Public Roundtable on Anticompetitive Regulation

Thursday, May 31, 2018

TRANSCRIPT PART TWO

ROBERT POTTER: If we could ask everybody to just stand so we can get started again.

ROGER ALFORD: Great. Thanks very much, everyone, for those great opening remarks. And that leads us nicely into some of the specific sessions. We're going to try to do this, because of time, collapse the two sessions into one, and just focus on some of the highlights that were discussed in the opening remarks. And just sort of tee up further discussion with respect to those.

So, I want to talk about antitrust advocacy on the issue of deregulation. And if you will concede the point that there should be some advocacy with respect to deregulation, it might be very formal, it might be informal, or it might be part of the interagency process, but if you were to suggest that the Antitrust Division should be engaged in advocacy with respect to deregulation, what specific regulation, federal or state, do you think harms competition the most that we should be focusing on? And I just throw that open to everybody. Conceding Lina's point, though, that maybe we shouldn't be doing advocacy at all, but--

THOMAS ZYCH: If you'll permit me quickly to repeat is that we jump to sectoral regulation, or specific applications of regulation. I think it's well within the Division's purview, and something we would greatly support to remember that there are attacks on antitrust, itself. That is, there's efforts to explicitly displace competition policy and discipline with something else. And I think that is well within the sweet spot, and there should be almost no controversy whatsoever that that's something that the Division should be doing and it should enjoy support for. Whether it's the ancient immunities, whether it is when we do healthcare deregulation, and the ACA-- We want to look at McKiernan-Ferguson. There are ways in which there are places where competition has been displaced. Competition law has been displaced. And that's something the Division, I think, with its special expertise, along with the Commission and other agencies, I think ought to be weighing in pretty explicitly.

CHRISTOPHER YOO: I think that there's a roadmap for when antitrust advocacy should support deregulation in antitrust doctrine and the essential facilities doctrine. Antitrust law indicates that courts should mandate access to facilities and regulate prices only when entry is infeasible. The problem is that increasingly entry is infeasible, which suggests that we have outmoded regulation. The problem is there, if you then rate regulate down the incentives to enter, you'll never see the entry that would be possible. And so what you need is to have some form of regulation that takes the foot off the brakes once entry becomes feasible.

Unfortunately, the regulatory processes are dominated by interested parties. What we're starting to see is, for example in telecom, that we used to just mandate access to monopoly loop. And now people are competing, as Makan said very nicely, in quality. Consumers are not going to see benefits in price reductions; they're going to see it in higher bandwidth. And unless there's a return on investments in higher bandwidth, you're never going to see them.

I'm working on federal advisory committee that is studying utility poles, which is one of those networks that we thought we'd never additional invest in. In a wireless world, pole owners are having to invest in building taller poles and stronger poles to carry more wireless attachments.

And that's a fundamentally different world that the old regulation isn't positioned to take into account.

RICHARD BRUNELL: I think the biggest bang for the buck is taking the industries that have been deregulated and making sure that we have vigorous antitrust enforcement, and limiting the immunities in those industries, and demonstrating that deregulation can work. But as an adjunct to that, you need to have antitrust enforcement in those deregulated industries.

JOHN BERGMAYER: I'm not an expert on every area of regulation, so I can't say that this-

SPEAKER 1: Like everybody else.

JOHN BERGMAYER: But of the things I mentioned, I will just highlight, again, this basic tier buy-through rule, which seems arcane. And it's the rule that traditional cable companies can't offer a broadcast-free tier, which basically effectively makes full a la carte illegal. I think getting rid of that makes a lot of sense. Not just in terms of the fact that it might just give some cable operators the option to give people lower cost packages, which would be good, and more choice. But it also would incentivize the creation of even new categories of devices that can take cable channels and over-the-air channels, and present them in one unified interface. There's no reason to make that device now, because there's no market for it because of this regulatory intervention. And I think a rule like that, it seems very small, but I think that could have some pretty good effects in terms of an immediate and measurable impact on consumer welfare in terms of lower costs.

GEORGE SLOVER: I would say, in general, focus on areas where there is a proposal, so that you're not out roving and looking for things that you can stir up a recommendation on, but proposals to impose new regulations and proposals to scale back regulations, or to reform them, and to focus specifically on things that would implicate the Antitrust Division's enforcement mission, creating a situation where right now you would be able to bring an enforcement action against it because it's a restraint of trade, and the regulation would block your ability to do that, or complicate your ability to do that. Or that, on the other side, scaling it back would open that up.

I think that's a good use of Antitrust Division resources, whereas the broader sort of “we're going to help with the deregulatory effort” is not a good use of your resources, and muddies your brand, really, which I think is a very strong one, and has a lot of bipartisan support in Congress, and support in the community, which we are trying to continue to help build for you. And it's easier if you all stay in the stuff that you're good at.

