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Good afternoon. I remember many sessions in this room, all from the other side of the desk, which, I suggest, is the less enjoyable place to be. First of all, I would like to thank those of you who organized this symposium. Law students do not have a whole lot of extra time on their hands, particularly those who are associated with journals. Time is a very precious commodity, and yet somehow you found time to organize this very comprehensive symposium.

I hope that you get as much benefit from the session as we who were invited here to speak. Many of us speaking today have known each other for years, but we don't have the opportunity to see each other all that often, which serves to make this event more special. And I have to say that when you are associated with as great an institution as Cornell, you certainly have a lot of advantages in attracting people to campus, but most assuredly, geographic location in March is not one of them. So I congratulate you on the group you have put together and on the size of the audience you have gathered.

My initial interest in antitrust, and my decision to pursue a career in that area, is the result of interactions with two people who are in the room today. George Hay, who I believe was in his first year of teaching at Cornell Law School, taught me antitrust economics. At that time, Don Baker was away as Assistant Attorney General, but when he returned to the law school, I took antitrust courses from him as well. In fact, I think more than one of the courses were held in this room, so it really is coming back home for me, and I enjoy it very, very much.

Now, today and tomorrow you will hear a lot about various regulatory approaches that different national agencies apply to antitrust. Since I do not want to jump the gun on what other people are going to say, I thought it might make more sense for me to take the time to back up and talk about something more foundational. In a general sense, this symposium is about comparative policies. Probably the two jurisdictions best known for antitrust enforcement are the United States and Europe, so I will share my views as to whether these regimes are moving closer together, which is

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43 Cornell Int'l L.J. 1 (2010)

known as convergence,[1] or whether they are drifting apart.

To be sure, this general subject is a very well-traveled road. What I would like to do today is to take a slightly different path. The typical approach of United States commentators addressing convergence is, in my view, very U.S.-centric. The question often posed is whether the European antitrust model is moving closer to the United States.[2] You never hear the question asked: "Is the United States moving closer to Europe?"—Americans just do not think of the issue in that way.

Of course, the unspoken assumption in asking the question in the conventional way is that the better approach is for Europe to move closer to the U.S. model.[3] And indeed, U.S. government officials have been known to fly on unsolicited trips to foreign capitals when the European Commission has taken action that is not to their liking. U.S. officials have criticized Commission decisions in press conferences, suggesting, in effect, that once Europe gets it right it will adopt the U.S. approach.

Now, in the most general terms, I would like to give you a flavor of the conventional wisdom regarding the different approaches to antitrust. In the United States, merger policy has followed a consistent approach since 1984, when formal guidelines were implemented.[4] Those guidelines, instituted more than twenty-five years ago, are reflective of a fairly stable policy;[5] they are very flexible, and they allow for changes around the margins.

The 1984 guidelines reflect a theoretic approach, known as the "Chicago School of Economics."[6] The essential premise of the Chicago School is that we do not know an awful lot about how humans actually behave, but we know, basically, how the rational person thinks.[7] And so the doctrine is based on a theory of rational choice. The approach of the merger guidelines, and the Chicago School, accepts as a premise that individuals and firms will make rational choices.[8] And by rational choices, what they mean is that firms, armed with adequate information, will make decisions

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1. *See* Randolph W. Tritell, *International Antitrust Convergence: A Positive View*, 2005 A.B.A. SEC. ANTITRUST 25, 25 (2005).

2. *See, e.g.*, Todd R. Overton, *Substantive Distinctions Between United States Antitrust Law and the Competition Policy of the European Community: A Comparative Analysis of Divergent Policies*, 13 HOUS. J. INT'L L. 315, 320–22 (1991).

3. *See id.* at 341 ("The surest method to create such stability is to reach an understanding between the American government and the EC Commission to ensure that the burgeoning EC laws develop in a direction that makes them compatible with those of the United States.").

4. U.S. DEP'T OF JUSTICE MERGER GUIDELINES (1984), 3 Trade Reg. Rep. (CCH) ¶ 13, 103 (June 14, 1984).

5. *See* Synopsys Inc./Avant! Corporation, FTC File No. 021-0049, Statement of Commissioner Thomas B. Leary (July 26. 2002), *available at* http://www.ftc.gov/os/2002/07/avantlearystmnt.htm ("1984 Merger Guidelines . . . are still authoritative").

6. See Herbert Hovenkamp, *Merger Actions for Damages*, 35 HASTINGS L.J. 937, 947 n.43 (1984) ("The 1984 Merger Guidelines are a product of the new economic orientation in antitrust law, if not an outright product of Chicago School economic theories.").

7. *See generally* Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 928 (1979).

8. *Id.* at 930.

based on their informed self-interest.[9]

In other words, firms will make profit-maximizing decisions.[10] This is essentially the underpinning of both U.S. merger guidelines and the entirety of U.S. merger analysis.[11] What flows from this is the notion that competition[12] and free markets provide the best products, the cheapest products, the highest quality products, and the most choice.[13] There is a corollary to this, that while markets may temporarily suffer from distortions, they will quickly self-correct.[14] There are those who would characterize this as representing a minimalist school of thought.

By extension, government intervention is something that should come about rarely, and, when it does occur, it should be minimal.[15] And I think that, even as of a year ago, the majority of commentators would have generally agreed that the United States had gotten it right when it comes to how mergers are analyzed. Judge Richard Posner noted that the intellectual journey for how we view mergers has basically come to an end and that the merger guidelines offer a modest vindication of the Chicago School.[16] All this could lead one to conclude that the U.S. approach is one essentially on cruise control, on settled presumptions to bring about the best results.

Without going into great depth, historically, the European approach to antitrust has had different underpinnings.[17] At a very basic level, there has been less confidence in Europe that markets always get it right.[18] There is more of a feeling that the government should step in, at least occasionally, and that it is independently important to maintain certain market structures.[19]

In the United States, if you are really a believer in competition, you *could* end up with a market populated by just one firm if its efficiency causes all other firms to leave the market. If somebody actually wins the race of competition because they have the better, cheaper product, wouldn't it be a perverse policy to then turn around and penalize them for being the winner? So competition in the United States is focused on creating an environment where parties can start out on an equal playing field,

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9. *Id.* at 928.

10. *Id.*

11. *See* Alan A. Fisher & Robert H. Lande, *Efficiency Considerations in Merger Enforcement*, 71 CAL. L. REV. 1580, 1583 (1983).

12. *See* Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 266 (2001).

13. *See* Fisher & Lande, *supra* note 11, at 1584.

14. *See* Hovenkamp, *Post-Chicago Antitrust*, *supra* note 12, at 266.

15. *See* Posner, *supra* note 7, at 948 n.67.

16. RICHARD POSNER, ANTITRUST LAW 132 (2d ed. 2001) ("For the time being, the history of merger doctrine is at an end.").

17. *See* Overton, *supra* note 2, at 316–17.

18. *See id.* at 328.

19. *See* Derek Ridyard, *The Commission's New Horizontal Merger Guidelines: An Economic Commentary* 12–13 (Global Competition Law Centre, GCLC Working Paper 02/05 2005), *available at* http://www.coleurope.eu/content/gclc/documents/GCLC%20WP%2002-05.pdf.

but then let happen what may.[20] It is not about fairness.[21]

And I believe that in Europe—and you will hear from European practitioners who will undoubtedly correct me if I am wrong—the approach has been more to assure that a certain number of players exist in the market.[22] At least at the margins, this can result in different policies between the two jurisdictions.

The Europeans have responded in several ways to the difference in approach. Some have said that our policies are too Darwinian.[23] Others refer to U.S. antitrust policy as cowboy capitalism.[24] And the list of pejoratives goes on. But nonetheless, through a series of steps over the last ten to fifteen years, it is fair to say that European merger policy has, in fact, moved closer to U.S. merger policy.[25] The European Commission now, and has actually for several years, had a set of merger guidelines.[26] Their test is one that focuses on impediments to effective competition as opposed to just pure dominance.[27] They recognize efficiency.[28] These are all steps suggesting increased convergence with the U.S. approach.

