This transcript has been lightly edited for clarity

THE FTC AND OTHER GOVERNMENT AGENCIES:
CONFLICT AND COOPERATION

SPEAKERS: TODD J. ZYWICKI
JOHN DELACOURT
THOMAS KRATTENMAKER
PAULINE M. IPPOLITO
COMMISSIONER PAMELA JONES HARBOUR

MODERATOR: PAUL A. PAUTLER

MR. PAUTLER: Welcome to panel number 7 of the FTC's 90th Anniversary Symposium. We're here today to discuss cooperation and conflict between the FTC and other domestic governmental units at the federal and state level.

This panel is going to be sticking pretty much to domestic matters since the panel after this will be talking about international conflict and cooperation.

We will be taking a historical approach, looking back about 30 years on activity in competition advocacy and state action. We've got two main papers. We've got two discussants who will cover slightly different parts of governmental interaction, and Commissioner Harbour is here with us to wrap things up.

For those who have read the recent popular

biography of Alexander Hamilton, that I think was supposed to be the summer read when you went to the beach, of course it was 750 pages long, so I'm not sure how many people actually got through it, but you can tell that conflict and cooperation between the state and federal levels of governments has been a hot topic ever since it was discussed by the Founders in the 1780s.

I don't think our discussion here today will quite reach the importance of those deliberations but it is something that we'll at least be touching on.

Because the papers you're going to hear today focus lot on interagency conflict and a lot less on interagency cooperation, before we got started, I wanted to briefly mention a little bit of the history of interagency cooperation that exists at the FTC, and Commissioner Harbour will also hit this point in her remarks.

Although I couldn't find a useful index of interagency cooperation that covered a long period of time, I think it's almost universally believed that the level of state and federal cooperation has increased markedly at the FTC in the last 15 years, and I suspect that that occurred for a number of different reasons. The first one is it was just easier to do because of lower cost communications, so it was easier to coordinate.

The second reason for increased coordination was a growing realization that there were shared goals at the

state level and at the federal level over the last few years, and certainly a third reason for the change was a difference in approach that occurred at the FTC when Janet Steiger came to the FTC.

I had an opportunity to reread a number of her speeches recently, and you get the unmistakable indication that cooperation across governmental agencies was one of her major goals, and she did a lot to make that actually happen. And there were several FTC reports written in the early '90s that indicated that she was actually quite successful in increasing the level of cooperation.

I'll leave the specifics of current cooperation to Commissioner Harbour for her remarks later, and we can get on with our discussion of conflict, and to start the discussion of interagency conflict, we have Todd Zywicki who will talk about the rationale for the Advocacy Program. Todd's pretty well known here because he was recently the Director of the Office of Policy Planning. He's currently a visiting law professor at Georgetown. He's on leave from George Mason Law School. He's a widely published author and a leading scholar on the effects of the 17th Amendment.

Todd?

MR. ZYWICKI: As opposed to starting off with the standard disclaimer, since I'm a professor, I never

have to disclaim anything for myself, but I have to do a double disclaimer here, which is first that my coauthors are Paul Pautler and James Cooper on the actual paper, and so the standard disclaimer would apply to them about not representing the FTC's views.

For me, I don't necessarily represent James' and Paul's views, so that if there's anything inconsistent in my oral remarks from our written paper that we're working on, that's all my fault and my responsibility.

I figured that advocacy would be a nice topic for this particular panel, and in fact there was a little bit of a bait and switch that went on. Originally when I was at the FTC, I was the one who was going to be in Paul's seat, and I invited Paul to do a paper with me on the Advocacy Program. Then when I decided to leave, they decided to switch roles, so in some sense I invited myself to give a paper by basically inviting Paul and then having him have to become the moderator.

I think this is a fortuitous time to think about the Advocacy Program. As you saw this morning, it's a topic that keeps coming up. It's been very prominent in the FTC history, but also this fall is the 30th anniversary of Chairman Engman's speech, a high profile speech on competition policy in the transportation industry, and the far-reaching consequences that had in helping to lead to

deregulation.

So I think it's a propitious time to revisit the question of competition advocacy and think about it, because one of the things you've seen is a sheet that's gone around that Paul Pautler has compiled, which is the number of advocacy filings over time, and whereas Bill Kovacic and Tim Muris, among others, have argued that enforcement policy has been relatively constant over time, what we see there is a wide variation over time with respect to level of advocacy activity.

The question I want to ask is, Why is that? Why have we seen that variation, and in particular, can we obtain a more theoretical and fundamental understanding of the Advocacy Program, a deeper understanding of how it fits within the core mission of the FTC or as a corollary to other core missions. Such an understanding can help the advocacy program be more effective and help it to withstand the forces of time.

So basically we call the paper The Theory and Practice of Competition Advocacy, and I'm going to start off by talking a little about the theory that justifies the FTC's efforts on competition advocacy. I will then look a little bit at the practice of advocacy, why we've seen variations over time, and then finally I will wrap up with some thoughts about lessons that we might be able to take away from this experience.

I think competition advocacy has two basic justifications. The first is the political economy of regulation, which suggests that many regulations are anti-competitive in nature and injure consumers, and that competition advocacy is an important tool to use to prevent those sorts of harms.

Secondly, I think competition advocacy is a necessary corollary to the Commission's enforcement mission, which is to say that in the face of antitrust exemptions like Noerr-Pennington and the State Action Doctrine and various statutory exemptions, competition advocacy is an important antidote to that to offset the fact that once exceptions are triggered, they become immune to antitrust scrutiny.

Let me take a few minutes and go through each of these: First, the political economy of regulation. Often regulation is pro-consumer and can be justified in terms of responding to market failures. But equally obviously, in many situations economic regulation is not for the benefit of consumers but instead to benefit well organized special interest groups who use regulation to protect themselves from competition and gain economic rents at the expense of consumers.

