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The Chair's Showcase: Can Antitrust Repair the World? Should it?*

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MODERATOR

Jonathan I. Gleklen
Arnold & Porter Kaye Scholer LLP, Washington, DC

PARTICIPANTS

Michael D. Hausfeld
Hausfeld LLP, Washington, DC

Jonathan M. Jacobson
Wilson Sonsini Goodrich & Rosati PC, New York, NY

Barry C. Lynn
Open Markets Institute, Washington, DC

Leslie C. Overton
Axinn Veltrop & Harkrider LLP, Washington, DC

Zephyr Teachout
Fordham Law School, New York, NY

Hon. Diane P. Wood
U.S. Circuit Judge, U.S. Court of Appeals for the Seventh Circuit, Chicago, IL

JONATHAN GLEKLEN: Hi. I'm Jon Gleklen. I have the honor and privilege of serving as the Chair of the Antitrust Law Section this year.

I am just thrilled beyond expression with the panel that we have today. Our topic is "Can Antitrust Repair the World? Should it?"

For the non-Jews in the audience, there is a concept called Tikkun Olam: To Repair the World. It's from the Mishnah from 1800 years ago.

Louis Brandeis, who was the first Jewish Justice but was not actually very religious, probably learned about the concept of Tikkun Olam from his mother. There's a great article in a journal called *The Green Bag: An Entertaining Journal of Law*, probably most well known for offering bobbleheads of the Supreme Court Justices, about Louis Brandeis's mother and the concept of Tikkun Olam that I commend to you, which you can find by Googling—or whatever; we're not supposed to call it "Googling."

Our panelists today are the brightest lights in this field, and I really could not be more pleased to have this group of incredible minds and incredible thinkers to share their views on this topic.

* Edited for publication.

I am going to start out by introducing our panel and then I'm largely going to stay out of the way. I've got eight pages of questions to tee this off, but I suspect I will not get past the first one. These folks are not shrinking violets; they all have a lot to say on this topic. So let me start off with some introductions.

Michael Hausfeld probably needs no introduction. He is an icon of the plaintiffs' bar, recognized for his work not just in antitrust cases but also human rights and discrimination cases. He is the founder of the firm that bears his name and has led work on cases like *In re Blue Cross Blue Shield Antitrust Litigation*, *O'Bannon v. NCAA*, *In re LIBOR-Based Financial Instruments Antitrust Litigation*, and *In re Vitamin C Antitrust Litigation.* He has taught at Georgetown and George Washington. He has been an active member of our Antitrust Section, leading our Civil Redress Committee among other roles. He has been honored for his work in civil rights and human rights cases by the Simon Wiesenthal Center and B'nai Brith, and I am delighted to say that he will be receiving a Lifetime Achievement Award from the Section of Antitrust Law at our Section Dinner tonight.

Next to Michael—to his left in only one way—is Jon Jacobson, a former Chair of the Antitrust Section. Jon is a Senior Counsel in the New York office of Wilson Sonsini Goodrich & Rosati. In addition to his firm and bar work, Jon was appointed by Congress to serve as a member of the Antitrust Modernization Commission. His high-profile matters include the *Vitamin C* case in the Supreme Court, representing American Express in *United States v. Visa*, and matters for Google, Netflix, Coca-Cola, and others.

To the left of Jon Jacobson—in actually almost all ways—is Barry Lynn. Barry is the Executive Director of the Open Markets Institute, a leading voice advocating for a new approach to antitrust enforcement. Barry's books—*End of the Line: The Rise and Coming Fall of the Global Corporation; Cornered: The New Monopoly Capitalism and the Economics of Destruction;* and *Liberty from All Masters: The New American Autocracy vs. the Will of the People*—and his many articles develop the argument that monopoly power threatens not just consumers but democracy, individual liberty, security, and prosperity. It's fair to say that he is a leader of the Neo-Brandeisian movement that is ascendent in the White House, the DOJ, and the FTC.

To my left is Leslie Overton. Leslie is a Partner in the Washington Office of Axinn. She previously served as a Deputy Assistant Attorney General for Civil Enforcement in the Antitrust Division of the Obama Administration and as a counsel to the Assistant Attorney General in the Bush Administration. Leslie has been an active member of our Antitrust Section working on publications, programs, our Task Force on the Future of Competition Law Standards, and as Co-Chair of our new Task Force on Antitrust, Consumer Protection, and Diverse Consumers.

Next to Leslie is Zephyr Teachout. Zephyr is a Senior Counsel for Economic Justice at the New York Attorney General's Office on leave from Fordham Law School. Professor Teachout is a leading voice connecting democracy, advocacy, and antimonopoly advocacy. She is globally recognized as an anti-corruption expert and has been cited in state courts and the United States Supreme Court. Her two recent books are *Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United* and *Break 'Em Up: Recovering Our Freedom from Big Ag, Big Tech, and Big Money.* Of particular relevance to this panel, and an article I would commend to you, is a recent article called "Antitrust Law, Freedom, and Human Development," which appeared in *Fordham Law Review* in 2020. Zephyr is a former National Director of the Sunlight Foundation, and in addition to her advocacy and scholarship has been a candidate for office.

The last member of our panel also needs no introduction. Judge Diane Wood has served on the U.S. Court of Appeals for the Seventh Circuit since 1995, serving as the court's Chief Judge from 2013–2020. She joined the Seventh Circuit after serving as the Deputy Assistant Attorney General for International, Policy, and Appellate Matters at the DOJ Antitrust Division and earlier as a Special Assistant to the Assistant Attorney General at DOJ. She has taught antitrust at the University of Chicago, including to me, and is an editor of a leading antitrust casebook. Judge Wood is the recipient of many awards, including the John Sherman Award from the Antitrust Division of DOJ and, as of lunch yesterday, our Section's own Lifetime Achievement Award.

How is our panel organized? As I said, I am largely going to get out of the way, but I do want to let each of our panelists start off by making brief introductory remarks.

Barry, why don't we start with you?

BARRY LYNN: Thank you Jonathan. It's truly an honor to be on this panel.

I'd like to start with a quote from Dean Acheson. He was a Washington lawyer, who clerked for Justice Brandeis, and whose best friend was a man named Felix Frankfurter. Acheson also served as Secretary of State under Harry Truman. The quote is from his book *There at the Creation*, about America's effort to rebuild the international system after the Second World War.

"Lawyers, who are habituated to having their main choices made for them by the necessities of their clients, when, as in government . . . have wide latitude in a choice of policy" . . . "are often at a loss."

My question to all of you today: What if you were—actually—in charge? What if you could set broad policy? On trade? Manufacturing? Distribution of wealth? Energy systems? The international political system? Speech and democracy? Would you welcome that opportunity? I suspect most would. If so, would you know what tools to use?

What policies to use? What levers? I suspect most of you might not.

That's because—you—the people in this room—the antitrust academy—have in fact had a fantastically large influence over all these policies. And more.

For 40 years now you have used your profession to advocate for a particular approach to competition policy. A particular approach to the concentration and use of power within society.

And the result has been the shattering of much of what we all hold dearest. The security of our nation. Our democracy. Our individual liberties. The stability of our climate and the natural world. Our children's future.

This is not because you represent bad people, some of the time. That's your job. Everyone deserves representation. Even Mr. Zuckerberg.

You did so by importing bad economics into the systems the American people made to deliver justice, to regulate power, to create opportunity, to engineer complex systems.

For two centuries, from 1776 to 1981, we in America used antimonopoly law and policy, to protect our liberties and democracy from concentrated power and control. To shape a good society and good communities. To build our families, and a sense of individual responsibility. To innovate. We used antimonopoly to free ourselves to debate, to see, to think coherently—together—about the great challenges of our time.