SPEAKER 1: Just following up on that, I would recommend that if people know that things are a policy proposal that is being ripe for comment, I invite people to bring that to our attention so that we are aware of it.

ROGER ALFORD: Anyone else?

STEVEN SUGARMAN: I'd just add, and we talked about it a little bit earlier, with Makan and the post-acquisition consent orders. There's a second aspect to that, which is during your interactions around mergers and acquisitions, corporations often submit plans or justifications as to why it won't impact negatively consumer welfare. And they make commitments as to the fact that they won't be taking actions that are negative for consumer welfare. And oftentimes that results in no enforcement action. And oftentimes it's during the scope of an enforcement action, like we saw that you had some settlements just recently, where you try and define post-enforcement behavior.

But when they make these commitments that affect the public discourse, and even may have the Division not take action after the deal's approved, there needs to be a mechanism to evaluate whether those things they said in their legal filings, and their expert opinions, and as business plans are actually what happened. You often see even a disposition that's then replaced a couple years later with hiring or growth, that kind of overcomes that disposition. You see a lot of promises about how there won't be a price effect or quality effect, and that's great. But without post-acquisition monitoring and governance, our view would be that enforcement or oversight of that once would probably have a very impactful effect that holds corporations and participants to a standard of honesty and follow-through, generally.

ROGER ALFORD: Anybody else? Tom?

THOMAS ZYCH: If I could very quickly just take a little different point of view than George. I think there is something to not only look at *de novo* attempts at regulation, that there are old regulatory schemes that either were poorly thought out at the beginning, or time has made them completely obsolete. And I think the distribution restrictions are square in the middle of that. We can have whatever belief we want to why the motor vehicle dealer statutes were passed in the first place, and we can debate that. What we know now is the costs they impose. And as technology has caught up, whether or not it ever had a good justification, we're in a better position now to review those. And we can calculate the cost to consumers of the inability to have an efficient distribution network in a major purchase, a large purchase situation. So I think there is a role to step up in those instances, even when the regulatory regimes are old and in fact maybe archaic.

ROGER ALFORD: Can I ask a broader version of the same question, which is to say, are there certain categories of regulations, similar to among the three that you identified in your discussion, in which there's really not going to be a left-right split? There will be sort of uniform consensus that this is problematic.

I was struck when I attended the Chicago Booth conference a month ago, and Tim Wu, at Columbia, made the comment that there's no greater barrier to entry than a captured agency doing the bidding of an incumbent. And so, I thought that was a really interesting comment, and I actually tweaked it for a speech that I gave a couple weeks later in the international context. But I'm curious if that's an area where general conservative deregulatory types, and then generally persons on the other side, that are really concerned about corporate power and the rise of corporate power might find common ground?

SPEAKER 1: That's a-

RICHARD BRUNELL: Yes. I mean the *North Carolina Dental* decision articulates a view of suspicion of incumbents using regulation to feather their own nests, and I think that's a view that Cato shares with AAI. Which isn't to say that just because there's the incentive to feather their own nests, or an incumbent is advocating, that there aren't necessarily legitimate reasons for regulation, but it's certainly enough to raise your suspicions that this is not in the public interest.

CHRISTOPHER YOO: So, what's interesting is the *North Carolina* example reflects the suspicion that state regulation is more likely to be captured than federal regulation. In fact, the old breakup of AT&T reflected the same concern. But you see an interesting asymmetry when antitrust law is looking at federal instead of state regulation, which is because of the difference in the doctrines. Antitrust courts don't apply the same degree of scrutiny. And part of it is comity. You don't want the Division or a court saying that because there are federal agencies that are regulating badly, this agency needs to go do something.

The consensus in favor of deregulation may come apart a little bit depending on the question you're asking, Roger. I was thinking in terms of the network neutrality debate. Right now, the move the FCC has made is to shift responsibility for enforcement to antitrust. The general assumption a lot of people have is agencies that are specific to one industry are more likely to be captured just because the repeat play nature of the focus on the agency. Shifting enforcement responsibility to general antitrust enforcement would be less subject to that particular dynamic you're talking about.

There is a politics around network neutrality, where some people object to the decision to rely more an antitrust law. That has an aspect about it that's controversial. Some of it's about substantive antitrust law, which is a good debate to have. But I think some of it's purely on institutional grounds as well. I think there's a very good argument of shifting oversight of anticompetitive activities to general-purpose agencies. And I think that there is a good literature that says industry-specific agencies are more likely to be captured. But I know other people disagree

ROGER ALFORD: Anyone else?

THOMAS ZYCH: If you go- sorry to triple dip, but if you go very specific instances, and I'm an Ohioan, so I don't take this as an attack on Pennsylvania, but there are a series of regulatory regimes in Pennsylvania, having come from there. The milk pricing, right? The distribution of bitter and alcoholic beverages.