The issuance of guidelines in Europe has led no less than the former commissioner of the European Commission, Mario Monti, to say, essentially, that the European Commission model has increased its reliance on solid economic analysis and that it draws upon the American approach.[29] Thus, at the end of the day, we've observed convergence between the two regimes over the past several years, but with Europe proceeding at a different pace from the United States. There remain differences, but we have been moving in the same direction.

We can debate whether the changes in Europe are the result of regulators seeing the light and the brilliance of American ideas or whether it is really the response to a series of stinging defeats that the Commission suffered before the European courts, after blocking some transactions a few

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20. *See* Nicola Giocoli, *Competition Versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy*, 5 J. Comp. L. & Econ. 747, 756 (2009).

21. *See* Eleanor M. Fox, *Monopolization and Dominance in the United States and the European Community: Efficiency, Opportunity, and Fairness*, 61 Notre Dame L. Rev. 981, 983 (1986).

22. *See* Overton, *supra* note 2, at 319 (quoting Fox, *supra* note 21, at 983).

23. *See, e.g.*, Jay Dratler, Jr., *Microsoft as an Antitrust Target: IBM in Software?*, 25 Sw. U.L. Rev. 671, 683 (1996) ("Just as the Darwinian process of natural selection does not care if individual creatures survive, so long as species grow and evolve, so antitrust law does not care whether individual firms survive, as long as competition itself thrives and prospers.").

24. *See, e.g.*, J. Bruce McDonald, U.S. Dep't of Justice, *Section 2 and Article 82: Cowboys and Gentlemen*, Remarks before the Global Competition Law Centre Second Annual Conference 2 (June 16, 2005) (describing the competition-based U.S. antitrust system as "cowboy capitalism").

25. *See* Tritell, *supra* note 1, at 1.

26. *See generally* Council Regulation 139/2004, 2004 O.J. (L 24) 1 (EC).

27. *See id.* art. 2.

28. *See id.*

29. *See* Mario Monti, Eur. Comm'r for Competition Pol'y, Competition for Consumers' Benefit, Address at European Competition Day 5-6 (Oct. 22, 2004), *available at* http://ec.europa.eu/competition/speeches/text/sp2004_016_en.pdf.

years ago. My own view is that the latter served as the predominant cause. Regardless, for the remainder of my time today, I will not discuss the pace of European change or where it stands; there are others who will discuss that. I will address some startling changes that recently have taken place in U.S. merger policy.

Indeed, I suggest, that wherever the European regulators are standing on the mountain of the Chicago School, if they look up ahead of them, they are likely to see the U.S. regulators coming back toward them. And, it is not as though the U.S. regulators are walking back toward them; they are running back at them. Perhaps more surprising, a lot of these developments preceded the change in administration and have nothing to do with the election of President Obama.

And I think that European practitioners may listen with a sense of irony as they hear a tonal quality coming from U.S. regulators that is very similar to statements regarding European policy that the United States' enforcement leadership was so critical of not that long ago.

In the United States, the regulatory question of whether a horizontal merger is allowed to proceed is purely an economic question.[30] It is a decision based on pure economics: will the merged firm, either by itself or through some type of tacit coordination with other firms in the industry, be able to raise prices above a competitive level?[31] It is an analysis that is designed solely to look at whether or not the merger creates or enhances market power, which is the ability to raise prices above a competitive level.[32]

It assumes that firms will act rationally.[33] It assumes that they are informed and that their preferences are stable, which means that they would make the same decision on day two that they made on day one as long as nothing has changed in the interim. The decision of a firm is based on profit maximization, which, again, is very much of an economic concept.[34] Because of the purely economic basis underpinning U.S. regulatory review, the issue of national champions does not arise—you do not arbitrarily pick one company and say, "We're going to pick this one to be the winner."[35]

Similarly, enforcers resist calls, which come from political corners all the time, to engage in merger analysis in a way that, for example, protects small business or protects a certain level of jobs in a particular community.[36] Those are all great public policy goals, but they have nothing to do with economic efficiency. U.S. policies are accused of being Darwinian,

30. *See* U.S. Dep't of Justice and Fed. Trade Commission, Horizontal Merger Guidelines § 0.2 (1992).
31. *Id.*
32. *Id.*
33. *See* Posner, *supra* note 7, at 928.
34. *Id.*
35. *See* Deborah Platt Majoras, Chairman, FTC, Remarks at the Int'l Competition Conference/EU Competition Day: National Champions: I Don't Even Think it Sounds Good 4 (Mar. 26, 2007).
36. *See id.* at 6; *see also* Overton, *supra* note 2, at 317.

and in many ways they are.[37] But that is what it means to have a policy that protects competition, not competitors.[38] In a regime where the protection of competition is the overriding objective, those who don't measure up fail, and those associated with those who don't measure up fail.

This policy inevitably allows mergers that can result in people getting laid off. Plants will be closed. But U.S. merger policy, at least for the last two decades, has been focused solely on economic efficiency.[39] In fact, merging companies sometimes rely on anticipated efficiencies as a reason for allowing a merger, arguing that a combination will eliminate redundancy. In other words, it will eliminate jobs that are no longer needed because they can be done by one person in the combined entity.

To be sure, the situation can result in dislocations, but the Chicago School does not really trouble itself with that because of a belief the ends justify the means: "Yes, those are bad, but at the end of the day, this is what's best for the most people. This is how we maximize consumer welfare."[40] The Chicago School believes that the firm that delivers a product on the cheapest basis available will win the race of competition, and that is the basis on which the economy should operate.[41] Dislocations exist, but they are unavoidable.

Any other policy, designed to protect some element of inefficiency, would create still other inefficiencies that would harm a greater number of people. That is really the sum and substance of the pure Chicago approach. In contrast, under the European model, the focus has been: if we really want an industry to operate competitively, we have to have a certain number of firms operating within it.[42] In response, it is argued: it is all well and good to encourage competition, but then if you have a winner, let them be the winner.[43]

I would note that the objectives of the European law are somewhat different from ours. European antitrust law is meant to facilitate integration into the common market.[44] This has led some U.S. critics to say, and I think largely these are unfounded criticisms, that the Europeans are fond of picking national champions.[45] The argument is that the Europeans

37. *See* Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 118 (Basic Books, Inc., 1978); Dratler, *supra* note 23.

38. *See* Overton, *supra* note 2, at 318.

39. *See* Bork, *supra* note 37, at 91; *see also* Posner, *supra* note 7, at 931-32; J. Thomas Rosch, Comm'r, FTC, Int'l Bar Ass'n Antitrust Section Conference: I Say Monopoly, You Say Dominance: The Continuing Divide on the Treatment of Dominant Firms, Is It the Economics? 5-7 (Sept. 8, 2007).

40. *See* Bork, *supra* note 37, at 66, 91; Rosch, *supra* note 39, at 16 ("Chicago School adherents generally think of 'consumer welfare' far more broadly, believing the antitrust laws should be applied in a way that maximizes society's wealth as a whole.").

41. *See generally* Posner, *supra* note 7.

42. *See* Valentine Korah, An Introductory Guide to EC Competition Law and Practice 315 (Hart Publishing, 9th ed., 2007).

43. *Id.*

44. *See id.* at 317.

45. *See* James F. Rill et al., *The New European Antitrust Regime: Implications for Multinationals,* 13 Geo. Mason L. Rev. 269, 275-76 (2004).

select winners as a means of protecting the common market, and that specific firms are selected and provided breaks that allow them to have a leg up when it comes to competing with the rest of the world.[46] In short, critics claim that the European system tends to protect competitors more than competition,[47] whereas, under the U.S. regime, if you protect competition, you let the winners and losers fall where they may.[48]

Now, these differences, for the most part, do not really impact very many transactions because this is kind of nuance stuff. But, when it does lead to different results, the fur flies. There have been a couple of circumstances over the past few years where identical transactions in the United States and Europe were looked at by both regimes because they were transactions with world-wide implications. One of these was the Boeing-McDonnell Douglas merger.[49]

The United States took a look at it, and chose not to take any enforcement action, even though Boeing and McDonnell Douglas were two of only three civilian large aircraft manufacturers.[50] The United States' enforcers reached out and talked to the airlines, only to have the airlines respond that they did not care about the merger because McDonnell Douglas "can no longer exert competitive influence in the worldwide market for commercial aircraft."[51] Note that post-merger, the only remaining player out there would be Airbus.[52] Meanwhile, over in Europe, the European Commission took a different view.