Then 40 years ago, this community replaced that approach to political economics with an ideology theoretically designed to maximize "productive efficiency" to increase the "welfare" of the "consumer." Those are Robert Bork's words. This community then buttressed that ideology with a claim that antitrust law is a form of "science." Again Bork's words.

And that the job of the economist is to "Test the propositions of the law" so that "judges might … use efficiency to guide decision." Those were Richard Posner's words - and they are worth repeating.

That the job of the economist is to "Test the propositions of the law" so that "judges might be led to use efficiency to guide decision."

Wow. Since before the days of Abraham, human beings have striven to ensure that law delivers justice. And 40 years ago this community embraced the idea that law is a form of science, and the goal is to promote efficiency.

Today we face many grave, even terrifying crises. We see choked and broken industrial systems. And dependency on autocratic regimes for drugs, fertilizers, electronics, and semiconductors. We see our democracy under siege by a legion of citizens deluded by the corporations they rely on for basic communications. We see radical inequality of wealth and power. And our news media made servile by Google and Facebook. And an entire political party run by and for the mongers of carbon.

This is all—to a great degree—your doing. It is your doing because you conspired to use a false science, an idiot science, to blind the law to dangerous concentrations of power. To blind the citizenry to the fist of monopoly. Which is the inevitable result of any effort to have "judges use efficiency to guide decision."

Today's world doesn't even work for those of you who might actually want autocracy because by importing this false science you also blinded our society to the concentrations of capacity, hence of physical risks—the engineering risks—that so threaten our lives today.

So what can we do? I'll give you two ideas.

First, read President Biden's Executive Order on Competition. Listen to his speech. What you will hear is Joe Biden calling out Bork, and saying that Bork's experiment failed. That's right, the president of the United States called out an antitrust academic and said the Consumer Welfare approach to antitrust had failed.

This is the biggest revolution in political economic thinking since Bork. The most important in right direction since FDR. You might not want to get on the wrong side of it.

Second, heed Dean Acheson. Much as was true in the days after the World War, we are now also in a time of a new creation. Google, Facebook, Amazon, Trump, Putin, Xi, have shattered the frameworks of law and democracy built by Truman and Eisenhower.

And every one of you has something the world really needs now. This is the antimonopoly community's understanding of law and history, which is essential if we are to rebuild what the monopolists and autocrats have shattered.

So recognize your responsibility. This is your world. Own it. Help to fix it.

JONATHAN GLEKLEN: Thanks, Barry.

Jon?

JONATHAN JACOBSON: I'm not going to agree with everything that Barry said. There may be a syllable or two that's okay, but the rest of it not so much. [Laughter]

I also need to start with a disclaimer. I represent Google and a number of other tech companies, so take what I say with an appropriate carload of salt.

About thirty years ago, in the *Kodak* case, the Supreme Court entered the post-Chicago rule of law and fundamentally rejected the hardcore Chicago School proposition.

Since then we've had an antitrust policy based on the consumer welfare standard. And what is that standard? It inquires in each case whether the actual or expected effect of the conduct or transaction is to retard innovation, reduce quality, raise or suppress prices or wages, reduce output, or otherwise harm consumers.

It has held up well for those thirty years, and the U.S. economy has flourished as a result. That's what assures political freedom; without a strong economy, political freedom is very difficult to achieve.

But, based on what we've heard from Barry and what we are going to hear from some of the other copanelists and

Congress, that thirty-year consensus is gone. Why? There are three main reasons that I hear.

First is that aggregate concentration in the U.S. economy has increased. But, as many analyses have shown—and I'm aware of no contrary authority—there is no evidence of increased concentration in the aggregate in relevant markets, which is what we should care about. Think of all the new businesses that exist today because of eBay or Google or Amazon or Instagram.

A second reason is that several tech firms have grown really large—basically "big is bad." That certainly is true—that they've grown big, not that it's bad—but so what? Economic studies are quite uniform in finding that large size does not mean poor economic performance.

A third reason is income inequality. That's a problem, but can antitrust fix income inequality? Of course not. It would be a fourth- or fifth-level effect at the most, and truly breaking up large firms would likely exacerbate income inequality as so many would become unemployed. There is a simple and direct fix for income equality—it's called the tax laws.

The calls to outlaw so-called "self-preferencing"—which we'll talk about today—are to me especially ridiculous. What is a company to do, favor the products of its competitors? Must Microsoft tell its Xbox users that they can use PlayStation or Nintendo instead, that they're just as good? Is Visa required to tell merchants that they must accept the Discover card too? Should Amazon be directing its consumers to Walmart?

Firms promote their own products and often say that rival products stink. Is that to be prohibited now for large firms? Antitrust is designed to incentivize competition, but this is the opposite.

The current tech hysteria is also pointless and harmful. The idea that the tech firms lack competition is simply not true, although the competition now may look very different in many respects than what we are used to. Amazon, Google, and Facebook look nothing like each other but in fact are each other's most significant rivals.

Amazon has over a 50 percent share of product searches. Those are the most lucrative searches, they generate the most advertising revenue; so the largest search engine in the world for the most lucrative searches is not Google, it's Amazon. Amazon may not look like Google, but for every product search done on Amazon instead of Google, Google loses out on the way it makes money, through search ads.

Let me wrap up by saying this. Much of what we are hearing today is truly the protection of inefficient competitors rather than competition. But the opposite rule, adopted in *Brunswick* in 1977, is one of the landmarks of sound antitrust law. We abandon it at our peril.

JONATHAN GLEKLEN: Thanks, Jon.

Leslie?

LESLIE OVERTON: Thank you, Jon. Everyone, I'm just very pleased to be on this distinguished panel, so thank you to Jon and the ABA Antitrust Section.

This is an excellent topic and it reflects a strength of antitrust—that so many scholars, legislators, practitioners, and enforcers care about and want to weigh in regarding what the antitrust laws can and should do.

I'm speaking for myself today, not for my firm or any client.

I believe antitrust is powerful and critical for the successful functioning of our economy. I do not believe that it can save the world, however, nor do I think that it should try.

Antitrust enforcers can work collaboratively with other policymakers in government to benefit society. The antitrust agencies can contribute to important societal goals through competition-based antitrust enforcement, but I think that antitrust enforcement will be most successful when it is based on competition rather than noncompetition factors.

I think it is really important for us to hear each other out in this debate, not just on this panel but in the world more broadly, even if we disagree or we expect to disagree with certain other views. It's also important for there to be processes and fora for a range of views to be heard. So again it's great to have the diversity that we have on this panel and that we have seen throughout this conference.

I do believe that the consumer welfare standard when interpreted and applied broadly can benefit consumers, workers, business customers, and the economy. And I am one who believes that the standard for the most part is administrable, though I do recognize concerns expressed in critiques that the standard is only seen by some as only protecting consumers or only focused on price and that it is interpreted very narrowly by some judges. But it is in my view broad enough to encompass not just short-term price effects but also output, quality, and innovation.

Again, I favor antitrust focusing on competition issues—I believe that's what antitrust agencies are best equipped to do—but I still think that there are important broader societal benefits with respect to other policy goals that flow from antitrust focusing on competition issues, as I'm sure we will discuss during this panel.

Thank you.

JONATHAN GLEKLEN: Thanks, Leslie.

Michael?

MICHAEL HAUSFELD: Jonathan has basically posed a quintessential question with regard to antitrust policy—not just as to what antitrust law is designed to encompass, but what it should encompass.

In looking at what it should encompass, retroactively basing the law's interpretation on the way the world was is not appropriate to judging what should antitrust law consider today, in today's world, and in tomorrow's world, because we don't live in a static world. The dynamics of business have changed. The dynamics of the way we live have changed.

