradigm. And I'm not making any argument to say that antitrust ought to be compromised by whatever 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, in 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, in 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 that 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.

Number two, distribution. There's a very interesting question about distribution of wealth. Joe has said before and he said now, antitrust ought to be for the people. So we had something as in American Express, where one way of looking at it is if you go for the holding, this below, that this restraint that allows American Express to prevent merchants from giving a discount if they go with a cheaper card or telling them anything about a cheaper card, if you go with that is anti-competitive and presumptively ought to be enjoined, you also are going with the notion that discounts are good for people. They're especially good for poor people and the masses of people.

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

Equal access. I want to just say a word about Cal Dental, a dentist rule that wouldn't let dentists advertise I 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-- it's a restraint. Hard to see that it's not a serious anti-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 need 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.

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

About 35 years ago, Judge and Professor Frank Easterbrook, author of "Limits of Antitrust," an article which called first structural rules and presumptions that 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 John Baker in Antitrust Law Journal. That's a critique of decision theory. Keith, your thoughts on decision theory and antitrust.

KEITH 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 theoretic arguments for quite some time. So in a sense, it would be, I think, not very productive to try to avoid or sort of push down or get away from these error cost arguments. They will find their way back into the doctrine, because court 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, 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 costs of these mistakes. The Brook 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 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 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 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 costs framework maybe changed slightly in some way. But for 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 longtime since the Trenton Potteries decision. It's now sort of brought out into the surface and judges are openly embracing the thought process and talking about it openly.

JOSEPH STIGLITZ: Can I make a comment?

ALDEN ABBOTT: Yes, please, Professor Stiglitz.

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

First is when stare decisis effects are important, then making a mistake that you allow market power to increase, you don't prosecute, will not be self-corrected. We know that the 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 shouldn't go through, the costs of that, you know, given 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 in scale and scope, then that error will be self-corrected in the future, because some other firm is going to-- or 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, at least in a lot of the decisions, has not balanced that correctly, not take into account the importance of stare decisis effects.

The second point I make is that the magnitude of those costs depend on partly our legal framework. If we had a framework where we could go back and revisit these issues, if we could say, OK, 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 that gave us more authority to go back if they say, oh, don't worry about these anti-competitive 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 go back and revisit it, I'd 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.

ERIC CITRON: Can I just followup?

ALDEN ABBOTT: Sure, Eric.

ERIC 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 try to get the rule right or wrong. Of course we 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 is under regulating, it's OK. Markets correct themselves. If we overregulate, that's the only source of durable market distortion.

If that premise is true, great. But 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 on the ground for lawyers, what you see is just decision creep. What this critique from Judge Easterbrook makes the most sense in is per se that might be way overbroad, per se rule against vertical price restraint or something like that. But at American Express oral argument, you have Judge 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 under enforcement for its own sake, I can't possibly agree with that.

ALDEN ABBOTT: OK. Interesting. So we're hearing different views on presumptions. 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.

DENNIS CARLETON: 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, you have a lack of affect flexibility to adapt the rule to the particular situation. You know, maybe that's OK for consumer protection. Maybe you want to have a different thinking about that. But at least for antitrust, it 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 maybe even Congress views certain practices. And that is related to the last question. It's all about 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 that if you have the empirical evidence in an industry there's never been entry. So why do you 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-- the US, people in the United States who are 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 US has gone from something like 5% of the workforce to 30% of the workforce. They create 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 the price go up? That's important. But would 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 improve my decision making?

Everybody has 20/20 hindsight. You can't say that was a good merger. That's 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 been done? 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 systematic way. That's something the FTC and DOJ could do or to try to do. When I was at the Department of Justice, I made the 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 correct. And that's a very important function of the FTC and DOJ to engage in.

ALDEN ABBOTT: Thanks. Keith, do you have thoughts on competition rules?

KEITH HYLTON: Sure, it's an old problem. The question is, should an agency engage in rulemaking or adjudication? And 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 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 some of the points that Dennis touched on. That they involved intricate, tough problems. You need to hear from people with real stakes on those issues. 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.

So my point is that the NLRB process actually produced better law as a result of adjudication then 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 a rule-making process or a civil 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'll get it from lobbyists, who will try to distort the decision makers' 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 common law versus civil law. Plenty of important benefits come out of the common law process. In fact, 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 that rulemaking can never be good. Sometimes there's an important, big change, institutional change. And that's 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 very that scope depending on the interests on both sides of the question, which can vary a great deal depending on the nature the distribution, nature of the parties.

ALDEN ABBOTT: Joe Stiglitz, you have thoughts on possible competition rules?

JOSEPH STIGLITZ: Well, first, I think the way 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 administrability. 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 if you misrepresent what you do, if you are engage in fraud, that should be illegal.