Looking at the economic theory of regulation going back to Stigler, Manser Olson, and others of course, basically what we know is that simply because a

majority may favor a policy doesn't mean the majority gets it, that well organized homogeneous interest groups can ban together more easily, lobby for benefits because the benefits of those laws will be concentrated.

The costs will be diffused across many consumers, so as a result consumers will lack both the incentive and perhaps the opportunity to educate themselves about the laws and to oppose it.

A good example is burial caskets. The 10th Circuit just upheld one of these laws, but a casket is basically a box. A very ornate, dear box to people, but it's just a box for dealing with the deceased.

Many of the states have laws that prohibit anybody but licensed funeral home directors from selling caskets. The result is that there is a substantial mark-up in the price of caskets. 200, 300, 400 percent have been estimated.

Now, in addition, the regulations don't apply to anything else involving a funeral: Flowers, limousines, whatever other people might need. This is an incredibly silly law. It's an incredibly silly law to say that you can only buy a box from a funeral home director. If you're concerned about the quality of the box, you regulate the box, not the seller, if you're saying that you have to meet certain specifications.

Now, it's a ridiculous law, but you can see why

the political dynamics allow these kinds of things to persist, which is most people who buy caskets are episodic purchasers. Many of them are from out of state, and they simply lack the incentive to lobby against the imposition of this kind of stupid law.

In addition, if you wrap it in some sort of a facially plausible consumer protection rationale which is true here because you want to protect people in their time of grief, it's facially plausible but completely empirically unjustified. If it's facially plausible, that may make it more difficult for people to figure out what's going on.

So that's the first rationale is failures of the regulatory process, and the FTC or somebody can intervene to try to provide information in that system. If we know that the interest of consumers or the competitive process itself are going to be systematically underrepresented in the political system, it seems appropriate to have some institution tasked with the responsibility of representing those views in the political system.

I think that also identifies the limits to the Advocacy Program, which is to say that just as the FTC doesn't pick winners and losers in the market process, they just provide the mechanism for competition to take place; in the political process, the Advocacy Program

tends to do the same thing, which is we don't pick winners and losers.

We basically provide information, and we rectify systematic failures in the political system by representing consumers and competition, but we don't actually tell the states what to do. We don't tell them not to jump off the cliff. We can just tell them that they will be injured if they jump off the cliff and allow them to draw their own implications, and if they want to go ahead and protect industry at the expense of consumers, that's a democratic decision.

I think it may also explain why the FTC is uniquely well positioned to do this role. First as we see, it might be appropriate for a federal actor to do this. As Madison notes in Federalist Ten, local faction can be very dangerous, which is the parochial interest can be stronger at the state level because special interest groups could be closely geographically linked.

So federal actors, as Madison notes, can balance out some of those parochial interests by bringing a different perspective on the effect to consumers.

Secondly, almost all these laws have spill-overs, which if you think about one of these sales below cost laws that prohibits selling gasoline at price that are supposedly below cost; think about Maryland, who passed one of these laws. A lot of people travel down

I 95 who don't live in Maryland.

Nonetheless, they have to pay higher prices for gas, just like everyone else that lives in Maryland. That's a simple question that looks like it doesn't have spill-overs, but anybody who is an interstate motorist may be affected by that law, even though they're not part of that political process.

Being a bipartisan independent agency also suggests another possibility why the FTC may be uniquely well positioned to carry out this role -- which is a lot of these things have a smell of partisan political positions, and being bipartisan tends to, I think, insulate the FTC if it's perceived that they're taking sides.

Finally, I think we have unique expertise and capabilities, and this is I think a point that runs through all this, which is that, in particular, the FTC's joint competition and consumer protection mission, combined with our deep economic expertise, gives the FTC a unique power to speak to these questions, especially because most anti-competitive laws are cloaked in a rhetoric of consumer protection.

So be able to speak credibly to both the anti-competitive effects as well as why there will be costs to competition without offsetting the benefits to consumers, if there's a phoney consumer protection

rationale, that seems to be especially effective with respect to these laws.

The economic expertise cannot be understated either, which is that especially with respect to dealing with the states, state legislatures and their staff simply do not have the same sort of expertise in dealing with empirical evidence, in dealing with complex issues, in dealing with trade-offs, and as a law review article that studied this found, state officials almost always value the FTC's input very highly on these issues, and especially in situations I think where the FTC speaks with empirical strength.

A second theoretical justification is immunities, which is to say that one of the costs of Noerr-Pennington and state action is that once a rent seeking law goes behind the immunity wall, there's no way for enforcement officials to reach it.

The last chance you get to try to head off an anti-competitive law is through advocacy. So that I think it's a necessary corollary to the FTC's effective enforcement mechanism that we engage in vigorous advocacy to try to temper the anti-competitive effect of laws before state action and Noerr-Pennington are triggered.

Advocacy is going to be much more flexible and I think can potentially be much more effective and certainly is much less expensive than trying to sue

after the fact. If you allow the law to go behind the exemption wall and the FTC tries to sue later, that's a very high risk proposition, much more expensive, much more dicey whether it's going to succeed, and it's going to be much more confrontational I think than an advocacy filing, which can be much more flexible. You have a variety of different tools, and so I think that that justifies it as well.

As we see in the trends that I handed out, advocacy activity has varied over time. Let me just give a couple thoughts on hypothesis on why that might be. One issue may be resource limitations.

In general, the Advocacy Program has been really quite small. Even at its zenith, we're only talking about maybe four to five FTEs per year; at its nadir maybe a one and a half to one FTEs per year.

There may be other times, however, such as the merger wave of the '90s where there was an all-hands on deck sort of idea where resources might be a constraint, but in general it's doubtful that resources are the constraint. It seems like it's more plausible, as anybody that's been around the FTC for awhile thinks, that it is just politically controversial, and that in particular it appears that under Chairman Steiger, there was a concern about the profile of the Advocacy Program when things were going on in the '80s and '90s. Bill Baer spoke to this I think a bit

this morning.