I am going to take a neutral position and talk about what should antitrust policy be in terms of how we want it to

encompass, as was just described, harms beyond what is generally characterized as consumer welfare.

For me antitrust law starts with business and is about business and is about the conduct of business. If you look at the conduct of business under Section 1, that takes us to Section 2, and that is what does that conduct lead to. That conduct can lead to concentration, and concentration can lead to dependence.

In the 1970s there was a book called *America Inc.: Who Owns and Operates the United States.* That is a connection that sometimes we don't make with antitrust law. What is owned by business can really control beyond what business itself is engaged in. It controls the operations far greater than the landscape of that business alone.

That concentration, as we can see in today's day, may lead to dependence—whether they by tipping points, acquisitions, or mergers—upon a small number of entities in the business world that really control a larger portion of what they do beyond just the service that they provide.

The combination of the concentration plus the dependence brings about the acquisition of power. Whether it be autocracies in government or autocracies in capitalism, power tends to want to continue to acquire more power.

The combination of the conduct and the acquisition or the concentration can lead to effects, and those effects, as you will hear this morning, will have links and connections to other aspects of the way we live more than just what we buy and how we service.

We have grown up now in an economy that we feel that we're getting services for zero. I grew up at a time when literally I learned back then and still believe today that there is no such thing as a free lunch. We've got to move the economic thought from getting something for nothing—allegedly—is really not costing us something and having implications for us as we go through our lives.

These effects need to be analyzed in terms of the power being exercised, whether we visibly or consciously observe it or not; and what we need to do is determine whether under the antitrust laws there should be a change, an adjustment, a rethinking, as to what harms are now caused by conduct and concentration and dependence.

This is not to say that I have the answer for that, but I do believe this clearly is the time—in today's economy, in today's world—that we need to think about whether or not our antitrust laws are aptly and appropriately designed to repair the world where repair is necessary.

Thank you.

JONATHAN GLEKLEN: Thank you, Michael.

Judge Wood?

DIANE WOOD: First, of course, like all others, I want to thank you very much for including me in this very interesting debate.

The more books that you read that have come out recently, the more you realize that everything seems to be on the table for antitrust in a way that has not been the case during all of the time I've been involved with it.

Let me begin with our question: Can antitrust repair the world? Well, at some level, of course not. Good human rights laws are not going to repair the world, and the World Health Organization isn't repairing the world either.

I interpret that question to mean: Should antitrust law—usually called "competition law" in other countries—play a greater role in achieving maybe not just sound economic growth but some set of other social goals?

I would begin by reminding all of us that even though we've been discussing "consumer welfare" thus far, even that term has been contested from time to time. It might mean, very literally, more money in the pockets of final consumers of products or services. It might mean some form of economic equilibrium, under which you can draw a graph and show that marginal cost and marginal revenue are being equated in some competitive market. It might mean a lot of things.

In some countries the argument is made that consumer welfare is the wrong approach; you should look at total welfare and you shouldn't really care where the dollars end up, whether in the pocket of the seller or in the pocket of the buyer. I've never actually subscribed to that school of thought, and our law has always been a little schizophrenic about that because we've said that the goal is consumer welfare, but we actually measure monopoly profits and measures of damages in cartel cases by looking at the transfer from the consumers to the monopolists. So that's just an aside.

But if you look at virtually any antitrust casebook, if you look at literature in the area, you will find that antitrust law has actually always been about two things. It has been about the so-called consumer welfare: are consumers being forced to pay prices that are too high or getting less than the benefits from innovation that they should get? That's part one. Think of Sherman Act Section 1; think of Article 101 of the European Treaty.

Part two is that antitrust law has always been about exclusionary practices. That's Section 2 or Article 102. It has been about firms with power in the market taking steps to exclude or gobble up or otherwise disable their rivals so that in the end consumers do not have the kind of choice that they would like to have.

I think there has been a false comparison when people say, "Well, our antitrust law is supposed to be about the protection of what was called 'small dealers and worthy men' back at the time." That is far too simplistic. I would like to introduce just one correction of a phrase that you have probably heard or perhaps quoted many times. Remember that in the 1950s the Supreme Court said, "Antitrust laws are for the protection of competition, not competitors." It said that in *Brown Shoe*, which came to a result that would not probably have come about after the mid-1970s. But

the Court picked that phrase up again in the *Brunswick v. Pueblo Bowl-O-Mat* case in 1977 and repeated it, and the Justices have repeated it since then.

I would say so far so good. But that's incomplete. There is no competition if there are no competitors. You can't set it up as an either/or. You have to make sure that there is vigorous competition in markets, provided by vigorous competitors, before you are going to get the benefits that the antitrust laws are supposed to produce. That's my first point.

My second comment is this: If we are not going to use antitrust to ensure the survival of those competitors, then what else are we going to do; what are we expecting from antitrust litigation? As somebody who has been sitting on the court now for longer than I can even imagine, I think litigation is helpful, but people who are starting a case need to understand what their theory of the case is; and, most importantly, they need to understand what remedy they are asking the court to order.

I remember an oral argument—this had nothing to do with antitrust; it had to do with Asian carp fish, an invasive species, that were (and maybe still are) threatening to get into the Great Lakes.

I asked the lawyer, "What do you want us to do? Do you want us to shut off all of the access points from the Mississippi River Basin into the Great Lakes?"

He said, "Oh, no, not that much, because of course there would be flooding events and other things."

I said, "What's the point of this if you don't want us to do that because they are all going to swim in at the first flood, won't they?"

The bottom line is this lawyer had no idea what remedy was being requested. This is a big issue in any case—certainly an antitrust action. What do you want, in the end? Do you want to require compulsory licensing of a patent; do you want to require some sort of open architecture if there is a monopolist; do you want to require just a payment of damages of some sort; do you want to stop a merger? What is it that you want, and is it something the court can do? That's my second point.

Another point that concerns me—and I'm actually glad to see this debate now—really does date from Robert Bork's incredibly influential book, *The Antitrust Paradox: A Policy at War With Itself.* He argued that if you looked at the legislative history of the Sherman Act in the years leading up to 1890, you would discover that the enacting Congress was exclusively concerned with high prices for consumers, reduced output, that kind of consumer welfare.

Frankly, that's just not true. It's not sustainable. Congress passed a messier statute than that. I know that every person in this room will be shocked by the idea that Congress does not always have just one coherent line in statutes, but I'm here to tell you that it doesn't. Resolving inconsistencies has been left to the courts. Everybody waves their hands ultimately and says, "Oh, well the courts will sort that out."

What we have wound up with, if you think of the *Chicago Board of Trade* case, is a very expansive list of unweighted factors that we're supposed to take into account when we are assessing the competitive impact of practices.

Maybe we could take into account whether bridges should be safer. Maybe we should take into account that if you allow a merger between two companies so that opioid production becomes cheaper, maybe we say, "We are going to stop that, not because there's anything economically wrong with it, but because opioids are a lethal plague in our society."

We haven't done that, and the usual answer is the one that Jonathan gave: "We have other laws. We have tax laws, we have health laws, we have other things." Even that may not be fully satisfactory. Certainly other countries look at a variety of factors.

But you need to be careful what you wish for because if you want just a giant, unweighted, multifactor test, you are reducing legal certainty for the people who must conform their actions to the antitrust laws, which is to say practically every business in the country.

Let me conclude with just a few thoughts about ways that you might at the same time reflect the broader purpose of antitrust and do something that is actually manageable for courts. I'm not necessarily advocating any of these things. Obviously, I'm a sitting judge. Whatever comes along, I will dutifully apply.