CHRISTOPHER YOO: Liquor licenses.

THOMAS ZYCH: Liquor licenses, and the whole range. And these may be small beer, pardon the pun, but there are specific instances in which it's hard to align when you understand where the capture really come from, at the state or local level, and bit by bit disassembling some of those restrictions. It's hard to think there's a political ideology that's in favor of people spending more for milk, as opposed to an industry interest in maintaining a price structure.

So I think, and again, Pennsylvania is by no means alone in this, but I think there are plenty of instances in which the ideological divide just disappears when you look at a hard analysis of what the effect is and who the few that are benefited.

ROGER ALFORD: Anyone else?

JOHN BERGMAYER: Okay, there is an ideology here, but it tends not to be a traditional left-right. It's just when forms of regulation are framed as being property rights, I think that sometimes there are some people who are just more likely to see challenges as somehow challenges to a government-created property right, itself, being an excessive regulation. So I would suggest that one area to look at is when forms of economic regulation are cloaked as property rights, for instance, patents. We just had a 7-2 Supreme Court case, the Oil States decision, where the argument was about whether when the patent office grants a patent mistakenly, a patent that does not meet the standards for patentability, a patent that should not exist, whether it should go away. The claim was, well it's a property right, and therefore you can't take it away from me. It has to go before an Article III judge. And the Supreme Court rejected that.

But to say that there's a particular kind of regulation, which is what patent amounts to, it's a government-created right that doesn't exist under natural law or anything, should get this extra special deference I think is very destructive in a number of areas, where the fact that the government is always already involved in the creation and structure of the rights in dispute. I just think that historically government offices and church offices were seen as forms of private property. The right to collect taxes was a form of private property that couldn't be stripped away. And this happened all the time.

So I think in a lot of intellectual property debates, the pro-market individual is seen as supporting patent rights because therefore you're supporting the free market. When in reality it's already an artificial right, so a government action to somehow limit or define the scope of how that right may be exercised and then limit it from abuse, does not really strike me as purely regulatory. Or rather, it is regulatory, but it's regulatory all around. There is no non-regulatory solution involving, for example, patent or copyright law.

And as Gail reminded me, taxi medallions are another example. Like maybe it's a good idea or a bad idea for a city to limit the number of taxi drivers that may operate within its borders. But framing it as a property right in creating these medallions which can then be bought and sold as commodities has been absolutely ruinous. Because now, with the advent of new forms of competition, you have people who invested their life savings and more into these taxi medallions which are now absolutely worthless. And that's an example where framing something as a property right was a terrible mistake. And making that point has nothing to do with whether or not there should be limits on entry into the market. It's just about the way that you do it.

ROGER ALFORD: On that point, that last point, I encourage you all to look at the OECD papers that are being published this week. There will be a whole series of discussions on the taxi industry and how the different countries around the world are addressing that question. So I think that's a great example. Anyone else? Yep.

CHRISTOPHER YOO: John and Lina make the point that because the government's involved, it's all regulation. I think that there's some truth to that, but I think it's a bit overdrawn. We probably should think about government involvement as a spectrum. There is no order of any kind without governmental, military protection, policing, and other services that the government provides. As such, we could call everything regulation. In fact, what we see is a varying level of commitments to markets. In some sectors, you have direct price regulation, which is the most extreme form of regulation and where private ordering has less province. In other places, you create property rights, but we now think of them as bundles of rights.

I wouldn't say that just because a system requires judicial enforcement of rights, contractual or property rights, that makes it inherently regulatory. I don't think that's helpful. What's more interesting is to talk about a range of possibilities, some of which are more regulatory and some of which are more conducive to facilitating private ordering, on the understanding that through government regulation, through zoning, and even land where we take it, we do nip and tuck at private activity even in areas predominantly governed by markets. But the fact that that nips and tucks occur doesn't make it inherently purely regulatory. It still leaves more room for private ordering and less room for regulation, and that's how we should think about it.

ROGER ALFORD: So there's a whole spectrum of different types of government activity with respect to an area. As a former contract professor, I always think of contracts simply as promoting efficiencies and choice by allowing people to have effective promises with one another. Right? But it's not really regulation. But it's an incredibly important role for the government to try to promote that in terms of a coordination function. Yeah. Yes, Richard.

RICHARD BRUNELL: Add one more gloss to that. Antitrust itself we talk about as supporting the free market. But others think of it as just another form of regulation, which it is. But the characterization can be important and contested.

JOHN BERGMAYER: One example here would be non-competes and employment agreements. He might say, well, that's purely private ordering. It's like, great, privately order it amongst yourselves and keep the courts out of it, which is what California does. It just says, we're not going to enforce this. And is the enforcement or non-enforcement of non-competes regulatory or deregulatory? Maybe it isn't a useful way of thinking about it. And I think the useful way of thinking about it is that non-competes are bad and should not be enforceable across the board. And I don't really care which is the regulatory side and which is not.