Now, there are cynics who say: "well, maybe the only difference is that Boeing and McDonnell Douglas are American companies and Airbus is a European company. That led to the different results on different sides of the ocean."[53] The American point of view was that the European Commission was not worried about the merger.[54] The European Commission worried about making sure that Airbus would be able to survive in the post-merger world.[55] Because Boeing had a series of exclusive contracts with

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46. *See id.*

47. *See* Gabriele Dara, *Antitrust Law in the European Community and the United States: A Comparative Analysis*, 47 LA. L. REV. 761, 789–90 (1986).

48. *See* BORK, *supra* note 37, at 118–22.

49. *See generally* Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry*, 45 ANTITRUST BULL. 119 (2000).

50. *See id.* at 121.

51. Statement of Chairman Robert Pitofsky et al., In the Matter of The Boeing Co./McDonnell Douglas Corp., 5 Trade. Reg. Rep. (CCH) ¶ 24,295 (July 1, 1997) (stating that the Commission interviewed over forty airlines as well as other industry participants); Kathleen Luz, Note, *The Boeing-McDonnell Douglas Merger: Competition Law, Parochialism, and the Need For a Globalized Antitrust System*, 32 GEO. WASH. J. INT'L L. & ECON. 155, 155–58 (1999).

52. *See* Boeder & Dorman, *supra* note 49, at 131–32.

53. *Id.*

54. *See* Luz, *supra* note 51, at 168.

55. *See* Boeder & Dorman, *supra* note 49, at 124 ("'[T]he EU [is] most concerned about Boeing and its role as arch-rival to the European aircraft consortium, Airbus Industrie.'") (quoting *EU Official to Discuss Boeing in Washington*, REUTERS FIN. SERV., Apr. 16, 1997).

U.S. airplane manufacturers, the Commission determined that because so much of the market would be tied up and not available to Airbus, the merger could only go through if the exclusivity clauses were lifted to give Airbus the chance to compete for those contracts.[56]

In other words, behavioral relief was required by the European Commission as a condition for allowing the deal to go through. There was, however, some static at the time—non-trivial static—from the United States that the concerns raised were little more than a device used by the Europeans to favor their own national champion as opposed to making a decision on the competitive merits.[57] While one could infer such motives, I believe it is also the case that the European Commission decision is reconcilable with its precedent.[58]

The transaction that caused a lot more static, which still reverberates to this day, was the proposed GE-Honeywell combination. General Electric and Honeywell agreed to merge several years ago.[59] The only identified overlaps between GE and Honeywell had to do with some fairly minor, smaller aircraft engines.[60] And those issues were resolved in the United States pretty quickly.[61] The companies agreed to spin off the overlapping business to somebody else.[62]

Yet, over in Europe, the European Commission decided to ban the transaction outright.[63] In other words, they said, "There's no fix here. You're just not going to do this." What did they base that result on? To some degree their analysis mirrored the U.S. approach.[64] But, in addition to that, they saw General Electric as a huge financing operation with all

56. *See id.*

57. *See id.* at 142.

58. *See id.* at 142, 144.

59. *See* Edmund L. Andrews & Paul Meller, *Europe Ends Bid by G.E. for Honeywell: Formal Action Clouds the Future for Mergers*, N.Y. TIMES, July 4, 2001, at C1.

60. David S. Evans & Michael Salinger, *Competition Thinking at the European Commission: Lessons from the Aborted GE/Honeywell Merger*, 10 GEO. MASON L. REV. 489, 498 (2002) (describing the "little competitive overlap between the two companies" between GE and Honeywell).

61. *See* George Stephanov Georgiev, *Bridging the Divide? The European Court of First Instance Judgment in* GE/Honeywell, 31 YALE J. INT'L L. 518, 518 (2006) ("The transaction—the largest industrial merger to date—had received speedy approval from the Antitrust Division . . . ."); Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures in Merger Between General Electric and Honeywell (May 2, 2001) [hereinafter DOJ Press Release (May 2, 2001)], *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8140.pdf.

62. DOJ Press Release (May 2, 2001), *supra* note 61, at 1.

63. Commission Decision of 03/07/2001 Declaring a Concentration to be Incompatible with the Common Market and the EEA Agreement (Case No. COMP/M.2220—General Electric/Honeywell) [hereinafter European Commission Decision], *available at* http://ec.europa.eu/competition/mergers/cases/decisions/m2220_en.pdf.

64. *See* Eleanor M. Fox, *Mergers in Global Markets: GE/Honeywell and the Future of Merger Control*, 23 U. PA. J. INT'L ECON. L. 457, 463-64 (2002). *Compare* European Commission Decision, *supra* note 63, at 28-30, *with* DOJ Press Release (May 2, 2001), *supra* note 61, at 1 (both the DOJ and EC discussed MROs in the context of the merger)

kinds of capital.[65] Moreover, GE had a subsidiary that was a big purchaser of airplanes and also a big aircraft engine maker.[66] Honeywell makes avionics—the instruments that go in the airplanes—as well as landing systems and the like.[67]

The United States' view was that the whole point of the merger was to allow for such efficiencies, fully recognizing that, after the merger, the combined entity would very likely be the preferred choice of customers—airlines.[68] The fact that customers would be able to go to one source, to purchase an integrated package that includes engines, airline instruments, landing systems, and the like was seen as the benefit flowing from the transaction.[69] To the Europeans, the likelihood of this occurrence provided the very reason to stop the deal.[70] It goes back to the idea about dictating market structure versus looking solely at the state of competition.

Frankly, I think that the U.S. criticisms of the Europeans were largely unfounded. Some in the United States had picked up on the public relations value of saying things that made nice sound bites, but which oversimplified the European analysis. Regardless of which enforcer was right or wrong, it was a common conclusion that as a result of the merger, GE would be able to offer different mix-and-match packages to its consumers.[71]

The concern in Europe was not that these packages would be forced on consumers—by consumers, I mean the airlines here—but that the airlines would actually *want* the packages.[72] That is, the airlines would want the packages so much that they would no longer have any interest in dealing with the stand-alone companies that had theretofore competed with GE and Honeywell.[73] The Europeans disapproved of this arrangement because the GE offer would be so attractive that airlines would move their

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65. *See* European Commission Decision, *supra* note 63, at 31–35 (describing GE's capital).

66. *See id.* at 35–38 (discussing GE Capital Aviation Services (GECAS) and its purchase of aircraft).

67. *See id.* at 58–59.

68. *See* Press Release, U.S. Dep't of Justice, Statement by Assistant Attorney General Charles A. James on the EU's Decision Regarding the GE/Honeywell Acquisition (July 3, 2001) ("[T]he combined firm could offer better products and services at more attractive prices than either firm could offer individually."), *available at* http://www.usdoj.gov/atr/public/press_releases/2001/8510.pdf.

69. *Id.*

70. *See* European Commission Decision, *supra* note 63, at 99–102; Georgiev, *supra* note 61, at 518–19.

71. European Commission Decision, *supra* note 63, at 86–88; *see* Douglas K. Schnell, Note, *All Bundled Up: Bringing the Failed GE/Honeywell Merger in from the Cold*, 37 Cornell Int'l L.J. 217, 240–241 (2004).

72. European Commission Decision, *supra* note 63, at 106–09 ("[A]s a result of the proposed merger, it can be expected that customers will continue to have a rather limited interest in exercising whatever countervailing power they may have vis-à-vis the merged entity's bundled offers."); *see* Schnell, *supra* note 71, at 241.