One could imagine, as happened when the Clayton Act was passed in 1914, an effort to articulate more precisely what kinds of practices are forbidden for firms to agree about; what kinds of practices are forbidden for single firms; what's the market power threshold that you are going to use. Maybe we've just been using the wrong market power threshold in our merger analysis and in our Section 1 concerted action analysis; and if we tightened the screws on that a little bit maybe we would come closer to the antitrust regime that would permit those competitors to survive. So the FTC talks about perhaps making rules. Maybe they'll do that. Maybe we'll see what happens.

You could play with the idea of per se rules, which has almost entirely disappeared from the scene; and maybe the list was too long; but maybe the per se idea was too strong. Maybe they should be tie-breakers. Maybe they should be presumptions. Maybe they should again get triggered at a certain market power level and not below that.

There are actually legally concrete things that can be done if you think that the pendulum has swung too far and has allowed our economy to become too concentrated, has deprived consumers of the kinds of choices that they should have, and that has also made it difficult to maintain the vibrant infrastructure of rivals in the market that helps our country grow.

Thank you.

JONATHAN GLEKLEN: Thank you, Judge Wood.

Professor Teachout?

ZEPHYR TEACHOUT: Thank you so much. What an extraordinary panel. What a wonderful event to be at. It is my first conference in years.

I am currently working at the New York Attorney General's Office, and I want to be crystal clear that what I am about to say are my views and not the views of the New York AG.

I'm going to talk about power and freedom. I've got to say that first it's also a delight to be here because it's sociologically a really interesting professional association.

If you go to a crypto conference, people talk about crypto and they say, "But really this is about freedom." You go an energy conference, same thing. At a watch repairers' conference, they're like, "Yeah you look nice, you're on time to get home, but really timeliness is about democracy." [Laughter]

You come to this conference and people are like, "Freedom and democracy, the most central issues of our day? No, it's the watch repairers. It's not us." [Laughter]

But we are in globally and domestically a moment of great democratic crisis. I've got to tell you that antimonopoly tools are some of the most important tools for addressing the crisis of power and freedom.

This week Amazon had leaked documents showing that they are considering an internal chat function. The chat function is supposed to have positive vibes. It would ban certain words, like "restroom," "plantation," "slave," and "freedom."

I've got to tell you I don't think it is credible to claim that market structure is irrelevant to questions of freedom, speech, and citizenship. I don't think it is credible to say that concentrations of private power collected in limited liability companies with unlimited life is not directly relevant to questions of freedom and democracy.

And we understood this for millennia. Antitrust did not begin in the late 19th century. Antimonopoly was an essential part of the spirit of the 1770s, of the Abolitionist movement, of the corporate charter debates of the 1830s. These are very, very old and so fundamental ideas that market structure and corporate concentration directly relate to freedom and dignity and human flourishing. But it's a very strange view that we would not use these central tools to recognize that this body of law has a central democratic purpose.

When I hear the responses, there are basically three kinds of responses I hear to "It isn't me," "It isn't us."

The first form of resistance, I think, comes from an open recognition that concentrations of private power is a problem for democracy and freedom, "but don't worry because you can use campaign finance laws to solve that."

I come from a career of studying campaign finance laws and I will tell you that if you think campaign finance laws are going to solve problems of dependency and political corruption, you've got another think coming from you—and I mean even in the fantasy campaign finance law system where you overturn a series of cases. Campaign finance laws are not designed to deal with the central problems of power but the particular last mile, the campaign contribution.

Campaign finance laws, for those of you who are still skeptical, clearly are not an answer to a company town. You can't have a company town and say, "Yeah, but you can only give $2,600 and we don't have a democracy problem."

The second form of response I hear is basically a very thin vision of democracy: "As long as you have the right to vote and things are cheap, you have a democracy. I've got to tell you when you talk to workers facing non-competes or businesses afraid of large platforms, scared of using their political voice to speak, that a thin vision of democracy that doesn't actually take seriously what dependency and fear in the political world does is not a vision of democracy that recognizes the kind of human flourishing we should be aiming for.

The third kind of response I hear—actually, frankly, this is the response I hear most commonly here, so I want to be very precise about it, and I think it comes in good faith because people come as practitioners—which is that there is a tendency to conflate a debate about purposes with a debate about factors. If you are asking what is the purpose of a law, you must mean "therefore we should incorporate that purpose into a factor."

Speaking only for myself, I would actually favor a move towards a more structural approach, a more per se approach, precisely because I see democracy and freedom as a core purpose of antitrust laws; as opposed to then asking judges to have the endless laundry list, the purpose being freedom says, "Do it in a bright-line way."

And by the way, that's what we do when we do it well in campaign finance. We don't ask judges, and should not, to say, "Was that particular contribution corrupting?" We say, "You just can't give more than $2,600."

So I just ask you to in this discussion not to conflate purposes and factors and move back from your current practice and ask, as Michael did, "What could and should antimonopoly laws and structures do?" I think Michael—not to speak for you—was suggesting implicitly "especially in an era of Big Data where concentrations of certain kinds of power may be even more insidious because of the depths of the soul into which surveillance can spy, what should and could a set of rules do to support human rights laws, campaign finance laws, voting rights laws, antidiscrimination laws, in enabling human freedom and human flourishing?"

Thank you.

JONATHAN GLEKLEN: Thank you, everyone.

Let me start with the equivalent of the philosophical question of "What is the good life?" This is why I think we may not get past the first question.

What is the goal of antitrust? Should antitrust have noneconomic goals; or is it really better to think of antitrust as achieving those noneconomic goals as the positive

ripple effects of achieving goals that are really fundamentally economic?

Barry, do you want to kick us off?

BARRY LYNN: Sure.

Actually, I just wrote down a quote which I think will help answer that. It's from a fellow named Senator Sherman and it was something he said in his speech defending the bill that now bears his name.

What Senator Sherman said is: "It is the right of every man to work, labor, and produce in any lawful vocation and to transport his production on equal terms and conditions and under like circumstances. This is industrial liberty and lies at the foundation of the equality of all rights and privileges."

That's the law you guys are playing with. The purpose of the law—the good life—in the American context, which we can see in Senator Sherman's statement but we can also see it in the Declaration, "equality"; we can see it in the Constitution, which is "the breaking of all power."

The good life is that everybody is independent. It says this bluntly, and it's a radical thing. If you go back and read the documents of early American history, they are radical documents—and I'm talking about the first 200 years.

The good life is the idea that every single person's voice matters; every single person's dreams matter; every single person what they want to dream, they have a right to bring that dream to the best of their extent to the world and share it with their fellows.

So the good life was that all of us are in charge together, that all of us get to say our piece, that all of us get to do what we want to—up to the point where we are infringing on someone else's liberty. That's the American good life—and it has been a good life.

JONATHAN GLEKLEN: Jon, you seem like you want to say something.

JONATHAN JACOBSON: I don't entirely agree with that. That may shock you. [Laughter]

The import of what some of my copanelists are saying is that it's okay if the economy suffers a little bit to achieve these noneconomic goals. But antitrust is fundamentally an economic statute. Its ability to achieve noneconomic and political goals is only indirect; at best, it can be a fifth- or sixth- order effect.

From 1890 through the 1970s we really had no objective standard for antitrust law, and the agencies were largely able to bring cases based on their own perceptions of what to do. Given the absence of any standard, they actually did a pretty good job, notwithstanding some outliers like *Schwinn* and *Pabst.*

In the wake of Bork's *Antitrust Paradox*, we saw a push for a total welfare standard that Judge Wood referred to, distinct from consumer welfare because it treated gains to producers as the same as gains to consumers. There are terrible problems with the total welfare standard, but the lack of any objective standard is worse. It allows the agencies to make things up as they go along, a concern that many have expressed with the current policies of the Federal Trade Commission. The agency's actual cases historically have been sound, but the current rhetoric is terrifying, and no one knows what to expect going forward—and, bizarrely, that seems to be the goal.