So what are the lessons we can draw from this, these sort of ups and downs? Oh, Paul Pautler has corrected me that its zenith was 4 percent of FTC's staff, 25 to 30 FTEs. I was thinking four FTEs, but it was 4 percent he said, but still a relatively small number, especially in light of what I think are the manifest benefits, and the Kirkpatrick report spoke to this very forcefully.

Ironically, the Kirkpatrick report talked about how valuable competition advocacy was right before the program got scaled back substantially.

Let me draw a couple lessons then since my time is running out. I think first there has to be a well-grounded understanding of why advocacy is important and the role that it plays, for both of these rationales. Otherwise the advocacy program can get blown away at the first political wind.

Unless there's a commitment to understanding why it's an important core mission at the FTC, it could be blown away as well as understanding the limits, basically how it can help solve political market failures.

Second, the decision maker has to care what the FTC has to say. There are periods, such as when the FTC was filing a lot of international trade comments, where

basically the response was, "protectionism isn't about consumers, it's about protecting producers, and so just tell it to the hand. We're not interested in what you have to say to this particular body." Now, I think it's easy to overstate that, the tilting of windmills idea.

Let me just say two last things: First, I think we should follow principle and not politics. I think principle is the coin of the realm, so to the extent that it appears that we're acting politically rather than in a principled manner, I think that can be wrong.

I'm going to just take one last example, which is the wine experience we had, which the perception was that weighing in on wine could be incredibly risky and controversial. It turns out that was completely wrong. Every newspaper in America who has opined on this across the entire country has come out in favor of free trade on wine.

New York City passed a resolution of its City Council supporting it. Basically we've got limited political tools, so we try to play the political game, and guessing what's going to happen I think it can be very unpredictable.

(Applause.)

MR. PAUTLER: Thank you, Todd.

Our next speaker is John Delacourt. He'll be talking about the law of state action. John worked his

way through both Georgetown and Harvard Law before joining Covington & Burling, and he's currently the chief antitrust counsel for the FTC's, Policy Planning Office. John?

MR. DELACOURT: Thanks, Paul. Let me try to pull up my PowerPoint here. Everything seems to be a go. All right.

Well, Todd started off with a discussion about the FTC's interaction with the states through the Advocacy Program, and I want to stick with that same theme and also talk about interaction with the states, but I am going to take a little different tack.

I'm going to talk about the evolution of the Antitrust State Action Doctrine over the past 60 years While this is not the exclusive domain of the FTC, I'm going to try to take the opportunity to highlight some of the instances in which the FTC played a significant role in the development of the doctrine, whether through litigation or through policy efforts.

I will also, at the end, take a few minutes to discuss some shortcomings with the current analytical framework for determining whether state action protection applies in a particular case and how it has failed to keep up with development of the doctrine.

Before I begin, however, I should give the usual caveats, that my remarks today reflect my own views and

not necessarily the views of the FTC or any individual Commissioner, and I should also acknowledge the contribution of Chris Grengs in the Office of Policy Planning. He's the coauthor on the symposium paper and also contributed substantially to this presentation.

So I'll start with an overview of the State Action Doctrine. I'll talk first about the objectives. The purpose of the State Action Doctrine is to strike an appropriate balance between two conflicting priorities.

You have first the Federal Competition Policy and also State Regulatory Policy, so the State Action Doctrine essentially holds that federal antitrust enforcement will give way in light of a conflicting State Regulatory Policy, even if that regulatory policy has a significant anti-competitive effect.

So how does one determine an appropriate balance between these two priorities? Well, that depends on one's view of the appropriate role of government in the marketplace, and that's led to some confusion in the underlying state action case law in that the Supreme Court's view of the appropriate role of the government in the marketplace has continued to evolve, and unfortunately, the Court has failed to update its analytical framework to account for these changes in the doctrine.

So I'm going to spend the bulk of my presentation talking about the evolution of the doctrine and the change

in the underlying political theory, and then spend a few minutes in the end talking about the analytical framework.

So this slide presents what I'm talking about in a big picture perspective. You can see in 1943 when the Parker v. Brown decision was decided, that the Supreme Court is coming from a background of a public interest theory of regulation. This theory is very differential to the role of government in marketplace, and it's also extremely label oriented, and by that I mean there's a focus on this broad brush distinction between differing types of public actors. There's really no more nuanced analysis than that.

That is a far cry from where we are today in the 2nd Circuit's Freedom Holdings decision. That opinion seems to be strongly grounded in a public choice theory, which in contrast to the public interest theory, is very skeptical in the role of government in the economy and also it's very incentive oriented.

I mean by that that there's a much more nuanced analysis of what the individual parties involved in the case might do and whether they're likely to pursue their own interest or the interest of the state.

So I'll start off with a few remarks about Parker itself. The objectionable restraint in that case is a state supervised market sharing scheme for California raisins, and the key holding is that the

actions of the state itself are not subject to federal antitrust enforcement.

So as I mentioned on the previous slide, the Parker Court seems to be coming strongly from a public interest theory grounding, and so that reflects great confidence in the role of government, and that viewpoint is reflected strongly in a number of aspects of the Court's decision.

First there's its weak focus on the federalism rationale. Now, the Parker Court does say that federal antitrust enforcement will give way in light of a state restraint, but there are various points in the decision where the Court's a little looser with the language and maybe uses terms such as governmental restraint or public restraint rather than specifically noting that it must be a state restraint.

Second, the Court is seemingly indifferent to electoral accountability. This is really one of the more striking aspects of the Parker case because the Court openly acknowledges that 95 percent of the effected raisins will not be sold in the State of California.

They'll be sold throughout the rest of the country and throughout the rest of the world, and that means whereas you would normally expect for the political process to play a significant role in

discouraging a state from enacting anti-competitive restraints, that's not going to be the case here because 95 percent of the affected consumers are going to be outside of that state political process.