73. European Commission Decision, *supra* note 63, at 107 ("As a result, airlines will have a very limited incentive to exert countervailing buying power since they cannot really afford to deny themselves short-term benefits even if they are associated with adverse consequences in the foreseeable future . . . .").

business to the combined GE-Honeywell firm. As a result, the stand-alone companies would not have adequate resources left to engage in research and development. Ultimately, the other competitors would slowly shrink into oblivion, with the result that the market would be left with one dominant firm.[74]

So, the European Commission blocked the deal.[75] The decision was appealed through the European courts, and several years later, it was affirmed on certain grounds but not others.[76] But the relevant point for discussion today is that the deal was blocked, notwithstanding the fact that the United States had approved it earlier. And, following the EU's rejection, there was much made of the difference between fairness considerations in Europe versus the pure efficiency approach of the United States.

Hopefully, this discussion has provided some background on the differences between U.S. and European merger review. For the sake of brevity, I have likely over-generalized, but my objective is to make points strongly enough that you can see cleanly what the distinctions are.

I will now describe my view of where the two regimes have been headed recently. In Europe, the movement has consistently, if not slowly, been in the direction of increased emphasis on economic efficiency.[77] I cannot say the same for the United States, where economic efficiency is enjoying less prominence at the federal enforcement level.

This is not a statement I would have made until about 2008. Recently, however, there have been actions taken and statements made by U.S. regulators, most notably at the FTC, that suggest a dramatic turn of direction. I should note that the Justice Department does not have a new head of the Antitrust Division yet.[78] Time will tell what happens there, but in light of statements made by then-Candidate Obama, it is likely that the Division will be headed by someone with sharply different views from that of the last Division head of the Bush Administration.[79]

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74. *Id.* at 109 ("[I]t can be concluded that the merger will result in the creation/strengthening of a dominant position on the markets for large commercial aircraft engines, large regional jet aircraft engines and corporate jet aircraft engines, as well as on the markets for avionics and non-avionics products.").

75. *Id.* at 130–31.

76. *See, e.g.*, Case COMP/M. 2220, Commission Decision 2004/134/EC, *application for annulment denied,* Case T-210/01 (Ct. of First Instance Dec. 14, 2005), *available at* http://curia.eu.int/en/content/juris/index.htm; Paul Meller, *European Court Upholds Veto of G.E.-Honeywell Deal*, N.Y. TIMES, Dec. 15, 2005, at C7.

77. *See* Borja Martinez Fernández, Iraj Hashi & Marc Jegers, *The Implementation of the European Commission's Merger Regulation 2004: An Empirical Analysis*, 4 J. COMP. L. & ECON. 791, 793 (2008) (characterizing Europe's shift in merger tests as "aligning the regulations with U.S. standards").

78. Subsequently, Christine Varney was confirmed as the head of the Justice Department Antitrust Division. Press Release, U.S. Dep't of Justice, Attorney General Eric Holder Welcomes Assistant Attorneys General for Antitrust, Civil, and Criminal Divisions, (April 20, 2009), *available at* http://www.usdoj.gov/atr/public/press_releases/2009/245029.pdf.

79. *See* John B. Kirkwood & Robert H. Lande, *The Fundamental Goal of Antitrust: Protecting Consumers, Not Increasing Efficiency*, 84 NOTRE DAME L. REV. 191, 194–95, 194

Note the difference in procedure with the FTC, where the commissioners sit for fixed terms of seven years and the lineup does not necessarily change much with a change in administration.[80] The chairman changes because there can only be three commissioners from one party,[81] and the incoming president always names one of the sitting commissioners from his or her party to be the chair.[82]

If you think my contention that the United States is moving away from economic efficiency is an overstatement, I would start out by pointing you to a statement made not by one of the Democratic FTC commissioners, but by a Republican commissioner appointed during a Republican administration.[83] Within the last month, after observing that two of his heroes—pure Chicago School types, Henry Paulson and Alan Greenspan—had bolted and discarded the Chicago School,[84] he followed suit. I'll read you what he said, "One thing is clear to me: the orthodox and unvarnished Chicago School of economic thought is on life support, if it is not dead."[85]

He went on to say that the change in policy had been so rapid that the FTC website had not even had time to catch up.[86] Commissioner Rosch was referring to several quotes on the FTC website, touting that the FTC has "faith in the market."[87] For anyone who follows these agencies at all, the idea that a commissioner—any commissioner, let alone a Republican commissioner—is apologizing about what is on the FTC website because it references faith in the markets is unusual, to say the least. To be clear, the Chicago School has been the underpinning of antitrust analysis in this country for the last twenty-five years.[88]

Chairman Rosch went on to say that "some would even say that [the] Chicago School is 'out' and Keynesian economics is 'in.'"[89] Now, I have already discussed what the Chicago School stands for. In contrast, Keynesian economics concerns itself with identifying situations when government should intervene with spending to stimulate the economy.[90]

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n.9 (2008) (discussing the adherence by Bush administration antitrust officials, including Thomas Barnett, to the ideas of the Chicago School).

80. 15 U.S.C. § 41 (2006).

81. *Id.*

82. *Id.* ("The President shall choose a chairman from the Commission's membership.").

83. 151 CONG. REC. S13969 (daily ed. Dec. 17, 2005).

84. J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks at the New York Bar Association Annual Dinner 4–5 (Jan. 29, 2009) [hereinafter Speech by J. Thomas Rosch], *available at* http://www.ftc.gov/speeches/rosch/090129financialcrisisnybarspeech.pdf .

85. *Id.* at 2.

86. *See id.* at 3.

87. *See id*; Federal Trade Commission, Bureau of Competition, http://www.ftc.gov/bc/index.shtml.

88. *See* TONY A. FREYER, ANTITRUST AND GLOBAL CAPITALISM, 1930–2004 6 (Cambridge Univ. Press 2006) (discussing the shift to the dominance of the Chicago School starting in the 1970s and continuing into the new century).

89. Speech by J. Thomas Rosch, *supra* note 84, at 4.

90. *See* Geoffrey D. Korff, *Reviving the Forgotten American Dream*, 113 PENN. ST. L. REV. 417, 434 (2008).

According to John Maynard Keynes, there are appropriate times for the government to spend and such spending is what fixes markets that are not always self-correcting (or at least not quickly self-correcting).[91] These statements are certainly a far cry from the Posner quote I gave you, made not that long ago, where he declared the intellectual journey for merger review had reached an end, that the key ideological battles had been fought and won, and that there is now universal consensus on how enforcers should proceed.

Now, some of you might be thinking that I am, just to be controversial and provocative, picking out one speech and taking a couple of sentences out of context. After all, anybody, even commissioners, will sometimes stray and say things in order to get the discussion going. That is fair enough, so let me give you a couple further examples in support of my position.

I should note first that I am really trying to avoid the macro-political scene, that is, the results that will occur strictly because of the election. To be sure, people are running all over Washington to distance themselves from the policies of the last eight years simply because of the economic situation we are in right now. Whether those policies were right or wrong, or a cause or non-cause of where we are, no one is going to embrace them. Realistically, that is just Washington.

You observe officials like Mary Shapiro, the new head of the SEC, say that her primary initial goal is to reverse the market-driven policies of her predecessor.[92] So, this is not something that is limited to the FTC. But, as noted, I am not really talking about that aspect of change. I am talking about changes that I believe started to occur before the groundswell occasioned by the recent election.

Going back to the FTC for a minute, there was a paper submitted recently by the American Antitrust Institute (AAI).[93] In a rare moment of prudence before I criticized the paper, I looked to see who was on the advisory board and saw it included Professor Hay. But, as he quickly reminds me, just because you are on the board does not mean you approve of any particular paper. The reason I point this out is simply to substantiate that this is a legitimate, mainstream operation. The AAI is not the left wing's response to the Cato Institute.

In any event, a merger recently was proposed between Pfizer and

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91. *See id.*

92. *See* Stephen Labaton, *S.E.C. Chief Pursues Reversal of Years of Lax Enforcement*, N.Y. Times, Feb. 23, 2009, at B1 ("Less than a month after becoming the head of the [SEC], Mary L. Shapiro is moving swiftly to reverse major decisions by her predecessor. . .").