We need to reach an objective standard for antitrust. In my view it should be an economically based standard; but, either way, we need some objective standard so that people are not making it up as they go along.

LESLIE OVERTON: Can I jump in now?

JONATHAN GLEKLEN: Of course.

LESLIE OVERTON: I personally believe that antitrust should be focused on the economic goals of protecting and promoting competition; but, as we've talked about, a competition goal can still advance other societal goals. For example, focusing on competition in healthcare, which is an area I care a lot about, can contribute to lower-cost coverage and higher-quality care, advancing the societal goal of a healthcare system that works better for society more broadly. On the other hand, I don't think that health policy should drive antitrust enforcement independent of competition issues.

Judge Wood had her example. I'm going to give my own example. I'm not someone who is of the view that antitrust enforcement is somehow inappropriate as a matter of policy with respect to the cigarette industry. Even if it's the case that fewer people might smoke or might smoke less if cigarettes were more expensive and there could arguably be a health benefit to society from an anticompetitive merger, I don't think it's the role of antitrust enforcers to forgo investigating a concerning transaction for pure health policy reasons. Again, as some of us have talked about, there are other parts of government with responsibility for that particular policy that could take actions to deter smoking, particularly among young people, and a number of actions have already been taken.

But one thing I want to emphasize is that if a competition agency is going to consider non-antitrust factors, they should say so. When I was a Deputy Assistant Attorney General at DOJ and I had the international portfolio, that was a message that we would convey through speeches and the like in different international jurisdictions: that competition authorities are best situated to address competition issues; but if your agency is going to take on more, please just be transparent about it.

DIANE WOOD: Let me suggest that from my point of view it's a bit of a false dichotomy to say, "Are the goals of antitrust

exclusively economic or are they noneconomic?" because I don't know what that means, frankly.

We do have the quote from Senator Sherman that Barry read; but we also have Learned Hand in the *Alcoa* case, who says in the course of holding that Alcoa has in fact monopolized, "The successful competitor, having been urged to compete, should not be turned upon when it succeeds." You have this tension between trying to encourage the best out of all of our companies and then the notion that there then are special rules if you get to be somehow too big.

I think what we need to focus on is: What are we asking of these companies? Are we saying something along the lines of there are certain tactics and certain business measures that are permissible in the competitive battle, and others are not? Well, we all understand that that's true at some extreme level—if you have a competitor, you're not supposed to go out and blow up their factory; that's not a cool way of winning the competitive battle.

At the other extreme, what if you hire a bunch of engineers and just design a better product and people like your product? Well, we all think *Hooray, hooray, that's a good thing!* It turns out, I think, to be very difficult to draw these lines, and we certainly don't want to dampen the interest in legitimate competition.

I want to bring in one last thought because I firmly do believe that the antitrust laws include a component that forbids unlawful exclusionary practices—practices such as the ones that were in the *Kodak* case trying to tie people up; practices such as the ones we saw in the *Aspen Skiing* case.

That's the idea of market access. Now you'll usually hear that phrase when people are talking about the international trade laws—are there tariff barriers to entry into a country; are there nontariff barriers; is there some norm of market access that we want to have—but we have certainly a market access dimension to our domestic antitrust laws as well.

I think that's all part of the backdrop of a law that's fundamentally an economic law, but it is part of the legal infrastructure that we use to run our economy. So is the law of contract. So is the law of property. There are basic laws that you have to have before you can have a healthy economy, and that's where I think antitrust law fits.

JONATHAN GLEKLEN: Michael?

MICHAEL HAUSFELD: I would like to just slightly modify what Judge Wood has expressed to not just ask "What are we asking of business?" but "What are we asking of the antitrust law?" I do not believe that we can segment antitrust law or pigeonhole it into a particular box. There is a business consequence to antitrust law and there are nonbusiness effects of business.

When we look at antitrust law, there are two things that have always impressed me. One is a book that was titled *The Hidden Persuaders*, and the other is the economic position of the invisible hand. Both of those had economic impacts in the business sector that under economies as they existed up to today antitrust laws were able to deal with.

Judge Wood has said that possibly we have to refine some of our terms with regard to per se presumptions, all dealing with the known business consequences of industries and/or businesses that we were used to over the last hundred years.

But business itself has changed. There are more dynamic entrants in business. Business now tells us what we want to buy, how we want to buy it, where we want to buy it, where we want to go, how we want to go.

Business is presented as "you can have this service at no cost"—but really is it at no cost? Modern economics has evolved and said that theory of looking at price alone no longer applies to some of today's services. There is a cost. What is the cost of privacy? What is the value of your data or your information? What leverage does a company get by aggregating data and excluding others from having access to that data? Those are all business concerns. I can understand that.

But what others are saying here is that concentration and that exercise of power may go beyond just the business of the service or product provided. If we accept that, if we accept that there are effects beyond the pure business or economic, the question becomes as a matter of policy: Should antitrust laws address that? If those effects arise from that business—whether they be, as Jonathan says, fifth- or sixth-order effects—are they effects; are they significant enough effects that they are recognizable harms that as a society we are willing to say, "That crosses a line of acceptable behavior?"

That's the policy I'd like to see the debate go on, not again what the law is—that's easy; it is what it is today—but it's what should the law be if we believe it can be something more than what it is today?

JONATHAN GLEKLEN: Professor Teachout?

ZEPHYR TEACHOUT: Thank you.

You raise so many different threads I want to go down, but I also was so excited that I got Jonathan to agree fifth- or sixth-order effects. By next year third- or fourth—what do you think?

In some ways I want to ask: What does it mean to ask this question? What it means is that at professional conferences like this we would have panels on precisely the question Michael is asking, panels on the political impacts, because we understand that this is not just an accidental impact; to own in a very serious way that the actual, like it or not, democratically passed purposes included protecting democracy and dignity.

To own that, instead of saying, "Well, it may happen to have an effect" means then to evaluate it and to discuss it and to see the effects of the policy, and then to think about reforms either in enforcement or in legislation that will then improve those purposes.

If you acknowledge the democratic purposes of antitrust law, then the congressional hearing is in part about how well it's doing at that. So that's why it's important to acknowledge those purposes.

I don't want to spend the whole time on the Sherman Act, but to underline, I think, a combination of Barry's and Jonathan's interventions here, the question of what a thriving economy is. How much stability do you want? How important is resiliency? How much decentralization do you want? What's the importance of local community? Those are fundamentally deeply political questions. There is not a single answer to what the best economy looks like. These are political questions.

Those political questions have been answered by legislation, and in each of those pieces of legislation the sponsors and the advocates talked about freedom and dignity. When I say we need to acknowledge the purpose, we could have a political collective societal decision that we don't care about democratic impacts. But we didn't. We had a judicial decision, not a democratic one.

DIANE WOOD: I just wanted to add a quick word. Maybe this is the way that judges are supposed to look at things, but I think it is not at all a "given" that the antitrust laws are about the preservation of democracy and dignity. I would remind you that the text of Section 1 forbids contracts, etc., etc. in restraint of trade, and the text of Section 2 forbids various ways of monopolization or attempting to monopolize, and that's an economic term.

Now the reason why Congress wanted to do that certainly was multifaceted—that's not uncommon—but the tool they enacted was "no restraints of trade," "no monopolization." That is going to guide the way the law goes.