SPEAKER 1: Well, we're doing what we can in that regard with respect to no-poach. That's all I'll say.

RYAN BOURNE: I completely concur with what the professor, and what you, said about the spectrum of government involvement in markets. There also seems to sometimes be this misdiagnosis as well, that we're talking about regulation on the one hand, or no regulation or complete absence of regulation on the other. In fact, most consumers in markets desire and demand safe products, safe outcomes for themselves and their families. And there's lots of within-market institutions that have arisen historically in financial services, and through accreditation agencies, certification agencies. You see this across countries in areas like I've

described, like childcare, intermediate agencies, where childcare providers voluntarily sign up as a signal of their quality to consumers.

We see it with Uber, as well. You might regard Uber as being less regulated than the taxi industry, but within the app they have their own regulatory structures, including the ratings, including being able to see the license plate, face of your driver, name of your driver, being given his phone number. So, where I disagree with-- I think George mentioned in his opening comment that in the absence of certain regulations-- perhaps I'm mischaracterizing, but in the absence of certain regulations, firms wouldn't necessarily deliver safe products and things. But in a repeat market, when you're looking for repeat customers, provided that the consequences of absence of regulation are not catastrophic, we see lots of private firms and private industries providing within-market regulations that get to the outcomes that we'd like to see.

THOMAS ZYCH: Although just to quickly note it, the fact that the 51st person is saved does no comfort to the first 50 who perished by the unsafe metered lights. I think we have to be careful in calibrating how we judge the appropriate approach to actually looking at how markets function.

GAIL LEVINE: And I'll just echo the point that Ryan was making about questioning whether new entrants are regulated less or more than the existing company. So, to put an example to the hypothetical you were raising, in the State of Maryland about a year and a half ago, Uber was at risk of going dark and just withdrawing from the state because we were being asked to comply with an old form of verifying that our drivers were who they say they were.

There was a new digital way of doing the same thing. In fact, it would do it better with a lower risk of false positives and false negatives. But it wasn't exactly the same as the old regulatory way. The incumbents had already built systems to comply with the old. We hadn't. And in the end, the State of Maryland, I'm proud to say, came around to allowing us to comply with a safety-oriented regime, but through a new digital technology.

So it can happen but I wouldn't oversimplify by assuming that the new entrant is going to have to deal with regulations in a less burdensome manner than old industry. Old industry has built itself around those old regulations, and a new incumbent will bear the heavy load of complying with old regulations or urging regulatory reform to allow more efficient means of doing business.

ROGER ALFORD: Okay, let's go to another topic. I'm fascinated with the idea of regulation versus market forces in terms of the cost-benefit analysis—a lot of discussion about that in the opening comments. How do you do a cost-benefit analysis in the context of dynamic competition, though?

I'll give you two examples. Motorized vehicles have to stay on the roads; bicycles can go on bike paths. But there is this new emerging market of electronic bikes, which my wife owns and absolutely adores. Technically speaking, she's not supposed to go on the bike path. But it's clearly a bike, not a motorcycle. But the dynamic innovation would suggest that the regulation prohibits what she's doing, even though it's much closer to a bike.

Another example would be regulations requiring all restaurants to have bathrooms in them, and then the innovation of food trucks. Should every food truck have a bathroom attached to the end of the truck? Or should we allow dynamic competition to allow food trucks to provide their services even though there's not a bathroom attached to it? Those are the examples, very, very simple ones, of dynamic competition in doing these cost-benefit analyses. How do you do regulatory analysis in the context of dynamic competition?

CHRISTOPHER YOO: I think that there are certain problems that are never going away. Your bike example is a category problem, and we're always going to face that. I think that we can have flexible standards, and we can say laws would be written better, but words have their limits.

So I keep thinking about the example John gave about the desire to include over-the-top video in conventional cable regulation. This is something the former Chairman of the FCC, Tom Wheeler, wanted to do. The problem was that the statute was written for a different context, and the words don't fit well with that interpretation. And it's not because the agency trying to obstruct it. It's just an accident how the words fall, because no one really had the Internet in mind when Congress wrote those words. And so, I understand Wheeler was very sympathetic to the idea of interpreting the statute that way. He just couldn't get there as a matter of statutory interpretation. As a lawyer, I think he's right that he couldn't get there, and the statute needs reform. That problem of making old statutes fit with new technologies isn't going to go away.

What I thought you were going to say is a different one, which is that dynamic competition is often framed not as reallocations along the production possibility frontier; it's framed as investments in new technology that pushes out the production possibility frontier. Dealing with dynamic efficiency has been a thorn in the side of antitrust and economics generally. We don't have great models for this. This is the hardest problem for me. Category problems are difficult, but they're kind of always going to be there, and the problem of updating obsolete statutes is always going to be there.