93. *See* Letter from Albert A. Foer, President, Am. Antitrust Inst., to Eric Holder et al., Attorney Gen., U.S. Dep't of Justice (Feb. 11, 2009) [hereinafter Foer Letter], *available at* http://www.antitrustinstitute.org/archives/files/Pfizer-Wyeth%20AAI%20memo.2.11.09_021420090933.pdf; Memorandum from William S. Comanor & F.M. Scherer, Am. Antitrust Ins., to the Attorney Gen. and U.S. Fed. Trade Comm'n 1 (Feb. 11, 2009) [hereinafter Memorandum from AAI], *available at* http://www.antitrustinstitute.org/archives/files/Pfizer-Wyeth%20AAI%20memo.2.11.09_021420090933.pdf.

Wyeth.[94] As a disclaimer, I should note that my firm represents Wyeth, but my comments are not relevant to that representation. AAI submitted a paper, touting that it had been written by two former heads of the FTC Bureau of Economics.[95] One of them was the head when I was in high school—trust me that was long time ago. And the more recent of them was at the FTC 30 years ago.[96] I think it takes a bit of base stealing to imply that these are recent policy makers.

Essentially, Wyeth/Pfizer is, from an antitrust standpoint, a standard pharmaceutical merger.[97] Each of these companies makes a lot of products.[98] There are some areas where there is a therapeutic overlap, and the government is presumably going to look at those, make decisions about what the competition looks like before and after the merger, and determine whether any relief is required as a condition to being allowed to close the deal.[99] But the AAI authors, Professors Comanor and Scherer, believe this thinking is way too small; instead, they unabashedly advocate a mode of analysis, which they themselves characterize as beyond the conventional scope under the antitrust laws.[100]

So why would they have the FTC block this merger? First of all, they object on macroeconomic theory grounds.[101] They are also concerned that some TARP money was used to finance this transaction and that the companies are relying on banks for financing.[102] That happens in any big merger. So, what is the issue with the banks using TARP money? The paper argues the following, in sequence: that the funds will end up in the hands of the shareholders;[103] everybody knows that shareholders are wealthy people; wealthy people do not spend money, they save money. This means that TARP money is going to go into wealthy people's saving accounts instead of being used for job-expansion opportunities.[104] They argue that this provides a reason to block the merger.[105] The authors reference conventional analysis as well but only to buttress their other reason-

94. *See* Matt Herper, *Will Pfizer's Merger Hurt Innovation?*, FORBES, Jan. 26, 2009.

95. *See* Foer Letter, *supra* note 93.

96. *See* UCLA Faculty: William S. Comanor Biography, http://www.ph.ucla.edu/hs/bio_comanor.asp (last visited Feb. 26, 2010).

97. *Cf.* Patricia M. Danzon et al., *Mergers and Acquisitions in the Pharmaceutical and Biotech Industries* 7 (University of Pennsylvania, The Wharton School, Working Paper, Sept. 2003), *available at* http://hc.wharton.upenn.edu/nicholson/pdf/merger_Sept03.pdf (finding that all but three of the top pharmaceutical companies in the United States have been involved in "major horizontal acquisitions" in the past fifteen years).

98. *See* All Products, http://www.wyeth.com/products; Pfizer Pharmaceutical Products, http://www.pfizer.com/products/rx/prescription.jsp.

99. *See* Thomas B. Marcotullio, *The Battle Against Drug-Makers: An Analysis of European Union and United States Merger Enforcement in the Pharmaceutical Industry 1995-1999*, 32 LAW & POL'Y INT'L BUS. 449, 458 (2001).

100. *See* Memorandum from AAI, *supra* note 93, at 2.

101. *Id.*

102. *See id.*

103. *See id.* at 3.

104. *See id.*

105. *See id.* at 15.

ing,[106] which they believe counsels against permitting the merger.[107] There is no discussion of market power, of economics, or of the effect on consumers.[108] The paper's discussion relates to industrial policy and the use of TARP money.[109]

The authors go on to argue that these are two really big pharmaceutical companies and, if they are allowed to merge, Pfizer, in particular, is going to have fewer incentives to acquire some of these smaller biotech companies.[110] The paper argues that it is these smaller biotech companies that really come up with better ideas when it comes to R&D.[111] The paper concludes that, if one wants to see innovation in the pharmaceutical industry, the two companies should not be allowed to merge because that will crowd out the acquisitions that Pfizer otherwise would have made from the smaller companies.[112]

Now, you tell me what the limiting principle is with this concept: the idea that you stop a merger not because it raises any competitive issue itself, but because of the hope or expectation that some other undefined merger would occur at some unknown time down the road?[113] Again, what is this other than industrial policy? It has nothing to do with mainstream antitrust enforcement. Now, we might ignore this because after all, this is just a proposal being made to the Federal Trade Commission. But we have some specific examples at the FTC to talk about as well.[114]

U.S. enforcers appear to be moving away from the precision of the Chicago School (accepting, as we must, that it is not perfect, can get things wrong, and can be very harsh). But, to my way of thinking, the shift is from the Chicago School's economically objective analysis to an undefined standard, which is, to say the least, unhinged and has no limiting parameters. Where do you draw the line and start or stop this shift?

First I want to talk about the FTC's *Ovation Pharmaceutical* case.[115] This was a situation with, apparently, very bad facts, and as they say, bad facts make for bad law. The matter involved a drug called Indocin, which, among other things, is used to treat congenital heart defects in premature infants.[116] Rights to the drug were owned by Merck.[117] Ovation, which previously was not in this market (it was not a pharmaceutical company

106. *See id.* at 4-5.
107. *See id.* at 5.
108. *See id.* at 4, 15.
109. *See id.*
110. *See id.* at 8-9.
111. *See id.* at 7-8.
112. *See id.* at 8-9.
113. *See id.*
114. *See* Jonathan Gleklen, *The Emerging Antitrust Philosophy of FTC Commissioner Rosch*, 23 ANTITRUST 46, 46-47 (2009) (discussing Commissioner Rosch's similar approach in other cases).
115. *See generally* Thomas B. Leary, *Antitrust Scrutiny of a Pure Conglomerate Merger: The* Ovation *Case*, 23 ANTITRUST 74 (2009).
116. *See id.* at 74.
117. *See id.*

and had no R&D), bought the rights to Indocin from Merck.[118] There was no antitrust concern with the purchase because it was not a horizontal merger;[119] it was just a straight transfer of assets to an entity that was not a competitor.[120] After the sale, however, Ovation approached Abbott Labs, which had a similar drug in the pipeline—one that was going through the FDA process and that ultimately would compete with Indocin.[121] In other words, Abbott's drug, NeoProfen, would also likely be indicated for treatment of this congenital heart defect in premature babies.[122] Ovation ultimately acquired Abbott's rights to NeoProfen.[123] The transaction fell below the mandatory reporting threshold, so there was no obligation to provide the government pre-merger notification.[124]

Assuming the accuracy of the allegations in the FTC Complaint, the company deserves an "A" for stupidity for their next move, which was to raise the price of the product from $36.00 to $500.00 per vial.[125] That amounts to a price increase of 1300%.[126] Inasmuch as market power is defined by the ability to raise prices above a competitive level, and the government considers a 5–10% increase in price as significant evidence of the fact, it is hardly surprising that the FTC moved aggressively when they learned of the situation and insisted on unwinding the transaction by which they obtained NeoProfen. The government had a compelling argument that the acquisition of the potentially competing product was problematic because of the increased price flexibility it afforded Ovation. Challenging the NeoProfen deal was a no-brainer.

The FTC went further, actually, seeking disgorgement of profits in federal court.[127] My guess is they are going to get it, assuming disgorgement is something available to the FTC as a statutory matter—the latter issue being a subject for another day.