I mean, you can say, subtlety. Well, there might be some circumstances in which freedom of speech is important. I have the right to lie as part of my freedom of speech. Well, OK, but as a business practice you should outlaw. And you could come back and make some defense. But it's rebuttable presumption.

And 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 under those cases or you engage in particular kinds of restraints that we can write down, the presumption will be very strongly that that's anti-competitive.

And 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 have monopsony power have passed on to consumers, you will 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're 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.

ALDEN ABBOTT: Interesting. Now, let's go now from some of the 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 five to four that lower court erred in failing to apply a two-sided market definition in evaluating so-called anti-steering agreements between American Express and merchants accepting its credit card. The anti-steering agreements basically prevented the merchants from revealing that other cards might offer certain advantages to consumers.

Now, this raises several questions. 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 have sort of an equilibrator of a platform, say, a publisher or a restaurant owner whose dealing with two different sets of transactors. Newspapers, 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 it was a novelty in judicial decisions, as pointed out in a dissent by Justice Breyer.

Will this holding you have a significant effect in the high tech platform and other markets? In particular concern raised about durable monopolies, say, by the big digital platforms, the Googles, the Facebooks, and so forth. This sort of decision, does it make it harder to apply antitrust scrutiny to the activities of the big platforms? And if so, is that problematic? And let me ask Eric.

ERIC CITRON: Yeah, I mean, I don't want to say too much about Amex lest my head explode here. But I will say, you have a situation where you have enforcement agencies active during both political parties occupation of the administration and a huge number of the most respected antitrust scholars and economists saying that the rule that Amex is seeking is incorrect. And then you get the Court saying the rule that Amex is seeking is correct. And that's the 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 of 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 to relentlessly criticized the Supreme Court for making this mistake. And that's OK. 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's really up to thinkers in this room and at the agencies to say, look, there are sometimes two-sided market definition might make sense, like in the predatory pricing realm. But when you're asking questions about restrictive 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 there in one particular case.

ALDEN ABBOTT: Dennis, do you agree?

DENNIS CARLETON: Yes. I should add I've worked against the credit card companies for many years, both here in the United States and a little bit 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. Their no steering rule was basically that when a customer is checking out tell them, hey, why don't you use this card? It's also the case that American Express 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 promotion. We know how to handle it. I'll let you read my paper with Winter. But we show that there's no basis for that. You 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 two-sided markets-- so that three-part test and who has the burden-

- that just strikes me as based on faulty economic logic. The Court is very unclear how it would define a two-sided market. 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 is going to say, well, who gets who. I'm a two-sided market.

ERIC CITRON: I'm a six-sided market.

DENNIS CARLETON: Right. 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 worried.

And I should add it's part of-- these no steering rules appear in many different guises. Joe mentioned this. And I agree with them. And I've opposed rules in these other guises, where 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've got to examine those rules.

I'm not saying they're always bad. But they raise difficult problems competition. And those are going to be increasingly important as platforms continue to grow because of the internet.

ERIC CITRON: I just want to say because it's really close I think to the mission of what we're talking about here-- I mean, Dennis and I don't agree about a lot of things. But the agreement that you have there, it's an opportunity to say, OK, what can we do about it when the Court makes a mistake. We're talking about the Agency's rulemaking authority. They don't have to let courts that aren't necessarily experts in the realm be the last word.

You can publish papers, 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.

ALDEN ABBOTT: Joe Stiglitz.

JOSEPH 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.

ALDEN ABBOTT: OK, 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 follow-on questions.

And certainly, as you know, there's been a lot of discussion about so-called standard essential patents and refusals to license, in restrictive licensing terms, a standard essential patent holders, 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.

DENNIS CARLETON: OK, so there are a lot of complicated issues or 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 over granting patents, creating patents that have a high probability of being invalid, you're just creating problems. And in this 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 sign 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 they 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 standard setting institutions, should play a greater role in trying to resolve those issues. I would suggest that standard setting organizations pay much more attention-- I they don't like to get involved because they are 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 are the responsible institution, to allow collaborative effort, you should be also responsible for the consequences of that collaborative effort. And 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 through a standard setting organization itself would be a superior resolution. There's no easy answer to this question.

ALDEN ABBOTT: Eric, anything to add on that point?

ERIC 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 regulation or a security regulation or something like that.

The test should be pretty relentless. Was this necessary to secure 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.

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

KEITH 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, their platform, the desktop startup wants to create some 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 sell it 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. I don't know what antitrust can do about it at this stage. And it seems to me it's empirical issue whether this is having a net negative social welfare impact. I'd like to see what the studies show. And people are doing empirical work on this question right now.