The bigger problem I think we're going to have, in terms of regulation, is whether we are going to have regulation that allows us to invest in innovations where competition is not so much about price and quantity but about out-investing each other. You see this in the R&D side. And I think about the old Gilbert and Sunshine proposal for innovation markets. That was huge problems in terms of product, supply-side and demand-side substitution. But a much bigger problem lying at the bottom of innovation markets is the old fight between Schumpeter and Arrow. We do not know the relationship between scale and innovation. And until we can say something about that empirically, we don't know whether blocking scale is going to help or hurt consumers. And the inability to say which would be better for consumers on a dynamic basis is kind of crippling, because we don't really know which way to jump.

I'm actually working on an article right now looking at this in the data context. Scale matters, but there must be diminishing returns. Until we know something more intelligent than the two forces that I just mentioned, it's going to be very hard to craft policy to understand how to make that work. That's why we need better empirics, and the problem is going to be intractable until we get them. But this problem is potentially solvable with better data.

SPEAKER 1: But in the absence of that data, isn't the default mechanism that the benefits are going to be undervalued and the costs are going to be overvalued?

CHRISTOPHER YOO: I would say yes, and that's why the traditional rule of reason puts the burden of proof on the person challenging the practice. So there is a line that Angela Merkel sometimes uses. But it's not hers, but she sometimes uses it. She asks, what's the difference in innovation in the US and the EU? This is in the context where everyone's wondering where is the Google of Europe. In Europe, everything that's not permitted is forbidden. In the US, everything that's not forbidden is permitted. That puts the thumb on the scale on the side of innovation. It's built on a confidence that if a problem comes up, we have antitrust to actually deal with the practices and deal them in appropriate ways. But we should allow people who have some great new idea that cracks the categories to try.

There is a precautionary principle that if the adverse consequences catastrophic or irreversible, maybe you can make a justification for blocking ambiguous practices. Most of the stuff we're talking about doesn't fit that description.

ROGER ALFORD: Others?

SPEAKER 11: Can I ask a follow-up question? Taking that principle as given, I understand how it might apply in, let's say merchant enforcement or something like that. But when we were talking about analysis of a regulation, what about in a simple case, where a regulation simply blocks entry and protects an incumbent? Are you willing to make some kinds of gross characterizations about effects that might have on innovation? It seems to really block [INAUDIBLE] of pressures that would otherwise force an innovative [INAUDIBLE]

CHRISTOPHER YOO: I, personally, would come very close to saying those kinds of things should be illegal. The best data-based example I know is when municipalities block overbuilding by cable systems. They gave cable exclusive franchises. Potential entrants wanted to overbuild in direct competition with the incumbent, but the law stopped them.

So my reaction is that empirical studies of where this has happened have shown that a price war between two firms is brilliant for consumers. It doesn't get any better. What may be happening is that the new entrant has made a bad decision. Their shareholders are going to lose a lot of money. But antitrust is not here to save shareholders from bad decisions. That's not a policy issue. And the incumbent is going to say that they're going to lose money as well. That's not the problem for enforcement officials either. The flip side is that if entry was a good proposition, and someone was trying to go in, the cost of blocking entry is that you just lost entry in a competitive situation in industries where costs are dropping and that used to be uncompetitive, but now is potentially competitive. You're going to lose that.

So my reaction is that if some company's foolish enough to enter a true natural monopoly and they're pissing away all their money, a re the losses of the wasted duplicative fixed costs so large that they're going to overcome the static, short-run welfare benefits from price competition? The evidence suggests no. The best thing that a consumer could have is a price war, and particularly between two firms with large fixed-cost investments. And so that is an example of an entry

restriction I think was just really bad for consumers. I can't say that I've studied everything, but I have a hard time thinking of an entry restriction that's actually good for consumers.

ROGER ALFORD: So I want to make sure we have time for others. Regulation is necessary because of market failure. That's the premise. So explain how you deal with that in the context of dynamic competition. Obviously, if there's market failure, then even dynamic competition didn't work, right? So comments from others?

THOMAS ZYCH: I think we have to be careful. Stating it that way, you have to define market failure so broadly that it almost lacks any meaning. Again if you don't think the type-- If you're talking about distribution market regulation, absolutely. There's a way classically, economically, thinking about a market failure. When you have unclean air, maybe it's because the market has failed to produce clean air. Because the market's never going to do that. That's a different issue. So, I think finding where the market failure analysis most clearly applies, I think, is a good gating question.

ROGER ALFORD: Right. That's a good example, too.

STEVEN SUGARMAN: I'd just weigh in briefly about a topic that I don't think we've discussed yet, but is relevant, which is governance. Oftentimes market failures and dynamic competition is a function of corporate governance, or governance that doesn't include, or reflect, the consumer population and include voices of all stakeholders.