Perhaps the law should be, as it is in some countries, more specific about exactly what is permitted and what is forbidden, but if we really want to say, as sometimes has been discussed, that once you get too big—I'm thinking of hearings in the 1960s and 1970s—if you get too big it actually eats away at the very democratic foundation of our government, that may be; but you need a law to be enacted, and maybe you need a law that doesn't put as much authority and responsibility for developing the law in the hands of judges. Remember the Supreme Court repeatedly says the Sherman Act is just an invitation for the judges to go out there and make up common law of antitrust—judges have run with that. Maybe you need more democratic accountability in the very articulation of the law rather than tossing it over to the judiciary to see what they're going to do.

BARRY LYNN: I think there's something important not to leave out there uncontradicted. That's the idea that by advocating for the kind of competition that we are advocating for, the structures of the market that we advocate for, that there is going to be some harm to the economy.

I think if you actually just broadly look at the United States—our lives, how they were, how they improved, how the United States led the world economy between the 18th century and 1980—I think it's pretty hard to say that the antitrust regime that was in place, the approach that was in place before Bork, harmed our ability to build big things and serve our people in a material sense. But a few specifics.

Jonathan said that breaking up big corporations would kill jobs. Well, pretty much every merger I've looked at it's the merger that kills the jobs. You guys know that. That's part of the efficiency.

Jonathan said there's no evidence of concentration when it comes to small business. Yeah, actually—and this is something that we studied very closely. We published this back in 2012; and then it got picked up by *The Wall Street Journal* and it got picked up by larger groups beyond that. We went and we looked at the numbers on the creation of new small businesses in the United States. We looked at the creation of a business that had a principal and at least one employee on day one. Between 1980 and 2010 the annual creation per capita went down 50 percent; and measured by those same terms it has gone down another 50 percent since then. It's really hard to make a small business. Yes, we can post a picture on eBay, but that ain't a business.

Pricing is the whole system; the Borkian system is supposed to be around pricing. Well, we know from John Kwoka's book from 2013 that actually a lot of these mergers result in higher prices. But I would challenge all of you to actually figure out how to do pricing. Ask Carl Shapiro how he's going to do a price analysis in a world in which Google and Amazon dictate prices; they dictate them down to their suppliers in an entirely opaque way, changing day by day, and they dictate prices out to the buyer. There's not a price for a good Uber; Uber is engaging in constant personalized price discrimination, and they say so. When you have constant tailored price discrimination, what is the price for anything? That's the world we live in today.

Can you guys demonstrate efficiency? No you cannot. You cannot.

And I'll tell you one thing about the economy. I know something about it. I came up as a journalist. I got into this by looking at supply chains.

We see on the front pages of our newspapers every day there's all these stories about supply chains—we've got chokepoints in semiconductors, we've got chokepoints in transportation, we've got chokepoints in chemicals.

Last year the United States produced about 30 percent fewer automobiles than the auto makers wanted to make. Why? Because there's a shortage of semiconductors. That means the price of new automobiles went up, of used cars went up, of rental cars went up. That's a major part of the inflation that we see in our society, structural inflation. It also means older cars and dirtier cars on our streets because you can't get rid of the older cars.

All of these threats to our political economy came from this concentration of capacity offshore. They were all foreseeable. I wrote the damn book about this! It came out in 2005.

We have sat and we have taken many of the most basic industrial capacities, industrial arts, the thoughts of our smartest people distilled into the products that make our lives better, and we have allowed monopolists to concentrate power over them and then to just extract the wealth out of these systems. Resiliency destroyed.

JONATHAN JACOBSON: Let me point out that what we're talking about is entirely in the abstract, and we have not heard, and I don't expect to hear—it's a nice book, but it's still in the abstract—what can antitrust do to achieve these other goals.

The one thing I have heard is break up large firms. But is that going to increase jobs or lower jobs? If you break up the firms they are less efficient, they make less money, there is going to be less money to pay people to work for them.

Now we had back in 1969 a very well-regarded report called the Neal Report that recommended no-fault monopolization, basically breaking up large firms irrespective of whether they have engaged in exclusionary conduct. It was actually supported by Phil Areeda and Don Turner.

Throughout the period following that, including some very important economic work at the Airlie House Conference in 1974, everyone really came to the realization that just willy-nilly breaking up large firms is not going to help the economy.

Do mergers occasionally result in fewer jobs? Is one of the arguments that we typically make to the agencies that we are going to be so much more efficient that we can cut our labor force? Absolutely that's true. But if you look at the longer-run effect of these mergers, if the company is doing well as a result of it, it is going to employ more people, not less; it's going to pay higher wages, not lower wages.

Again, to achieve the political goal is going to necessarily sacrifice the economic goals, and I think the country will suffer from that.

BARRY LYNN: There is absolutely no foundation for your last statement. Walmart is very big, Amazon is very big; they employ lots of people, they make lots of money, but they don't share that money with their employees. Let's be honest.

The Waltons, you know how much wealth that one family has? That one family has as much wealth as the bottom half of all Americans put together, 160 million people—one family, 160 million people.

JONATHAN JACOBSON: But think of the tens of thousands of people who have jobs at Walmart because of that. In the case of Amazon, who pioneered the $15 minimum wage for the employees?

BARRY LYNN: You're making a logical error. If we were to break up Walmart tomorrow, the stores don't vanish, the demand doesn't vanish. We will have retail stores everyplace where there's a Walmart today. We will probably have more.

JONATHAN JACOBSON: The demand doesn't reduce, but the ability to supply that demand does necessarily if you're making less money.

MICHAEL HAUSFELD: I'd like to get back to the fundamental question because I don't think we're here to either deify or damn any particular company or industry.

The question was: Can antitrust repair the world? That question was not to propose a specific solution to a specific issue. It was, in my mind at least, to have the discussion that we're having: What is the purpose or the goal or policy of antitrust law?

Going back to Judge Wood, even if we believe their purpose should move, is that purpose movable solely on a case-by-case basis with decisions from courts, or does it need some legislative overview?

Now let's take the language that Judge Wood focused on, "contracts, combinations, or conspiracies." There was a time when the United States had the monopoly on antitrust thought. That now clearly I think has changed in terms of the rise of the European Commission and its thinking on competition policy. They don't use "contracts, combinations, or conspiracies" alone; they now consider "undertakings," a word which doesn't appear in any antitrust decisions or in the antitrust law.

We have the term "monopoly." In Europe the term is "abuse of dominance" and it's not bounded by the structural parameters of what we consider a monopoly share of a market.

That's not to say we accept one or the other, but thinking has evolved from the way the world was and there are now new thoughts which require at least an opening to: Should there be a reset on antitrust policy and what should that policy be?

I am not advocating we go beyond anything, but I am advocating that, at least at this point, Jonathan has somewhat conceded the fact that there are effects beyond business-to-business or business-to-consumers—and consumer I don't include only as end-users; there are consumers along the entire chain of that end-use.

Do we need, or should we at least acknowledge, that it's time to reevaluate and see where we are, and see not only where we are today but where do we want to be tomorrow—and not tomorrow in the next twenty-four hours, but tomorrow for example in the merger and acquisition context, longer term.

What we see today that the invisible hand may be doing is not being recognized as hitting us on our visible heads. But if we sat back and asked, "What are the longer-term implications of this?" maybe we would have a better idea, greater clarity, of what harms are arising out of the effects that we are experiencing.

DIANE WOOD: I think that's actually a really great point. One of the things we have learned from the spread of what

originally was U.S. antitrust law—certainly Leslie knows this very well—to 125, 135, whatever the number of countries is at this point in the International Competition Network, is that other countries have taken different views about the moment at which intervention is appropriate.

The longstanding difference of opinion between the European Union and ourselves on the single-firm side is that their abuse of dominance standard is—I'll overgeneralize—somewhat more sensitive to the problem of oligopoly, which we haven't mentioned yet but it's one of the problems that comes about because of concentration in an economy. We don't have just the one monster firm; but maybe we have three firms, and they all perfectly legally can watch what one another is doing and respond in a way that doesn't help any kind of consumer—middle of the line, end-use, anybody.