Third, the Court is extremely deferential to state oversight efforts. There's some perfunctory language in the statute about the fact that a price will only be approved if it does not result in unreasonable profits for raisin producers, but that's pretty much it. The Court doesn't look for anything beyond that.

Finally, the Court is extremely deferential to the purported state objectives. In this instance the legislation itself again openly states that it is geared towards price stabilization and also to preventing economic waste, so these are certainly objectives that maybe would raise an eyebrow if they were suggested to the Supreme Court today.

So I'll start with the 1970s. That's really the first time the Supreme Court revisits the state action issue, and you already see this move toward the public choice theory end of the spectrum. There are a couple of important cases. There's first Goldfarb and then City of Lafayette. I'll say a few words about City of Lafayette.

The objectionable restraint there is the tying of electric utility service to the purchase of monopoly

gas and water service, and the key holding by the Court is that municipalities are not the equivalent of the state for purposes of state action analysis.

So this right away shows a significant break with Parker in that Parker was extremely weak on its focus on federalism, but here federalism is front and center in the City of Lafayette Court's rationale.

Specifically, the City of Lafayette Court states that the federalist system recognizes only two sovereigns, only a state sovereign and the federal government. It does not recognize any subsidiary governmental authorities, so a municipality or a county government has no special status, and second, the Court recognized that municipalities are often likely to pursue parochial interests.

So while the Court doesn't go to the extent of saying that a municipality is the equivalent of a private actor that is likely to pursue personal enrichment, the Court does acknowledge that municipalities are likely to look at the interests of their own citizens, which may diverge from the interests of the citizens of the state as a whole, and that needs to be taken into account.

Moving on to the 1980s, we see some more development in the doctrine and again a move towards the public choice theory end of the spectrum.

There's first Midcal in 1980; City of Boulder; Southern Motor Carriers and Town of Hallie decided on the same day in 1985; and then the Patrick case.

I'll say a quick note about Midcal because Midcal is really the Court's first and only attempt to articulate an analytical framework for determining when state action protection should apply in a given case.

What the Court does there is basically articulate a two-part test. It states that anti-competitive conduct will be exempted from federal antitrust enforcement where it's clear that the conduct is in furtherance of a clearly articulated state policy, so that's the first prong, and also where the conduct is being actively supervised by the state, so that's prong number two.

Basically the state action case law that comes over this is devoted to refining and polishing that test, so that's certainly the mode that the Town of Hallie case is in, and I will talk about that now.

The objectionable restraint in Hallie is a municipality tying arrangement. It's the tying of sewage collection and transportation to the purchase of monopoly sewage treatment service.

The key holding here is that municipalities are not subject to Midcal's active supervision requirement, so initially this may seem like a bit of backsliding by

the Supreme Court, that they're giving more deference to a municipality, which seems to be towards the public interest end of the spectrum.

However, a little closer reading of the case indicates that's not really what's happening. You see a significant break with the Parker Court because the Town of Hallie Court is very focused on electoral accountability.

The Court states that municipalities are presumed to act in the public interest, but the reason for that is that a municipality is exposed to public scrutiny and checked through the electoral process.

So as opposed to Parker, where the Court is openingly acknowledging that 95 percent of the affected consumers are not going to have any voice in the electoral process, here in the Town of Hallie, the Court says that that's a critical factor.

More recently, in the 1990s, we see the trend continuing. There's Superior Court Trial Lawyers and then the Omni case in 1991, and then finally Ticor Title in 1992. Ticor Title was the chance for the FTC to get into the act, so I'll say a little bit about that.

The objectionable restraint here was the collective rate setting for title searches and title examinations, and the key holding by the Court is that a negative option supervisory system does not satisfy the

active
supervision requirement.

So basically the situation here is that you have a group of title insurance companies, and they all get together and jointly establish rates and then propose those rates to a state supervisory authority, and if the supervisory authority takes no action within a set period, say 30 days, then those rates become the official approved rates.

So the states themselves are happy with that arrangement, but the Supreme Court says that's insufficient, and again this demonstrates a break with Parker in that there is much less deference obviously to state oversight efforts.

The Court says that whether the states would prefer to go with a negative option system or not, the mere potential for active supervision is not satisfactory, and second, the Court specifies that the State Action Doctrine reflects deference to an actual state regulatory policy, not the economics of price restraint.

So the federal antitrust laws will give way if there is some sort of positive state regulatory regime that will conflict, but the antitrust laws will not give way if there's merely the state expressing a preference for a price restraint as opposed to the federal policy

of free markets.

So that brings us to the present day, where there haven't been too many cases; in fact, there have been no cases by the Supreme Court addressing the State Action Doctrine, but there has been action in other levels, specifically at the FTC level.

In 2001 you have the founding of the FTC State Action Task Force by Chairman Muris, and two years later in 2003, the task force issued its report, which contained a number of recommendations about clarifying the doctrine to bring it more closely in line with its underlying objectives.

Then, subsequent to that, there were a number of efforts to implement those recommendations through litigation, so for example in the Movers Cases, this is a series of cases that's still going on in fact, the FTC has attempted to implement the task force recommendation regarding adding tiers to the active supervision requirement.

In two more recent cases, the South Carolina Board of Dentistry case and the Virginia Board of Funeral Directors case, the FTC looked at boards of professional licensure that were dominated by market participants, and in that context attempted to implement some recommendations regarding the clear articulation requirement.

The case I really want to focus on is Freedom Holdings, which is a recent Second Circuit opinion, and the reason I want to focus on that as opposed to the FTC matters is that it really does show quite starkly this move from the public interest theory to the public choice theory end of the spectrum, and I think part of the reason for that is that Freedom Holdings is in the context of the tobacco master settlement agreement, and the public choice theory reflects skepticism about the role of government, and if someone was not a skeptic before, after they reviewed that process, they certainly would be a skeptic.

The objectionable restraint here, as I said, is legislation implementing the tobacco master settlement agreement, and it creates an output cartel of foreign and domestic cigarette manufacturers.