However, two of the commissioners took the position that, not only was it correct for the FTC to challenge Ovation's acquisition of Neoprofen from Abbott, but that the FTC should also have gone back and challenged Ovation's *initial acquisition* of Indocin from Merck.[128] Now, what was their argument? After all, that transaction was not between two competi-

118. *See* Gleklen, *supra* note 114, at 46.
119. *See id.*
120. *See id.*
121. *See* Leary, *supra* note 115, at 74.
122. *See id.*
123. *See id.*
124. *See id.*
125. Complaint at 2, F.T.C. v. Ovation Pharmaceuticals, Inc., No. 8 Civ. 6379 (D. Minn. 2008).
126. *See* Jon Leibowitz, Concurring Statement of Commissioner Leibowitz: Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008) [hereinafter Leibowitz Statement], http://www.ftc.gov/os/caselist/0810156/081216ovationleibowitzstmt.pdf.
127. *Id.* at 11.
128. *See id.*; Leary, *supra* note 115, at 74; J. Thomas Rosch, Concurring Statement of Commissioner J. Thomas Rosch: Federal Trade Commission v. Ovation Pharmaceuticals, Inc. (Dec. 16, 2008) [hereinafter Rosch Statement], *available at* http://www.ftc.gov/os/caselist/0810156/081216ovationroschstmt.pdf.

tors, actual or potential. It was a simple change in ownership. There was no overlap in research and development, and no change in the state of competition in the market from the day before the transaction to the day after.[129]

One of those who would have challenged the Indocin purchase is the now chairman of the FTC, Jon Leibowitz,[130] one of the more thoughtful people you will come across. However, the antitrust rationale behind his reasoning in arguing the FTC should have challenged the Indocin purchase from Merck eludes me. Chairman Leibowitz first declares profiteering is immoral and illegal.[131] I am unaware of legal precedent basing antitrust merger policy on what's moral or immoral. The Chairman goes on to note that the transaction serves as a stark reminder of the need for universal health care.[132]

That serves as a very strong statement of public policy, but, first, I do not see the connection between that observation and the application of antitrust merger law. To me, these statements are like saying it is warmer in the summer than it is in the country—a non-sequitur.

One next looks for guidance as to the antitrust foundation for challenging the initial acquisition in Commissioner Rosch's concurring statement. The Commissioner concludes that when Merck owned these assets, they did not and would not charge the price the market would bear.[133] Merck was charging five dollars, but Ovation raised prices by a huge amount after purchasing rights to the drug.[134] He posits that Merck, which has a good reputation and sells products across the board, did not want to take the hit to its image that would result if Merck started exploiting its pricing power on a treatment for premature babies with heart defects.[135] So, concludes Commissioner Rosch, while in the hands of Merck, with its broader product portfolio, the product was handled responsibly.[136]

In contrast, opines the Commissioner, Ovation is a single-product company whose incentives simply are to make as much money as it can on sales of the product.[137] Thus, both Commissioners challenged the initial acquisition by a single-product company because it did not have the same incentives to keep prices down as was the case with Merck, with its reputational concerns.[138] As a matter of industrial policy or public policy, this could be considered a fantastic result. But in either statement is there any reliance on competition laws—the laws these Commissioners are empow-

129. *See* Complaint, *supra* note 125, ¶ 18.
130. Jon Leibowitz, Chairman (Mar. 2, 2009), http://www.ftc.gov/commissioners/leibowitz/index.shtml.
131. *See* Leibowitz Statement, *supra* note 126, at 1.
132. *Id.*
133. *See* Rosch Statement, *supra* note 128, at 1.
134. *Id.*
135. *Id.*
136. *Id.*
137. *See* Leibowitz Statement, *supra* note 126, at 1.
138. *See id.*; Rosch Statement, *supra* note 128, at 1.

ered to enforce? Even if a thread to antitrust law could be discerned, what possible standard could be articulated for making determinations as to when a single-product company should be able to engage in acquisitions and when not?

It is often said that we are a nation of entrepreneurs. Must an entity own a portfolio of products before it is permitted to merge with another company? Where is the limiting factor? I do not see one. I think these statements are reflective of pure industrial policy. How could the matter be resolved relying on the thinking of the Chicago School? For better or for worse, the Chicago School doesn't take moral positions.[139] Some would say for worse, but the Chicago School instructs that monopoly profits actually spur innovation, a conclusion that the Supreme Court echoed as recently as two days ago.[140]

The reasoning behind that view is that monopoly profits encourage others to weigh in with efforts to create an even better solution.[141] And this case actually supports the theory. Abbott had a product in the pipeline, and the price of the existing product was low. When did Ovation raise the price? It was at the point where they got control of both products.[142] So the proponents of Chicago School could argue that, prior to acquisition of the Abbott product, the market was already bringing discipline to the situation.

The theory underpinning Chicago School thought is that the higher the reward, the more it encourages further innovation. *Ovation* is a tough case with which to be defending the Chicago School, because the matter presents very unattractive facts, and my point here simply is that it isn't possible to reconcile the statements of Chairman Leibowitz and Commissioner Rosch with any kind of Chicago School analysis. Indeed, the legal precedent relied upon in the statements is thin, consisting largely of a dated and obscure Seventh Circuit case.[143]

The other precedent—and I think, to long-time antitrust practitioners, this will come as somewhat of a surprise—is the oft-maligned *Procter & Gamble* case, perhaps best known as serving to block a conglomerate merger in 1967 because it was too efficient.[144] I noted a footnote in Commissioner Rosch's concurrence acknowledging the existence of a view that

139. Marc Allen Eisner, Antitrust and the Triumph of Economics 116 (1991) ("For most Chicagoans, the use of antitrust to realize grand political, social, and even macroeconomic objectives was nothing short of perverse.").

140. *See* Pacific Bell Tel. Co. v. Linkline Commc'ns, Inc., 129 S. Ct. 1109, 1122 (2009).

141. *See, e.g.*, Gregory K. Price et al., *Size and Distribution of Market Benefits from Adopting Biotech Crops*, 1906 U.S.D.A Tech. Bull. 9 (2003) ("Monopoly profits help the innovator to recover research and development expenditures . . . . Without these profits, few incentives to develop these technologies would exist.").

142. *See* Complaint, supra note 125, ¶¶ 22–24.

143. *See* Rosch Statement, *supra* note 128, at 2 (citing EKCO Prods. Co. v. F.T.C., 347 F.2d 745, 753, 745 (7th Cir. 1965)).

144. *See id.* (citing FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967)); Gunnar Niels & Adriaan ten Kate, *Introduction: Antitrust in the U.S. and the EU - Converging or Diverging Paths?*, 49 Antitrust Bull. 1, 8 (2004).

the *Procter and Gamble* case does not reflect the present state of economic thinking or the case law.[145]

I think *Ovation* is Exhibit A for the proposition that bad facts make for bad law. Even accepting the proposition that straying from a pure economic analysis can be justified, how does a regulator determine whether a company is a "good company" or "bad company," and what standard is used for making a decision on that basis? Is that the sole parameter to be used? It is the only factor that seems to have been relied upon in the concurring opinions for the conclusion that the FTC should have blocked the original Indocin acquisition.[146]

If the Chicago School is being abandoned, this leaves open the question of what is replacing it as the mode of analysis. The school of thought appearing to gain currency at the FTC right now is known as "behavioral economics."[147]

What are the guiding standards of the behavioralist school? At the risk of over-simplification, whereas the Chicago School applies rules based on an assumption of rational behavior, behavioral economists dismiss any assumption that rational people act rationally. Instead, they would base decisions on actual observed behavior. Let us look at how people *really* act and make our decisions based on that.[148]

Who could argue with that proposition? It sounds terrific. And if I could find someone who could predict actual, as opposed to rational behavior, she would probably be a successful investment advisor, not working in the bowels of academia or a government bureaucracy. But the fact of the matter is that people simply do not know how to do that for the most part. Note also the Chicago School has never stood for the proposition that it can predict human behavior perfectly. So while there is still clear theoretical room for improvement, what justifies a leap to theories like behavioral economics?

One feature of the Chicago School is relative simplicity.[149] Proponents will acknowledge they do not always get it right, but it is still better than any other system. They also believe Chicago School theory explains human behavior better, in the aggregate, than any theory that attempts to identify behavioral idiosyncrasy. In *Eastman Kodak Co. v. Image Technical Services, Inc.*,[150] the majority opinion included a discussion of whether people who buy photocopiers actually think through what the cost of

145. *See FTC. v. Procter & Gamble*, 386 U.S. at 588 n.6 (Harlan, J., concurring).