But 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 courts say we're going to put an arbitration process over this, because the problem with the kill zones is that the platform owner always has the threat, the credible threat, to say, well, if you don't sell out to us for $1, we'll just do it ourselves, and you'll never see any money out of that venture. So maybe there's some way we could structure the arrangements 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 as an example of one of the specific problems generated by platform markets and mergers and 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.

ALDEN ABBOTT: Interesting. Let me-- yes, please.

ELEANOR FOX: I think here is a problem in this area. And I agree with everything that Keith said. And just 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.

DENNIS CARLETON: Can I can just say one thing?

ALDEN ABBOTT: Yes. Dennis.

DENNIS CARLETON: I kind of agree 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 may 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 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 merge, that sounds right. But let's suppose we both use data sets and have different tastes, 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 that those two data sets are going to be 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.

ALDEN ABBOTT: Right. I have a number of audience question--

KEITH HYLTON: Bill wants to--

ALDEN ABBOTT: Go ahead, yes, please.

JOSEPH STIGLITZ: Yes, and that's one area, by the way, where the FTC's consumer protection and privacy concerns interact with antitrust. And those combinations of data can be a very big barrier to entry for other firms. It is a tool for extracting consumer surplus and producer surplus, so having negative social value engaged in distribution. And it's related to I said you have to make judgments about what the future effects on the data had on the 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 a judgment-- that the anti-competitive effects, effects on undermining 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 a breathtaking idea. And somebody will invent it maybe a week later. But the world will survive.

ALDEN ABBOTT: OK, we've talked about big data briefly. What about the implications of data protection and privacy? Typically, viewed as consumer protection problems. Since it's consumer protection looks at those issues, should antitrust also try to assess them in particular cases. Who would care to comment? Say, Eric?

ERIC CITRON: Yeah, when it comes to big data privacy and other 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. 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 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 it's inability to reach others.

ALDEN ABBOTT: Eleanor, any thoughts?

ELEANOR 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.

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 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 real market obstruction? Does it lessen innovation?

But second, I would be up 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?

DENNIS CARLETON: Could I just add?

ALDEN ABBOTT: Dennis, yes.

DENNIS CARLETON: There are really I think two additional points I'd 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 in the-- I'm not a lawyer, but I have a general understanding-- that I have a property right in my health care data. Do I have property right in my search engine data? Well, I think we should ask questions, what does an individual or a firm have in terms of property rights in its data? That's one question.

Second, we've only talked, or I only talked about sort of mergers, when your merging data sets. That's not the only antitrust concern you want to be concerned about. If I'm a dominant firm and 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 all than any data. That strikes me as something we should be concerned about. So 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.

KEITH HYLTON: Alden, both Joe and I--

ALDEN ABBOTT: Yes.

KEITH HYLTON: Maybe I'll yield to Joe first.

JOSEPH STIGLITZ: Oh, 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 by combining property-- the value of the data to the individual might be very little. But when you combine it with other data, it becomes very valuable. That was the first point.

The second point is this misuse of data that's generated in another way is a problem that is confronted in other areas. For instance, in Goldman Sachs as 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 real 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 incentives for other people to gather data information, because the value of their information was being appropriated.

Finally, let me just mention that Eleanor mentioned 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. So it's a restriction that has a 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're just allowing people to exploit you a little bit more.

KEITH HYLTON: So I just want to say one thing, Alden, and I'll be quite, that the property rights issue-- 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 example, Bing, I guess, has a bidding system already that offer rewards or something if people search on Bing. But I don't think anyone 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 property 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've got to worry about the property rights issue and what can be done about it for now.

ALDEN ABBOTT: I have a few audience questions. Let me very quickly ask an important issue. Joe Stiglitz had discussed briefly vertical mergers and a 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?

DENNIS CARLETON: Well, I won't say anything about vertical mergers because of the AT&T case that I was involved in. It's 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 restraint is what I call vertical most favored nation 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 raise subtle or maybe not so subtle issues that hadn't been well thought through.

And a very simple example, so let's suppose Eric and I are two manufacturers. And here's the retailer. And we have a most favored nation clause, a clause just like we said.

If I lower my price, Alden can't lower the retail price. If I lower my wholesale price, then he can't lower the retail price. Therefore, I'm 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 stores is going to be higher than Eric's and then 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.

ALDEN ABBOTT: Anyone else?

ERIC 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 that 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. Everyone thought Netflix was going to be a distribution company. 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. And that's something we should worry a lot harder about, both in the vertical space and in the conglomerate space.

ALDEN ABBOTT: Eleanor?