The US Treasury and the CFPB, one thing that they've agreed on over the last few years is they've looked at some programs that require community representatives to be involved in governance of organizations with the idea that people won't be predatory against themselves. People who reflect the communities they serve, who reflect the consumers, don't need to be regulated as strongly because they have a governance structure that can be trusted.

So a lot of these market failures are that there's a lack of trust between regulators enforcement and companies. And oftentimes that comes down to an earned lack of trust, because you look at corporate boards, you look at diversity, you look at representation of at-risk consumers that they serve, you look at any structures they have that actually has an authentic, real voice of the consumer as part of this that when there's an acquisition, or when there's a competitive decision, there's someone there to speak for the consumer. When that's absent in governance, which it often is, it's very hard, if not impossible, to trust a lack of regulations and dynamic competition situations, because the company can go off the rails the day after the regulation.

And so the question that I'd turn back is, how do you resolve these antitrust matters with a lack of strong governance and dynamic competition? Because you're putting a point in time without knowing what happens the next day. And so often what's missing from the conversation, even these settlements, is a control mechanism where these companies—they get the scale and this potential power that's trying to be used for good—aren't asked to include the voices of everyone in their governance. And they don't have a governance process that can be trusted.

ROGER ALFORD: I'm curious if people think that market failure and dynamic competition is too small of a box to do the analysis. Is it possible that we should be saying, well the market will never capture questions about environmental harm. Right? And therefore, you need regulation because whatever kind of competition you have, it's just never going to focus on protecting water, or protecting air, or things like that. Or is that captured in the market cost-benefit analysis?

RYAN BOURNE: Environmental issues have always been one of the preeminent market failures, and something falling within that framework through the externality discussion. One interesting thing, just kind of rolling back on some of the other discussion, is regulators tend to define a market in terms of the nature of the producers. So we hear about the milk market, for example, or the childcare market, which really just means the formal childcare market.

I tend to think about these issues from the consumer market. So, if you think about newspapers, for example, yes, there might be, from a production side, a market in newspapers. But really, the consumer market is reading news. Right? And you can do that on internet sites, and the options available to consumers is much broader than the market which might be regulated by a regulator. Same as in the childcare sector. I think it's foolish to think about the childcare sector in terms of formal infant center care when the alternative can quite often be a family member looking after a child, child going to daycare, child being looked after by the parent, themselves.

So I think the market failure framework is useful. But I think in lots of cases regulators think about it, think about the market itself, in too narrow a sense. And that leads to quite often overregulation of the formal sector, which raises prices to consumers, who then opt for more of the informal sector, which in some cases can be lower quality. So, even though you improve the quality in one subsector of the market, actually the overall quality of the outcomes for the consumers, themselves, can fall.

GEORGE SLOVER: I would say that there are different kinds of market failures, which you kind of alluded to. And that the appropriate focus for antitrust and competition authorities is the failure of a market to deliver competition the way competition should work. And do you need some construct to substitute for delivering those benefits? And the other kinds, like environmental, health, safety, those things are really in a different category. And that's what the whole premise of my testimony is. Let's not wander off into turning antitrust into promotion of removing all regulations.

JOHN BERGMAYER: One thing that could certainly be helpful is identifying-- If you see an anticompetitive regulation out there, to not just say, well this is anticompetitive and therefore bad. But also think through, okay, what is it trying to do? What is it trying to correct?

For example, I agree, I'm not a big fan of the exclusive franchise model, but it was designed to make sure that a cable provider served the entire franchise area, even those areas that would not be economic by itself. So it's like okay, here's the deal, you're going to get to serve these densely populated, richer areas, and the cost of that is you also have to serve these other areas that might not otherwise be economic. And we're going to grant you a monopoly so that people can't come in and cream skim just the rich areas off of you. And that was the bargain. You might think, oh,

it didn't actually work out. It's not the best way to do that. What is the best way to do that? You can question the premise. Maybe rural areas shouldn't have cable service, because that's the cost of living in a rural area. Or you think maybe we could have a government-constructed network in areas that otherwise are not economically viable.

But I think some of the difficulty comes about if you just challenge regulation without suggesting an alternative. And I think this just happened now, with the Uber issue in the Ninth Circuit, where what was challenged has been seen as a mechanism for drivers to raise the amount of money that they get in the face of what is portrayed as a monopsonistic labor market. And then the Department or the FTC come in with their very abstract legal theory about state action doctrine, why that's not allowed. And then the drivers think, okay, what am I supposed to do? Like, is the answer that I'm just getting paid what I deserve now? And therefore, suck it up? Or is it, okay, there are also other problems that can be addressed? I think focusing on the anticompetitive effect while ignoring what the intended benefit was I think can leave some people with a bitter taste in their mouth.

RYAN BOURNE: Roger, if I may- I'm sorry.