The key holding by the Second Circuit is that the clear articulation requirement is satisfied by conduct in furtherance of a legitimate state policy, so not merely any state policy but a legitimate state policy, and furthermore the Court states that there must be a plausible nexus between the State policy and the anti-competitive conduct, so you can't just have some sort of implausible rationale.

This obviously presents a significant break with Parker in that there's no longer as much deference to

the purported state objectives. In this case, for example, arguably one of the objectives of the legislation was to allow the state to share in the monopoly rents generated by the tobacco cartel.

Although the State of New York did not adopt this argument as its official position, the Court, nevertheless, expressed great skepticism that such a plan could constitute a legitimate state objective for purposes of state action analysis.

Instead, the State of New York argued that the legislation was intended to promote public health by discouraging people from smoking and raising the cost of cigarettes, et cetera. The Court didn't buy this rationale either though, and ultimately held that there was no positive nexus between this purported public health rationale and the objectionable provisions of the legislation.

Specifically, the Court stated that a per package tax on cigarettes would have eliminated the need for the complex marketing sharing scheme that was developed and would have eliminated a lot of the anti-competitive problems.

I've learned at the FTC that lawyers ramble on, but economists are very efficient about what they do so I'll wrap up quickly.

What does this tell us about the analytical

framework? Here's how the doctrine has evolved over time, but what does this tell us about how the State Action Doctrine will be applied in future cases? Well, the short answer is not very much because the Supreme Court's views on the role of government has evolved, but its analytical framework really has not.

The Midcal factors still continue to be applied pursuant to the public interest theory rather than the public choice theory, and this is demonstrated by a couple examples involving the lower court's attempts to apply the Town of Hallie case.

So with respect to clear articulation, a number of courts have reverted to a deference kind of standard and said that the Town of Hallie's holding that clear articulation is satisfied by a foreseeability standard, they've taken that, and while there are good reasons to think it should be limited to the context of tying arrangements or the content of municipality action, some lower courts have deferred and really applied that across the board.

A little bit more clearly is with respect to the active supervision requirement, and in the Town of Hallie you'll recall the Court exempted municipalities from that requirement.

Well, some lower courts, looking at this, have reverted back to a tendency to focus on broad brush

labels, and they've concluded that because a municipality is a public actor and is exempt from active supervision, therefore all public actors should be exempt from active supervision, and this obviously has expanded the scope of the doctrine considerably.

So what's a sensible way to address this problem? Well, one approach that was suggested and hinted at in the FTC State Action Report, though it was not adopted as a full-fledged recommendation, was to take a tiered approach to state action, and this would involve applying the Midcal factors pursuant to a tiered framework with varying levels of rigor, and this would essentially mean that the level of rigor would be calibrated to reflect incentives of the parties, that is, the likelihood that the defendant will pursue its own interests rather than the interest of the state itself.

So two examples of what this might mean in practice are with respect to active supervision, you might expect to see the active supervision prong applied with greater rigor when you're dealing with private parties or boards of professional licensure where you can expect them to pursue their own interest or the interest of the profession rather than the interest of the state itself.

Then conversely, you would expect to see the active supervision requirement applied with less rigor

in the case of municipalities because you can expect them to be checked by the electoral process.

Finally with respect to clear articulation, this will be a chance to take into account the specific nature of the anti-competitive conduct so you can expect to see the clear articulation requirement applied with greater rigor when you're dealing with Per Se conduct, and there's a broad consensus that that's always going to be harmful to competition, and you can expect to see it applied with less rigor when you're dealing with more ambiguous Rule of Reason or unilateral type conduct.

So that certainly leaves a lot of questions to be answered, but I think I've gone significantly over my time perhaps, so I'll turn the floor back over to Paul, and I'll await questions during the discussion period. Thanks.

(Applause.)

MR. PAUTLER: Thanks very much, John.

Next up is one of our discussants for today, Tom Krattenmaker. The places that Tom has worked have been so many it's hard to list them all. He taught at Connecticut, Georgetown, William and Mary, and he was a Special Assistant at the Department of Justice. He was the research director at the FCC. He's now an attorney in the Bureau of Competition. He's worked for private law firms, and I think he must like to work a

lot.

With his experience at the FCC, he brings us a unique perspective on these things, and I'll turn it over to Tom.

MR. KRATTENMAKER: Thanks, Paul. My father taught me to keep moving, you stay one step ahead of the law. That explains it all.

Speaking of staying within the law, I see my boss, Alden Abbott, sitting back here, so I thought I would begin by showing that I do obey the rules. We were given a rule, you need to give a standard disclaimer if you work at the FTC.

Well, I work at the FTC. As those of you who know me can attest, I don't think in my 37 years of doing antitrust I have ever once said anything that any Commission or Commissioner blessed, and I am sure there's no chance of that happening today, but if you misapprehend, I'm only speaking for myself.

Now, here's the next thing. There will be three TV screens behind the panel table, so all speakers will have a big head shot while they are talking. Of course, I already have a big head, but folks, I think this is my ten minutes of fame, and I'm getting on in age. I didn't think it was ever going to happen, so if we can sort of sit here and soak it up.

If that's not enough for you to just sort of

wallow in my ten seconds of fame or ten minutes, let me try to make three points. One, you should read these papers; two, you should read another paper; and three, be careful what you wish for.

One, you should read these papers. I think that Todd and John have spoken eloquently for themselves. I would point out that they talk a lot better than they play basketball, but that would be getting outside the parameters of today's discussion, and I hope they have shown you why it would be worthwhile to read these whole papers.

One point I want to emphasize and I hope came through from the talk that both these papers convey is is that political romance is dead in America. The liberal faith in the product of democratic institutions, at least with respect to economic regulation, has collapsed. I can't remember whether it was Kennedy or Nixon, you're probably going to tell me it was Reagan, that said we are all now. Today we would also say we all believe in public choice theory.