ELEANOR FOX: Yes, I think we do need clarification on vertical mergers and vertical agreements. And I agree with both 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 of vertical guidelines that I'm not predicting that they will happen in the end. But I think it's a very important exercise to go through and see if agreement can be reached.

ERIC CITRON: It can't hurt to try.

ELEANOR FOX: Yeah, it 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.

ALDEN ABBOTT: OK. Keith, before we turn to our audience questions, do you have anything to add on verticals?

KEITH HYLTON: No. I mean not much. AT&T, Time Warner, I mean, that seems to be largely a question about evidence and a case based on evidence and proof. And the litigants seem to have a lot of opportunities to make arguments about anti-competitive effects, which in the arguments were put out there. And 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 the antitrust can do anything about the evidence and proofs 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 from what I can see AT&T, Time-Warner involved, I don't see an antitrust issues here.

ELEANOR FOX: So could I just add one more? Is there 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've raised this in your initial presentation. Maybe we should rethink that.

JOSEPH STIGLITZ: Yeah, and particularly when you have ogopolistic 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 ogopolistic 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 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.

ALDEN ABBOTT: OK, we're running short. It's about seven more minutes. Here a few audience questions.

We haven't talked about antitrust immunity, 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 of which contributes to maintaining market power? So the issue of anti-comparative activities. Lobbying, questions of petitioning antitrust exception doctrine, but in general, are these issues worthy of additional thought and analysis? Professor Fox.

ELEANOR 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.

In my view, there's 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.

So the second is the other place which I mentioned earlier, it fit into an existing competition problem. It wasn't it's own problem of just saying lobbying is anti-competitive. And that is where I mentioned it in Holcim Lafarge that I thought it was really in a merger that looked so anti-competitive 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 keep imports coming in.

ERIC 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 have to be aware of that the way that power can be used at government to get what you want.

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

ELEANOR FOX: Yes.

DENNIS CARLETON: And I understand that may have political risks and may even be legal. I don't know if the DOJ and FTC can do that. But if they can't, they should be able to.

JOSEPH STIGLITZ: Just let me add, the analytics of what are the effects of various regulations should be within your remand and the way in which a whole set of rules and regulations affect bargaining power in ogopolistic markets, in markets with imperfect competition, would be an important contribution to try to bring that out.

ALDEN ABBOTT: OK, let me ask one more question. To what extent if any-- and this is probably primarily for Professor Fox, but and others should chime in-- to what extent, if any, should US policy makers 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?

ELEANOR 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 the EU, it's a little complicated because the 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 a lot that we can pick up by watching the EU, but with some skepticism, but 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.

ALDEN ABBOTT: OK, we've got three minutes left. Let's have very quickly closing thoughts. Let me go back to Professor Stiglitz.

JOSEPH STIGLITZ: 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, 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 where do we begin to start saying we have to redefine the law?

ALDEN ABBOTT: OK, Keith Hylton.

KEITH 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 that the data privacy issue, the kill zone problem that we've 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 a solution.

As far as the rulemaking adjudication divide, or going to Congress, my inclination is for 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 making as a general matter. Wary of Congress too, because the Sherman Act, if you read the statute, it's pretty sparse. Section 1 and Section 2 are just two paragraphs.

And could you imagine Congress producing a statute like that today? No way. It would go to 2,000 pages. And it would have exceptions in there for this company and for that company.

There's 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 largely judges to figure out how to do it. And they've done it case by case. And they've generated very useful rules out of that approach.

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

ALDEN ABBOTT: We have technically run out of time. But if anybody wants to do anything very quickly.

ELEANOR FOX: Oh, could I add quickly?

ALDEN ABBOTT: Eleanor.

ELEANOR FOX: Because 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 book. And it was 10 years ago, How the Chicago School Overshot the Mark, the Effect on Conservative Economic Analysis on US Antitrust. It's not Republican, Democrat. It's a large span of really important scholars. Everybody should read it again.

And this was 10 years ago. The Chicago School philosophy keeps even way more overshooting the mark, as shown in American Express. And what we've got to do is we need a new center of gravity. And I want to invoke 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 about Pitofsky. CalDen, Legion American Express , Breyer tries to get back to the mark with clear rules that respect the forces of competition more than we respect the forces of competition today.

And read the Second Circuit opinion Trinco, which was the law. And in my view was correct before the Supreme Court in Trinco, because the Supreme Court in Trinco changed a huge amount. And the Federal Trade Commission with Section 5, in my view, can take up the slack.

ERIC 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.

And 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 a 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.

DENNIS CARLETON: 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, a few 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've 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.

ALDEN ABBOTT: Thank you. That ends our panel. We have a 10 minute break. Be back in 10 minutes sharp. That would be 10 minutes after 12:00. Thanks.

[MUSIC PLAYING]