I'm trying to be concrete here and trying to say: What is it we could do as we reexamine our antitrust laws? I don't think it's repairing the world, but it certainly is making sure that this body of law is in fact addressing the business realities that exist and have existed for a long time.

As we all know, our ability to detect which mergers might be anticompetitive has changed over the years. Many mergers were stopped in the 1950s and 1960s that people scoffed at in the 1980s and 1990s. Maybe the line needs to be recalibrated again to make sure that oligopoly problem is understood, to take some lessons from the notions of abuses of dominance, and to come up with something that will be for the longer term, as Michael says, lay the groundwork for a healthy economy not just today but ten years from now.

JONATHAN GLEKLEN: How does that happen? I'm a little bit worried that when you're a hammer everything looks like a nail. If we concede that we want liberty and equality and the good life and a good society, does a jury in Brooklyn or Southern Illinois or San Francisco get to decide that because a competitor is disadvantaged? What are the institutions, and do we have the right antitrust institutions to accomplish that whether we have a statutory change or not? Is it feasible to use antitrust to do something that is more complicated than math?

DIANE WOOD: I think it is. Of course if you have a hypothetical jury—in the 1.5 percent of cases in the federal court that ultimately reach a jury—you could imagine drafting jury instructions in a Section 2 case that would more closely resemble an abuse-of-dominance standard than the jury instructions you would draft right now.

I completely agree with you that you have to be specific about what it is you are asking people to do, because otherwise it's all too easy to say, "motherhood and apple pie" and be done with it. But that's not going to be helpful.

MICHAEL HAUSFELD: The summation to the jury in these cases, the few that get tried, always raise these noneconomic issues, and talk about the size of the defendant and how it's important to send a message. So I think we actually have some of that today. Maybe we need some more.

MICHAEL HAUSFELD: I just wanted to ask you, Jon: Are you talking about a hypothetical jury only in Brooklyn? If you are, I can give you a better answer. [Laughter]

But possibly, rather than "can antitrust repair the world," can it at least diminish the number of repairs that may need to be made?

BARRY LYNN: I think connecting antitrust to the world, as you guys just have, actually offers us another opportunity to learn from our own history.

After the Second World War, how did antitrust become part of European policy; how did it become part of policy in Japan and Asia? It was imposed on Germany by the occupying U.S. forces. It was imposed on Japan by the occupying U.S. forces, by General MacArthur.

Why was it imposed on Germany and Japan? It was imposed on them because of the assumption by the Truman Administration, which shared the same assumption of the Roosevelt Administration, which was then embraced also by the Eisenhower Administration, that the militarism, the autocracy that we saw in Germany and in Japan, was facilitated by extreme concentration of control over the political economy by pyramidization over entire sectors of the political economy.

So the democracies that we see in Europe and in Japan are to a very large extent a result of the United States using its position of utmost power to impose competition policy as a guarantor of democracy.

And there was a structural element in it as well. In Japan MacArthur imposed land reform, and they went from 10 percent of the land farmed by the people who owned it to 90 percent of the land farmed by the people who own it. Lord, if we were to do that in America today!

ZEPHYR TEACHOUT: Jonathan suggested that there haven't been solutions. I don't think we're going to get into particular debates about particular bills, but I want to be clear that a series of solutions are actually very clearly on the table, which is a structural approach, looking at models like dominance models and an increase in per se laws, including examining things like non-competes in other areas. These are a very clear direction. Again, I don't think we want to debate the particulars.

And then, to Michael's really important question about the contemporary context—and I want to come back to this—the concentration of data and information exacerbates the power problems in really significant ways, and it's not slowing down.

To my mind that means a few things. One is the increasing importance of a structural approach. But second, looking at areas—we are right now in the middle of a real commodities crisis—involving algorithmic pricing. You as a

professional association have real insights into ways to think about problems of volatility, problems of pricing, that we desperately need solutions for that are very contemporary problems that come from contemporary data issues.

So I think there are some directions where we have some pretty clear directions, and in that area it's like looking at how do we adjust our modern laws—if we do—around price fixing or other violations to say, "We need to address the role of AI decision-making and distinctly big data." I think those are exciting, but really important, questions that again you have special tools and wisdom to be able to bring to bear.

LESLIE OVERTON: I'll just make the quick point that I think something very important in our particular competition system is that at the end of the day the courts matter for antitrust. I think having systems that are administrable, having evidence that is persuasive—and obviously this is a debate that includes questions of whether it's appropriate to have new legislation or what have you—but I just think at the end of the day it's important to remember that thinking about ultimately you are going to need to persuade a court if something goes to trial.

JONATHAN JACOBSON: Let me just add one point from my own perspective. A year after *The Antitrust Paradox* was published, Bob Pitofsky put out an article called "The Political Content of Antitrust" in the *University of Pennsylvania Law Review*. I commend it to everyone here. What Bob is saying is that the goals of antitrust are basically economic, but political and social considerations can be taken into account as a tie-breaker. And I support that.

The reality is that there aren't that many ties to be broken. But certainly if we take that approach, I think we can answer the question that Jon has posed for this group.

BARRY LYNN: Real quickly, one thing that Pitofsky also said in the hearing when Bork was up to be on the Court is Bob Pitofsky said Robert Bork, the parent of this theology —

JON JACOBSON: It was actually Aaron Director.

BARRY LYNN: —that his ideas were fundamentally dangerous to our democracy. That's what Bob Pitofsky said about Robert Bork.

JONATHAN GLEKLEN: So if we're not in a world where we're looking to low prices—in *Professional Engineers* the Court says: "The antitrust laws don't care about safe bridges; there may be other laws that care about safe bridges, but we care about price competition for engineers." In *Superior Court Trial Lawyers* the Court says: "The antitrust laws aren't about effective representation of indigent defendants; they're about low prices to the city or the district that pays those lawyers."

If we have these good life/good society goals, do they get in the way of low prices? There seemed to be a suggestion that they were generally compatible. But in *Professional Engineers* and *Trial Lawyers*, maybe the claims of bridges falling down and poor representation of indigent defendants were just false; but the courts weren't even willing to listen to those.

Do we balance those or do we just say that's not an antitrust problem?

BARRY LYNN: Maybe they shouldn't be balanced.

DIANE WOOD: I think it depends on what you think of those claims. Certainly the opinion in *Professional Engineers* said exactly what you said. Justice Stevens was saying this is not what antitrust law is all about.

If you had a narrower view, you might say: Okay, here are a bunch of competitors and here is a trade association rule or a membership organization rule or some other kind of rule that they are going to adopt, which is that there is a minimum standard that bridges have to meet. Or in the *NCAA v. Board of Regents* case, actually to pick up some dissent, the NCAA argued passionately that its restrictive rules were necessary to protect the student athlete and so on.

They at least weren't saying, "We're just trying to make more money." You could examine those claims. You could say, "This is just a front"—I'm thinking of the *Indiana Federation of Dentists* case now where it just didn't hold together when you looked carefully at that rule.

But it's conceivable that one could imagine groups of competitors saying that a particular arrangement despite the fact that it may add some cost is not for an anticompetitive goal. I'm not necessarily advocating that, but I could imagine some space for that.

MICHAEL HAUSFELD: I think to some extent we're conflating two different issues. One deals with what Jonathan said referring to Bob Pitofsky, saying antitrust law possibly could be considered by a court as a tie-breaker; or I think Barry said, "Do you balance it?"