Jefferson lost, Hamilton won. As a proud graduate of the James Madison Elementary School in Quincy, Illinois, I'm happy to say that I'm on that side, but hold that thought.

Public choice theory is ascendant. The kind of

belief in the value of the product of democratic decision making reflected in Chief Justice Stone's decision in Parker v. Brown seems quaint to us today. So read these papers. Have that in mind while you read them.

Number 2, you should read another paper, because there's another one that goes with these very well. Susan Creighton, the Director of the Bureau of Competition, delivered a paper yesterday that's entitled Cheap Exclusion, and it fits like a hand in the glove with these papers.

The papers that Todd and his colleagues and that John and his colleagues wrote explains what Susan and the Commissioners will confront in implementing the agenda that's laid out in the Cheap Exclusion paper.

I think I have time to give you an 83 second summary of the other paper, the one that Susan presented. It goes something like this: We all know that a firm that wants to exercise market power must restrict market output.

Unless that firm is an actual monopoly, this means that the firm has to deal with actual or potential rivals because it can restrict its own output, but it can't restrict market output all by itself.

Despite the infinite deviousness of the human mind, which I hope I represent well here, we have so far discovered only two ways to keep your rivals under

control: Buy them up or blow them up. Antitrust does better at present with buying them up. We have a fairly good stable law with respect to cartels, facilitating practices and horizontal mergers, all of which are forms of buying up your rivals.

What about, however, blowing up your rivals, which is more politely known as exclusion or as some of us might prefer, if you don't mind a little commercial, "raising rivals' costs" to achieve power over price.

Susan Creighton's paper explains that we need to understand that exclusionary practices are like any other service or good. Business people prefer cheap products that give big payouts, so that's where antitrust enforcers should look long and hard for cases. Indeed the paper is subtitled something like Fish Where the Fishes Are. Let's look where business people are looking for exclusionary practices.

When you try to think about this, it turns out that cheap exclusion often involves manipulating the levers of those who already have power, for example, maybe a private standard setting organization. There's a subtle little commercial for a case for you.

For another example, a state or a local government, which may have the power to exclude somebody from a market or some thing from a market, and the papers that were presented here bear very importantly on

how this war against cheap exclusion might be carried out.

I think you probably already got it, but Todd explains how competition advocacy may be the best way to go, in part because as John has explained under the State Action Doctrine, you get behind the immunity wall sometimes, so that's kind of a fit of those papers and why I think they should be read as a batch.

So point one, read these papers; point two read another paper.

Final point, be careful what you ask for. I think it is common at functions like this to have a little old man utter this caution, be careful what you wish for. I think it's particularly appropriate to give the task to somebody like me, a recovering law professor.

For of those of you with long memories, I remember when I was a young person the person who performed this role for me was Victor Kramer, and so now I feel like I'm a little bit standing in Vic's shoes, not with respect to what I'm saying but just with respect to reminding people to be careful here.

I agree, of course, we do need to be vigilant about rent seeking. We also know, and Todd and John mentioned this, that not all economic legislation is necessarily rent seeking, for example, a well tailored

law to deal with natural monopoly or to deal with externalities or to deal with information failures. Nobody believes that there's no role for economic regulations whatsoever.

What I would like to suggest, and I have a little paper that tries to advance this a little way, is that maybe if you take a very long run view, some other forms of what we call rent seeking deserve a more respectful burial.

I have in mind two things. Perhaps regulation that has the simple effect of cushioning temporarily the shock of technological and administrative innovation may be something that, in the long run, is beneficial to us, even if it's a form of rent seeking.

The specific example I have in mind is that back in the '30s and '40s, when the only kinds of telecom mergers that ever occurred were among telephone systems outside the Bell System, the competition bureau at the FTC used to check those mergers to make sure no jobs would be lost, and then they would let them go routinely. Maybe that was inefficient. Maybe it wasn't so bad.

Secondly and perhaps more provocatively, regulation that is designed to alleviate the harshest market outcomes may sometimes be permissible, I think, if it has the effect of avoiding, polarizing class

politics at a higher level. Maybe robbing Peter to pay Paul doesn't just earn the legislator the undying loyalty of Paul, although that usually seems to be the advantage, but maybe doing that in small increments in regulatory settings is preferable to having a large political system that turns explicitly on economic class.

Those seem to be some things you might think about or, as I suggested, while I'm with these guys on this program, we need to be careful what we wish for because we might get it.

Thanks.

(Applause.)

MR. PAUTLER: Thank you, Tom.

Our next speaker will be Pauline Ippolito who will discuss a specific case of FTC interaction, FTC and FDA interaction, and she's remarkably well suited to do this because she's been working on FDA food regulation issues on and off for the last 15 years. Pauline?

MS. IPPOLITO: In other words, I'm old, and I've been doing the same thing for awhile. I think the real reason they asked me to talk about the FDA Advocacy Program was because in certain ways it typifies another part of advocacy, and it really is a special case.

One reason for this slide, I should stop and say, See my disclosure there? I'm doing what I'm

supposed to do too.

We have a long history of providing formal comments to the FDA, a very long history. We bother them a great deal, and I think quite a legitimate question is, Why are we after them so much, and I think really there's a very good answer.

We have overlapping jurisdictions in substantial areas. Both agencies have jurisdiction over advertising and labeling for foods, drugs, supplements and RX drugs. We've come to a gentlemen's agreement on who does what. FDA does prescription drugs. We do advertising for everything else. They do labeling for everything else, but that still means that we get in each other's way.

If FDA says something is deceptive on the label, how can we say otherwise in the ad? We better come to some kind of agreement on what sensible policy means. When they look at labels, maybe they're not worried about the kinds of things that are important in ads. When we look at ads, maybe we're not so worried about the kinds of things that are realities in labeling.

So coming to some sort of agreement, or at least talking is certainly important. In some sense, we're in an unavoidable partnership, whether we like it or not.