ROGER ALFORD: [INAUDIBLE] Go, Lina.

LINA KHAN: I just meant to say, we've been talking a lot about the consumer costs, but antitrust is also supposed to care about monopsony issues, which can involve effects on producers. And one reason I brought up the GIPSA rules is because that was very concretely looking at the buyer power issues between processor, packers, and farmers and ranchers. And the GIPSA rules are one instance where it's possible that - there are different aspects of the rule, but one aspect would have prohibited mandatory arbitration clauses to enable farmers and ranchers to try and bring private suits when they felt that there was anticompetitive conduct. It's possible that allowing that to go through would then require the processor and packers to change their practices in ways that would actually raise prices for consumers.

But I think it would be misguided to say, well, it's clear how antitrust should come out on that kind of regulation. Because there are ways in which rectifying anticompetitive issues at the buyer side could lead to higher consumer prices yet still align with the antitrust mission.

CHRISTOPHER YOO: Roger, I'm entirely sympathetic to the way you framed it, personally, which is, I would define regulation largely in terms of market failure. As a historical matter, common carriage has never been limited to that. There is no market power filter to common carriage in economic regulation. And in fact, in the old railroad days, for long haul between Chicago and San Francisco, there were three routes. It was competitive. We still regulated it as a common carrier.

I would suggest there's another way to think about this, which is, I'm citing my new colleague, Herb Hovenkamp. He says that regulation is a political decision to withdraw something from the province of competition. The politics may or may not have been motivated by market failure, but regardless, once the regulations come in, they said, we're not going to allow markets to govern this area of the economy. We're going to do building codes. Or we're going to do something like

that. When you think of regulation that way, the recourse is political. And that's an alternative way to conceive of it that actually fits better descriptively with the history of common carriage, which is sort of the heartland of traditional price regulation.

People have tried for years, going back to Hale in the early 20th century, to fit market power and natural monopoly onto common carriage. It's largely failed. Because innkeepers and taxis, it just doesn't work. And historically, there seems to be something else motivating it.

ROGER ALFORD: We have time for one more person, and then we'll do closing comments. Anyone else? Great. Okay, so we started with opening comments here. Can we start with closing comments here? Do you want to start, Mary? Or you can just say this was great.

MARY BLATCH: Yeah, this was great. Thank you.

ROGER ALFORD: Everyone, could say the same thing and we could end quickly.

RYAN BOURNE: Just, on the behalf of Cato Institute, thank you for inviting us. I think this is a vitally important discussion. I would just urge- I guess this is where all sides kind of agree. We should be thinking this through from first principles, trying to look at, well what was the purpose of the regulation within some framework? I prefer the market failure framework, others may prefer other frameworks. What are we trying to achieve? Does it achieve the objective? If there are net costs to consumers and the consumer cost is high relative to those benefits, then thinking about how we can use your power, your advocacy, to go in and improve the situation.

LINA KHAN: I would echo the thanks for inviting the Open Markets Institute. I would just say that I think, given what's happening in our political economy, I think that the Antitrust Division, specifically, has one of the most important roles to be playing right now, and has a fantastic set of tools that, given the enforcement actions that we're seeing, are really being put to use. And I would just hope to see continued focus on enforcement. I think these kinds of issues are important, but there are a lot of other agencies also in the game. And the FTC also has more regulatory-like powers which I think mean that focusing on enforcement right now could make a lot of sense.

ROGER ALFORD: Great. Thanks.

RICHARD BRUNELL: Thanks again for having us. And I think it's been a worthwhile discussion. I won't reiterate our suggestions about where to focus. But I just wanted to note another area of consensus related to your question about market failure. I think there would be a general consensus that most market failures for which there is a regulatory justification don't justify eliminating competition as the solution to the market failure. If we want to reduce the use of cigarettes, we have externalities. We don't say, well okay, we'll let you collude to raise prices.

So I think it's an example of the way in which antitrust stays within its lane and gains. And although at the dinner table, your spouse might say, well, why not? Higher prices are good. We don't want people to smoke. But the answer is, well, antitrust is designed to keep markets open, and if there's a regulatory problem it should be solved by regulators, or tax, or whatever.

By the same token, in advocacy, I think the main frame should be that the Division is an antitrust enforcer and has expertise in industries based on its enforcement, and can lend its support to regulatory agencies to make sure that the regulations do make sense and to promote competition.

CHRISTOPHER YOO: Thank you for doing this. And I think your focus on finding consensus is the right one. I think that it does somewhat exist on broad ground. I think Thomas brought the perfect example. Those of us who live in Pennsylvania, until recently, could not buy beer in a grocery store. And you could only buy it in case quantities from beer distributors. That's not a politics of left and right. That's just bad for consumers. And if you go to most restaurants, they're still BYOB because liquor licenses can't be had. It's just a startling type of regulation that a broad consensus opposes. And I think that that consensus you're looking for does exist.