I don't think it's a tie-breaker or a balance in some of the discussions that we are having with regard to democracy. It is a separate question, and the question is: Are the effects of competitive business conduct greater than just economic, dealing with price and output? If they are, getting back to what Judge Wood said, do we need some new policy recognition giving clarity and guidance to the courts as to how to reach those goals?

But even within the context of just business-to-business and business-to-business to conduct, the issue, at least for me, is: Are there effects that we have not presently accurately accounted for, even economically, with regard to antitrust or competition enforcement which are causing harms, which are not being enforced?

I think that is another question that, unfortunately, needs to be possibly added to the smorgasbord. But it's not

a balance; you can't balance the democratic issues against the business issues. They deserve their separate consideration as to whether or not competitive behavior causes consequences or has effects which we would consider harms that society finds unacceptable.

JONATHAN GLEKLEN: So competitive behavior—so an acquisition is competitive behavior. If a liberal wants to buy Fox News or a conservative wants to buy MSNBC, and they're not in the news business but there would be a loss of viewpoint competition as a result of that, is that within the scope of antitrust?

MICHAEL HAUSFELD: Take what was just referred to a moment ago dealing with algorithms. Digital platforms have the unique ability to use algorithms to determine which members of the consuming public will share a particular piece of news. That algorithmic-identified grouping becomes self-reinforcing, amplifying the effect not of a fact but possibly of an alternative fact.

A traditional newspaper or a non-Fox News cannot take that same ability to pigeonhole or direct or manipulate—any word that you want to use, whether it be possibly more pejorative than not. That is happening. You are putting people in boxes that reinforce their beliefs and reinforce their belief as to what is or is not a fact. I didn't say a truth.

JONATHAN JACOBSON: It's an enormous problem, Michael, but it's not an antitrust problem.

BARRY LYNN: Actually, according to Robert Pitofsky—this is something he said in 1999—if you have issues in the newspaper business, in book publishing, news generally, entertainment, you want to be more careful and thorough in your investigation than if the very same problems arose in cosmetics or lumber.

DIANE WOOD: Let me just point out, though, I certainly don't want the antitrust laws to wind up looking like the Internal Revenue Code. But there are countries that single out diversity of viewpoint in the media for particular concern. So a merger or an acquisition or a deal of whatever type that might go through on ordinary competition or antitrust principles—and we even have our Newspaper Preservation Act, so this is not a complete stranger to us—so if there are areas of particular concern, they could transparently, as Leslie said, be addressed.

One other thing I want to respond to is what Michael has been saying, I couldn't agree more that the whole way competition works in the vast cyberspace, where large firms are providing services and the consumer is actually the "product" that is being sold (or more accurately, his or her personal data is being amassed for someone else's profit). The recent spate of cases against Meta, Alphabet, and so on are all dealing with this new dimension, which certainly needs to be understood. We will never have successful antitrust laws if we don't even understand the markets on which they are working.

ZEPHYR TEACHOUT: I'll be very quick. I think it is pretty hard to say that the market structure in communications infrastructure isn't relevant for democracy. This one's a no-brainer. That's all.

LESLIE OVERTON: I was just going to make the very quick point that when the ABA Competition Standards Task Force conducted its work it found that a number of thought leaders believed that the consumer welfare standard is broad enough to encompass choice or variety.

JONATHAN JACOBSON: And certainly consumer choice, which is part of the basic consumer welfare standard following *NCAA* many, many years ago—diversity of viewpoint is an aspect of consumer choice; it is cognizable under the consumer welfare standard.

JONATHAN GLEKLEN: Even if the person acquiring it has a zero percent share right now? If some rich guy who's a liberal decides to buy Fox News —

JONATHAN JACOBSON: God willing. [Laughter]

JONATHAN GLEKLEN: —so there's no lessening of competition because there was no competition—he's just going to buy it and he's going to fire the conservatives and replace them with liberals—is that viewpoint competition? Is that antitrust or is that something else?

JONATHAN JACOBSON: I actually do think that the argument about choice should be evaluated in analyzing that. But I don't see that as a material reduction in choice because there are many other outlets—today small, tomorrow maybe not—that can accommodate those points of view.

It's an interesting question. I don't think there's a practical "yes" answer to it.

BARRY LYNN: There is another factor here. Yes there are many, many outlets still out there. Even after this sort of mass extermination of media outlets, there are still a lot in America.

Many of them have to pass through another medium, that of the platforms, and one of the things that we do see, and this is one of the things that Frances Haugen showed us—we knew this was happening, and Frances Haugen helped us see how it's happening—that Google and especially Facebook manipulate how we all share information with each other. They actively suppress certain approaches, certain articles, over others. This is a fact. We have the most powerful communications platforms in history manipulating how we share information, share ideas, and share news with one another.

MICHAEL HAUSFELD: Trying to put this into a—more pure let's say—competition category, newspapers depend upon circulation; circulation depends upon the ability of the newspaper to attract enough advertisers that it can publish its news.

Digital platforms have a competitive advantage because they reach their circulation more directly, more immediately, and can attract more advertisers. Does the fact that one type of media communication has a competitive advantage, possibly gained through leveraging data that it acquires through other means, over a print newspaper present a competition problem? I'm not sure it doesn't.

But I think the way we tend to think about it we don't see it. That's where the invisible hand or the hidden persuader comes in. The business of business operates in mysterious ways, and I think we need to at least acknowledge antitrust law is backward-looking. Business is ahead of antitrust enforcement. Antitrust enforcement follows business conduct.

The brilliant question that you ask I think is "What is it that antitrust law can repair?" and that is what we need to start thinking of on a going-forward basis in a new world.

JONATHAN GLEKLEN: We have two minutes left. I promised one to Leslie; and because Professor Teachout's article helped inspire the topic of this panel, I will give her the last minute.

LESLIE OVERTON: I want to touch super quickly on racial equity because Jon was wonderful to create a task force this year that is focused on antitrust, consumer protection, and diverse consumers. Look out for our work product at the end of the Section year, and if anybody is a thought leader on that come talk to me.

I think while antitrust by itself can't achieve racial equity—it's a super-heavy lift, requires a lot of aspects of policy throughout the whole of government—it can contribute to racial equity.

Let me also share my own view that I don't see racial equity as necessarily being relegated to a non-competition factor because racism in a number of instances also has the effect of suppressing competition.

I will just shout-out Commissioner Rebecca Slaughter for her work that she has done at the FTC on talking about whether we can look into more demographics to make sure that we're not missing effects that impact marginalized or disadvantaged communities. I look forward to more work on this topic.

ZEPHYR TEACHOUT: Thank you for that.

We did not get a chance, for instance, to talk about how in this country—in any country, but in this country in particular—it is not credible to suggest that market structure has no impact on dignity and freedom given the anti-monopoly focus of W.E.B. Du Bois and others looking at the ways in which market structures and concentrations of power in the late 19th century disenfranchised Black Americans for decades.

We did not get a chance to talk about the ways in which our antitrust approach for the last forty years led to the collapse in several communities, but I'll just talk about the collapse of Black-owned pharmacies that were central in the civil rights movement, Black-owned insurance companies, as well as Black-owned newspapers. Market structure questions have a direct impact on power, and that is where I will end.

We are at a really exciting moment, as hard as it is, because there is a recognition from the top, and I want to start where Barry ended. When President Biden used the word "failed," I'm sure you all sat up in your seats. He said the approach of the last several decades has failed.

That creates a moment, as Michael has asked us again and again to reimagine what we should do given the crises we now face of inequality and the multiple democratic crises we face.

I am actually quite hopeful, and I invite you all to bring the deep insights and wisdom to figure out, not what in this three-factor test, but rather how the tools that you already have can help us build a new structure that allows for greater democratic freedom.

JONATHAN GLEKLEN: Please join me in thanking our panelists. ■