146. *See* Rosch Statement, *supra* note 128, at 2 (citing EKCO Prods. Co. v. F.T.C., 347 F.2d 745, 753, 745 (7th Cir. 1965)).

147. *See generally* Joseph P. Mulholland, Summary Report On The FTC Behavioral Economics Conference, *available at* http://www.ftc.gov/be/consumerbehavior/docs/07 0914mulhollandrpt.pdf.

148. *See, e.g.*, Craig Lambert, *The Marketplace of Perceptions*, Harv. Mag. 50, 50 (Mar.-Apr. 2006) (discussing the preference for the actual human rather than the "Economic Man").

149. *See* Posner, *supra* note 7, at 928 (discussing how Aaron Director's antitrust theory was derived from simple price theory).

150. 504 U.S. 451 (1992).

repair and of buying a replacement—the so-called "life costs"—and factor all that in when they pay the initial purchase price.[151] Justice Scalia, in dissent, acknowledged that not all purchasers look at the price of "aftermarket support," but noted that notwithstanding the "occasional, irrational consumers[,] . . . we have never before premised the application of antitrust doctrine on the lowest common denominator of consumer."[152]

In other words, antitrust law does not protect every consumer, no matter how lazy, uninformed, or stupid. What it protects is the rational consumer because it is the best available surrogate and it is the only model that also provides a structured regime with any semblance of predictability.[153] I would speculate that behavioral economists point to Chicago School policy as being a substantial cause of the present economic downturn and question its credibility as a normative model, saying, in effect, "You had your shot, now give us ours."[154] And at some level, that observation is likely to provoke some sympathy.

Let us take an example. Try to think of a market that best approximates perfect competition—a market where there is instant information, lots of buyers and sellers, and the ability to enter and exit at will. Let's look at the stock market, which comes as close to a perfectly competitive market as you can imagine. Yet, on Tuesday it went down 251 points, and the next day, with no real difference in the news, it went up 236 points. Do the behavioralists have a point after all?

I do not have expertise in this area, but from what I have reviewed, behavioral economists have actually shown quite convincingly that people do respond to the same stimuli in different ways under different circumstances and make different presumptions and different decisions.[155] One example often cited is the employee coffee wagon. Apparently the honor system works a lot better in a small company than it does in a big company. The employees in a big company are a lot more likely to cheat the coffee wagon than those in a small company.

This, and similar examples, cause critics of rational choice theory to argue: "What reason is there for assuming that people always make decisions based on profit maximization?"[156] There are just some good people out there who make decisions on one basis, and others who reach different results. Why else, for example, would a rational person visiting a strange

151. *Id.* at 469-71 .

152. *Id.* at 495-96 (Scalia, J., dissenting).

153. *See, e.g.*, Neil W. Averitt & Robert H. Lande, *Consumer Sovereignty: A Unified Theory of Antitrust and Consumer Protection Law*, 65 ANTITRUST L.J. 713, 733-34 (1997) (discussing how consumer protection laws, and not antitrust laws, are designed to protect against lack of information and other "inside the head" market failures).

154. *See, e.g.*, Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1143-44 (2000) (noting that rational choice theories are flawed and that law and economics should be transformed into "law and behavioral science").

155. *See infra* notes 158-60 and accompanying text for specific examples and more in-depth discussion.

156. *See, e.g.*, Korobkin & Ulen, *supra* note 154, at 1143.

town she is never going to see again, leave a tip? Why would a rational person participate in a blood drive? People needing a transfusion aren't rejected for never having donated blood. These instances point to what I see as a difficulty facing proponents of Chicago School: it is based on tough love and is Darwinian in the way it works, so politically it can be a very hard doctrine to sell.[157]

Behavioral economists have also engaged in more systematic analysis. For example, they have demonstrated a penchant for loss aversion: people are much more concerned about a given loss than the positive prospect of that same gain,[158] and people tend to be over-optimistic—more willing to accept good news than bad. Similarly, they have observed an overconfidence bias: people think that good things are going to happen more often than bad things.[159] Framing the issue can make a difference: if something is seen as a sure gain as opposed to an avoidance of loss, people will react differently to the exact same fact pattern.[160]

There is much more to be said about behavioral economics, and I suspect we will be hearing more about it over time. However, I will, in the interest of time, now leave the topic to discuss other instances where I believe the government has deviated in the antitrust context from pure Chicago School economics. I suppose, given the present ubiquity of the phrase "too big to fail," that it was only a matter of time before an antitrust regulator sought to find its intersection with competition law. Indeed, at least one FTC commissioner has suggested a separate blocking screen for mergers that would create entities that are "too big to fail."[161]

The idea behind "too big to fail" is that some companies are entitled to a government bailout, to stave off failure that would cause a catastrophic hit on our economy and the nation's financial system. Well, maybe so, but a lot of companies can become too big to fail under this theory and still pass a traditional Section 7 antitrust analysis.[162] Some of the banks that received bailout money are ones that were created as the result of a merger,

157. Alon Brav, J.B. Heaton & Alexander Rosenberg, *The Rational-Behavioral Debate in Financial Economics* 9 (Duke University, Working Paper, Mar. 3, 2009) (noting that Milton Friedman's rationality theory resembles Darwin's theory in some respects).

158. *See* Colin F. Camerer & George Lowenstein, *Behavioral Economics: Past, Present & Future, in* ADVANCES IN BEHAVIORAL ECONOMICS 3, 4 (Camerer et al, eds., 2003).

159. *See, e.g.*, S. Mullainathan & R.H. Thaler, *Behavioral Economics*, *in* INTERNATIONAL ENCYCLOPEDIA OF THE SOCIAL & BEHAVIORAL SCIENCES 1094, 1095 (Neil J. Smelser & Paul B. Baltes, eds., 2002).

160. *See* Robert J. Schiller, *Behavioral Economics and Institutional Innovation* 4 (Cowles Found. for Research in Econ. Yale Univ., Discussion Paper No. 1499, 2005) (discussing the centrality of the concept of framing to behavioral economics).

161. *See* Speech by J. Thomas Rosch, *supra* note 84, at 8 (discussing how mergers should be analyzed with regards to whether they would create entities "too big to fail").

162. *See, e.g.*, Memorandum from the Republican Staff of the Committee on Oversight and Government Reform to Republican Members of the Committee on Oversight and Government Reform, Full Committee Hearing: "Bank of American and Merrill Lynch: How Did a Private Deal Turn Into a Federal Bailout?" – Part II (June 25, 2009) (discussing the merger of Bank of America and Merrill Lynch without mention of Section 7 analysis).

and they passed Section 7 analysis.[163] Indeed, in any particular industry, there may be more than one player that is too big to fail, which in and of itself suggests there is not a one-to-one relationship between an entity that is too big to fail and traditional antitrust analysis.[164]

Another FTC Commissioner-generated suggestion for post-Chicago School merger analysis applies when the two companies in question operate in two completely different industries. The putative basis for a challenge would be if substantial leveraging and financing resulted in the merged entity being too weak to compete effectively with a strong competitor in either of the predecessor industries.[165] Again, while the concept might have superficial appeal, it is far more attuned to an economy with central planning than one based on competition. How do you analyze that? I do not know.

It would be one thing if the ideas emanating from the FTC were, for the moment, mere musings in a speech, but the situation has progressed beyond that. A recent illustrative case is *Fresenius/Daiichi*. Fresenius owns dialysis centers.[166] One of the treatments provided at dialysis centers is for iron deficiency.[167] Fresenius sought to purchase the manufacturer of a product for the treatment of iron deficiency.[168] This was a purely vertical merger because a downstream supplier was buying the purchaser of an input.[169] Fresenius did not make the drug before the acquisition, and Daiichi did not own dialysis centers.[170] The owner of iron deficiency dialysis centers, sought to purchase the manufacturer of an upstream product.[171] But the concern, at least as stated by the government in a consent decree regulating the transaction, did not rely upon typical vertical foreclosure theory.[172]

Traditional vertical foreclosure theory applies if, as the result of acquiring an upstream input, a purchase can effectively deny that input to competitors downstream. The theory of harm derives from the chokehold created. But no such claim was made here. The argument relied upon by the FTC was that the acquisition by Fresenius was undertaken to game the Medicare system.[173] Dialysis centers are reimbursed based on average

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163. *Id.*

164. *See, e.g.*, Speech by J. Thomas Rosch, *supra* note 84, at 5 (providing examples of several companies in one industry—banking—that were all too big to fail).