The agencies differ in a lot of ways. I really can't talk about them all, but what I would like to do is talk about the cultures that are different and I

think that are part of what is good about the interaction and part of what explains some of the tension in the interaction. I'm going to oversimplify probably to the point of caricature, but good caricature has an element of truth in it I hope.

The FTC is really set up to preserve competition and to protect consumers. That's the fundamental goal, the fundamental mission. So the agency inherently goes to a paradigm that works towards that broader mission. I would say we have sort of an "economic reasonable consumer" model. What are the essential elements of such a model?

We think competition is important. We think incentives matter. Advertising plays an important role in markets. Consumers are more rational than not. We worry about the typical consumer, not the hapless few. We worry about type I error as much as type II error.

For the lawyers in the audience, by that I mean, if we stop something that could happen, that's as important as if we do things that cause bad events to happen. So, for instance, in the advertising area, if we choke off truthful information, that could cause as much damage as if we allow false information to go to the market. Finally, the staff is lawyers and economists.

The FDA is set up for a very different purpose. FDA is primarily set up to keep bad drugs and

bad foods off the market, and so they have a very different view of what it is that they do, and so my caricature of the FDA, and I admit it's a caricature, is that they have sort of a "public health" model, and the public health model starts with the view that firms are driven by profits, not public health, and therefore firms' decisions are inherently suspect.

They're not motivated by the proper things. The view of consumers is basically that consumers don't understand what experts understand, and they can't possibly cope with the kind of sophisticated scientific information that's essential to understanding these issues; thus, a very different view of consumers.

Therefore, governments, health authorities are really the best arbiters of health decisions. They're in the best position to distill the sophisticated scientific knowledge to understand what its importance is, so it creates sort of a paternalistic view of health decision making.

The Hippocratic oath is floating around in the background that says "first do not harm," which means type II errors are much more important than a type I errors. If you don't give consumers truthful information, well, they're going about their business, but if you give them information which then turns out to be bad information, false information, you have done something that has

caused harm. This is a very different perspective than an economist would render. The staffing correspondingly is chemists and nutritionists.

Now, the agencies interact in a lot of ways. There's a lot of staff to staff contact on individual cases. We consult them regularly. We talk about what they're doing, what we're doing, how it might conflict, how it might interact, and given all that coordination and contact, why would there be any benefit in doing formal comments?

I guess as I thought about that question, I focused on three things. First when you do formal comments on a rule-making, it forces you to frame arguments very carefully. There's nothing like getting up in front of a public audience for you to get yourself together. If you're going to write things down for everyone to shoot at, you better have your arguments clearly articulated. You better understand what they mean. They better be internally consistent.

Second, it allows us to put evidence on the record. To the extent that the public health model doesn't adequately consider incentive effects, R&D effects, it gives us an opportunity to try to put evidence on the record to push a little bit for those issues to be considered.

Third, I think the formal comment process, like

the advocacy process generally, the litigation process, imposes discipline on all parties, including us. Again if we have evidence to put on the record, we've got to make sure that it's evidence that we feel is credible.

To give you a little bit of a history on one area where this kind of interplay has played out, and to give you a little sense of how things move and that the pressure goes both ways, I thought I would put down some events on health claims history.

Health claims, for those of you not in this area, are advertising or marketing claims that link foods to disease, a low saturated fat diet reduces your risk of heart disease.

In 1974, the FTC Staff proposed adopting what was then the FDA's standard, which was to ban health claims in marketing. The FTC had a big rule-making at the time where this was one of the proposals.

By 1978 the presiding officer said, That doesn't sound like a good idea, heart disease is a major risk, you ought to allow the heart disease claim. By 1980 the Commission was telling the Staff to develop such a proposal. By 1982, the Agency abandoned the rule making. It was all getting way too complicated. We were worrying about, What does "natural" really mean?

So they decided to go much more to a principled approach. If it's truthful and nonmisleading, you can

say it. If it's deceptive, you can't say it, and everything would be done through an ex-post evaluation process.

By 1987, FDA put out a proposal to adopt the same type of approach, great concept. Hubbub ensued. I think we didn't provide enough information in that forum, and for other reasons, by 1990 the FDA was pulling back. They officially withdrew that proposal. The states got into making national advertising policy. The firms couldn't deal with that, and went to the Hill. We got the Nutritional Labeling and Education Act of 1990, which was the basis for the reform of food labels.

By '93, we had official regulations on health claims. They were very strict. It was a preapproval system with lots of conditions, a very formalistic regulatory type approach. FDA denied certain claims. That started a litigation process that resulted ultimately in a 1999 decision, which said that the FDA approach would not withstand First Amendment scrutiny.

There were subsequent cases along those lines, so much so that the status quo today is we still have the stringent regulation on health claims. We also have qualified health claims, structure-function claims, dietary guidance claims, authoritative statement claims, so a rather byzantine system to try to patch a system together that will withstand scrutiny.

What's the overall take? I think we're moving in the right direction. We've clearly gone from banning a lot of very useful, truthful information on both labels and in ads to a much more open system. I don't think it's finished yet in terms of working out where it will end.

What mattered? I think strong theory mattered. I think the fact that there was empirical evidence we could put on the table mattered a great deal. Strong First Amendment law certainly mattered, and one thing I think that doesn't get enough credit is that there were challengers who were willing to go to the courts and ultimately discipline the regulatory process.

Thanks a lot.

(Applause.)

MR. PAUTLER: Thank you, Pauline.

Our final speaker for the day is Commissioner Pamela Jones Harbour. She's here to wrap up this session and to talk a little bit more about cooperation among the agencies. She was Deputy Attorney General in New York and ran the 150 attorney public advocacy division, so I think she knows a good bit about public advocacy, and also about the state view of the Federal Trade Commission.

Commissioner?

COMMISSIONER JONES HARBOUR: Thank you, Paul. In the interest of brevity and completeness, I will give

a four-word speech today, not mind you a speech limited to four words, rather a speech about the meaning of four words: Diversity, commonality, opportunity and challenge.