THOMAS ZYCH: I'd also add that forcing people to buy beer in mass quantities is not promoting health.

[LAUGHTER]

But two comments, one procedural, the other more substantive. To procedural, I think on behalf of the Section, I can say that we applaud this bringing us all together and having the open dialogue. And the Division, in our experience, has always been tremendously open to these dialogues. And so the point is that we don't just do this once, that it's a terrific idea and that we appreciate the chance to give you input.

The other is, we've talked a great deal about regulatory humility. Former Acting Chairwoman Ohlhausen made that point well, repeatedly. But that can be taken too far. We can recognize what a lane is, but at the same time the Division ought to be applauded, encouraged to be very aggressive, and very enthusiastic within that lane. And so the Section would support that, would continue to support that. Thank you.

STEVEN SUGARMAN: Well the National Diversity Coalition's been blessed under this leadership at the Antitrust Division that you've welcomed ongoing and regular communications about consumer impact. And so, we want to thank you. And I think the core of our message today is that that's something that the Division should be proud of, and that all stakeholders that come to the Division should understand that the Antitrust Division values consumer input, and that they are a key stakeholder in the antitrust process. So the confusion is eliminated. And so that we can get to a better result no matter what the circumstance.

GAIL LEVINE: On behalf of Uber and the Chamber, thank you very much for hosting this roundtable series. I think this is invaluable, not just so we can provide our input, but so we can be hearing from you about the kind of issues that you're thinking hard about. The only closing comment I might offer is don't forget your international leadership role. Right? Other nations are respected fellow sovereigns, and they're going to do what works for their populations. But if there's a way to, with deference and respect, offer them the learnings that you've gained in the American context about the importance of competition, the importance of innovation, and the role of regulation when there's market failure, and the risk of overregulation and its costs. If you are able to bring that message overseas, I think that will be very helpful for the global economy.

ROGER ALFORD: Thank you.

JOHN BERGMAYER: Thank you for having Public Knowledge not just here today, but at the other roundtables. I guess my concluding thought would be I think sometimes the line between health and safety, economic regulation, property rights, and antitrust can be unclear. There are obvious examples that everyone would agree to, but there are areas where it's a bit more murky.

I would say, without saying anything substantive, in the privacy debate today, some people want a more European behavioral regulation model. Others proposed more transparency requirements, and other people are proposing the creation of a new kind of intellectual property rights of some kind in personal data. And you can tackle the same problem through a variety of different ways, and I think when you're looking at an area where people are seriously considering new forms of regulation, you can see these different framings being played out in real time.

ROGER ALFORD: George.

GEORGE SLOVER: So I'll also say thank you very much for holding this, and for inviting us to participate in it. I'll just repeat quickly the point that I've made before, that the Antitrust Division, the antitrust community, have done a tremendous job over the years in helping to shape regulation in a procompetitive way, to look for alternatives that can be recommended to redirect regulatory efforts in a way that preserves the benefits of competition where that's possible.

My organization is engaged on a wide variety of fronts now, trying to, some would say fight, some would say contain reasonably, what we perceive as an overly aggressive deregulatory effort. We hope that it ends up landing in the right place. We do think there are reforms that can be beneficial all the way around. Those issues are important to discuss. But we hope they do not become antitrust issues. I think there's enough for the Antitrust Division and antitrust community to do without taking a broader focus on how we free up business to do things without having to deal with regulation.

ROGER ALFORD: Great. Let me just have a quick closing comment myself as well. So I want to make sure that I give credit where credit is due in terms of all of the incredible work of the staff at the DOJ. Bob Potter, Douglas Rathbun, Daniel Haar, Rene Augustine, Bill Rinner, they did a huge amount of work. But there's also a lot of other people behind them that also did a lot of work about these roundtables, and I want to give them credit where it's due.

I also want to thank all of you for the time and effort that you put. Your papers are really, really helpful. This is the last of our third roundtable, but I'm sure we'll be doing continued dialogues. I also want to really emphasize that one of the great side benefits of these events have been developing relationships with the different groups and really sort of broadening our perspectives from the different organizations. And that was quite deliberate, that we really wanted a broad range of perspectives.

We encourage you to keep that dialogue open with us. Invite me to coffee, I will say yes. You know Makan may not say yes, but I'll say yes. No, I'm just kidding. But we really do want to

have more dialogue, more discussion, more engagement. If you read Makan's speeches, he talks a lot about civil and robust discussion and debate. We really do mean that.

Invite us to speak at your events. On June 12, Makan is speaking at the Open Markets Institute as a keynote. And then a week later, he's speaking as a keynote at the Federalist Society. So you know he really is serious about wanting to be engaged and active. And so, thank you all, and we look forward to further discussions offline. Thanks.

[APPLAUSE]