165. *See id.*

166. Federal Trade Commission, Analysis of Agreement Containing Consent Order to Aid Public Comment 2 (Sep. 15, 2008), http://www.ftc.gov/os/caselist/0810146/080915freseniusanal.pdf.

167. *Id.*

168. *See id.* at 1.

169. *See* EISNER, *supra* note 139, at 130.

170. *See* FTC, Analysis of Agreement, *supra* note 166, at 2.

171. *See* Complaint at 3, *In re* Fresenius Med. Care AG & Co. KGaA and Daiichi Sankyo Co., Ltd., No. C-4236 (F.T.C. Sep. 15, 2008), *available at* http://www.ftc.gov/os/caselist/0810146/080915freseniuscmpt.pdf.

172. *See* FTC, Analysis of Agreement, *supra* note 166, at 3–4.

173. *See* Fresenius Complaint, *supra* note 171, at 4.

sales price.[174] And so, according to the FTC, if Fresenius purchases the rights to an iron drug, it will then raise the internal transfer price to its own dialysis centers, which in turn, will raise the national average sales price, with the result being that not only Fresenius, but competing dialysis centers as well, are going to get higher rates of reimbursement for Medicare.[175]

As with some of the other examples I have spoken about, the FTC action may lead to a terrific public policy result, but what does it have to do with application of competition law? The FTC's theory appears even more anomalous when the FTC's solution is examined. The FTC imposed rate caps for the period of time in which the merged entity could conceivably engage in regulatory evasion.[176] Again, it may be hard to criticize the result from a public policy standpoint, but, one has to ask, where is the *antitrust* analysis?

Lest you think deviations from well-settled antitrust doctrine are just occurring at the FTC, there are signs of its looming presence in the courts as well. A transaction you may have heard of recently involved two stores that sell premium, natural, organic foods: Whole Foods and Wild Oats.[177]

The FTC concluded that if these two players were to merge, competition would be eliminated in the market for premium, natural, organic stores.[178] More specifically, in eighteen locations, the merger would eliminate the only organic stores.[179] So, the FTC moved to block the transaction.[180] The District Court properly asked the conventional question in this situation: if prices are increased at all organic stores by a certain amount—five percent—will consumers accept the price increase or would the increase be unprofitable because sufficient numbers would shift their purchases to a conventional store?[181]

If a sufficient number of consumers would switch so as to render the price increase unprofitable, one could conclude the relevant product market extends beyond organic stores to also encompass conventional supermarkets.[182] The District Court observed that when Whole Foods determined its prices, it was done across an entire region. In other words, Whole Foods did not historically set its prices at a different level in those areas with a Wild Oats store.[183] Moreover, Whole Foods, when conducting its pricing research, compared itself with conventional supermarkets and others.[184] The District Court concluded on this evidence that the FTC

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174. *See id.*
175. *See id.*
176. *See* FTC, Analysis of Agreement, *supra* note 166, at 3–4.
177. FTC v. Whole Foods Mkt. Inc. [*Whole Foods I*], 502 F. Supp.2d 1 (D.C. 2007), *rev'd*, 548 F.3d 1028 (D.C. Cir. 2008).
178. *See* Complaint at 1, *Whole Foods I*, 502 F. Supp. 2d 1 (No. 1:07-cv-01021), *available at* http://www.ftc.gov/os/caselist/0710114/070605complaint.pdf.
179. *See Whole Foods I*, 502 F. Supp. 2d at 16.
180. *See id.*
181. *See id.*
182. *See id.* at 34.
183. *See id.* at 39.
184. *See id.* at 29.

could not meet its burden that Whole Foods/Wild Oats would profitably be able to raise prices post merger.[185] Therefore, the preliminary injunction was denied.[186]

On appeal, the D.C. Circuit Court of Appeals began its discussion with the gratuitous observation that the District Court did a fabulous job in its reasoning[187] and that the FTC did a really lousy job—a statement that was both gratuitous, and in my view, incorrect.[188] But the D.C. Circuit then proceeded to reverse the District Court because it reached the wrong conclusion[189] by erroneously focusing on the so-called marginal consumer.[190]

The marginal consumer is the one who is the most sensitive to a price change.[191] The D.C. Circuit reasoned that all consumers are protected by the antitrust laws, not just the marginal consumer.[192] And the D.C. Circuit is absolutely right about that. But the D.C. Circuit missed the point of focusing on the marginal consumer. The fact is that traditional antitrust analysis does look at the marginal consumer to ascertain whether enough of them will defect in response to a price hike to make that action unprofitable. The exercise of looking at the marginal consumer is undertaken for the very reason that it identifies those situations where a merger can adversely affect all consumers. If the price hike would be unprofitable, the merged entity will not impose it.[193] And when the merged entity keeps prices at the status quo, both the core customers and the marginal customers are protected.

On the other hand, if the marginal customers are not going to switch away, then the price increase is profitable, the merger would be prohibited as violating Section 7 of the Clayton Act, and all consumers would be protected.[194] So the District Court, I would submit to you, was completely right.

Also notably, the D.C. Circuit relied for its reasoning on a 1965 Supreme Court case, *Brown Shoe*, which stands for the dubious proposition that rigorous analytical market study is not required to establish market definition.[195] Instead it is sufficient to pose a series of qualitative questions: How is the industry perceived?[196] How does the public look at the industry? Are the products viewed as unique? The idea is that if you throw all these observations together and really think they suggest products are in the same or separate markets, that's enough.[197] It may be a little over-

185. *See id.* at 35.
186. *See id.* at 50.
187. *See* FTC v. Whole Foods Mkt., Inc. [*Whole Foods II*], 548 F.3d 1028, 1032 (D.C. Cir. 2008).
188. *See id.*
189. *See id.*
190. *See id.*
191. *See Whole Foods I*, 502 F. Supp. 2d at 17.
192. *See Whole Foods II*, 548 F.3d at 1037.
193. *See Whole Foods I,* 502 F. Supp. 2d at 35.
194. *See id.* at 19, 22.
195. *See* Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
196. *See id.*
197. *See id.*

stated to call *Brown Shoe* the worst antitrust decision ever written, but it certainly ranks high on the list and out-ranks several other worthy candidates.[198]

Regardless of its merits, or lack thereof, *Brown Shoe* simply is not a case that recently, prior to the D.C. Circuit decision, was thought to be instructive on the issue of market definition in this day and age.[199] Reliance on the case generally meant some allowance to raise qualitative factors, but only in conjunction with a quantitative assessment of market definition and product substitutability. To my mind, the D.C. Circuit almost entirely disregarded the steady and careful development over the last twenty-five years of the application of economic principles to the question of market definition, falling back instead on an undisciplined, qualitative form of analysis, and making the majority opinion a relic of a bygone era when antitrust laws were divorced from basic economic principles.[200]

In my view, the dissenting opinion was correct. I think the more interesting—and valid—question is whether the decision of the D.C. Circuit is simply a relic of the past or a precursor of things to come. At the very least, it serves as a wake-up call for those who have been confidently claiming victory for the Chicago School when it comes to the proper methodology for antitrust for merger review.

Thank you very much for being here and for allowing me the honor of speaking at this symposium.

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198. *See* Tim Wu, *The Copyright Paradox* 8 (Stanford Law and Economics Olin Working Paper No. 317, 2006), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=828784#.

199. *See* Bork, *supra* note 37, at 210.

200. *See Whole Foods II*, 548 F.3d 1028, 1063 (D.C. Cir. 2008).