As always, when talking about the meaning of words, please note that these words today are my own and don't necessarily reflect those of the Commission or any of my fellow Commissioners.

As always is the case when talking about the meaning of words, we need to begin with a context, because context gives words meaning, shades of meaning and depth of meaning, and our context today is our federal form of government and, more particularly, law enforcement policy within the context of enforcement pluralism.

In other words, we are operating in an environment with multiple actors, multiple actions, multiple motives and multiple outcomes. This diversity borne of federalism and embodying the very spirit of federalism poses challenges for the enforcement of antitrust and consumer protection laws.

So what role has the Federal Trade Commission played within this scheme, and what role should the Commission play in the future, and how can the FTC ensure that the overall level of enforcement falls within an appropriate and optimal range? In short, what

can the FTC do to make enforcement work better?

Federalism is an abiding characteristic of our republican, small R, government. It reposes sovereignty in both the United States and several states. Both economic policy and law enforcement policy are, of necessity, the product of multiple and diverse sources. This diversity of policy will continue unless Congress some day decides to occupy the field.

In the world of antitrust in particular, the Supreme Court has observed that Congress adopted the Sherman Act to at least supplement, rather than to surplant the antitrust laws of the individual states, and as John Delacourt has observed in his remarks earlier, the Court went even further in the state action cases, explicitly holding that adoption of the federal antitrust laws was not intended by the Congress to displace legitimate state regulatory regimes.

Federalism provides similar sorts of checks and balances in the law enforcement realm that the separation of powers provides within the Constitution. This is reflected in the fundamental decisions Congress made when it first shaped the antitrust regime, distributing enforcement responsibility among the antitrust division, the Federal Trade Commission, the State Attorneys General and private plaintiffs enforcing state and federal law.

So our beginning point is thus a deliberately rich tableau of diversity and enforcement authority, and if that is not enough diversity, the legal rules Congress adopted are themselves diverse.

Our nation's core antitrust principles are at heart, admixtures of laws and economics. Rather than simply specifying which actions are and are not permissible, the antitrust laws attempted to find the outer limits of acceptable business behavior based on the realities of the marketplace.

Further, our antitrust laws are stated broadly in a manner in which Professor Milton Handler used to refer to as uncalibrated yardsticks. The antitrust laws take their meaning, in large part, from experiential rules that have evolved from the courts on a case by case basis in a form that is very true to their common law origins. The rules continually are refined as more cases work their way through the system, and the robustness of the case law is a direct result of the multitude of actions brought by many different enforcers.

Last week at the close of the Commission's class action workshop, Commissioner Leary related a story of how Chinese officials reacted to our messy model of pluralistic enforcement, and conceptually, yes, the system is messy. That messiness is not, however,

necessarily all bad.

Indeed, federalism based diversity permits a state to function as what Justice Brandice once described as a "laboratory to try novel and socioeconomic experiments without risk to the rest of the country."

Another abiding characteristic of our laws is that they are designed largely to be self enforced. We don't expect public enforcement actions to be the predominant means of enforcement. Indeed, without devaluing the importance of litigated enforcement actions and upholding our antitrust and consumer protection laws, I believe that a greater volume of enforcement activity actually occurs in the offices of the antitrust and consumer protection counselors.

Our total enforcement regime, with all its multiple parts, is designed to create a deterrent effect generating incentives for businesses to compete vigorously near the edge of the cliff without going over the edge. This invisible hand of deterrence, if you will, in the world of antitrust enforcement operates in much the same way as Adam Smith describe his invisible hand in economics.

As a result of this diversity in antitrust and consumer protection enforcement, we have multiple levels of government adopting both complementary and conflicting statutes. Moreover, these statutes may be

enforced by variously motivated actors and agencies applying rules of laws which may change over time, even without legislative intervention.

This complex system has been evolving for more than a century, and I dare say that if Congress, in 1890, had projected the possible consequences of its actions at this level of detail and had understood the great potential for non functional outcomes, I think Congress probably would have adopted a very different Sherman Act. Yet, in our system and in our experience, the system has worked, and it continues to work without drastic changes.

In large part, it works because of our second term for today, commonality. The focus of this panel is conflict and cooperation between the FTC and other governmental agencies. One of the main points that I would like to emphasize is the level of cooperation between the Commission and State Attorneys General in fulfilling our mutual antitrust and consumer protection missions.

Certainly the diversity I've just been describing has given rise to many, many opportunities for conflicts over the years, but in spite of this, by and large, the Commission and the State Attorneys General today enjoy a relationship of mutual trust and cooperation, and this is true in large part because we

follow common enforcement principles.

We enforce statutes that have been modeled upon each other, and many of our enforcement guidelines are substantially similar as well. Moreover, many state statutes mandate enforcement in a manner consistent with comparable provisions of federal law, but even more importantly, we share common core values.

In defining the very purpose of the antitrust and consumer protection laws, we realize that we share a common mission, and that mission is to preserve consumers' ability to make informed, voluntary choices in the goods and services they purchase and to assure those consumers that they will have a wide range of choices available to them.

Commentators on federal state relations and antitrust enforcement too often focus on occasional case specific differences of opinions that tend to surface from time to time. In the final analysis, however, those disagreements, in my view, are narrow and infrequent.

Differences may take on great importance to, for example, a party that might feel pinched by the marginal implications of the federal state disagreement. In reality though, both federal and state enforcers seek to determine what course of action will achieve the greatest value for consumers, and more often than not,

consumer welfare is maximized when federal enforcers and State Attorneys General engage in cooperative enforcement.

An exploration of the benefits of cooperative enforcement will bring us to my third term for today, opportunity. Professor Calkins has observed that federal enforcement agencies and State Attorneys General each have comparative advantages in the enforcement of antitrust laws.

For example, states have the advantage of proximity to, and knowledge of, local markets as well as expertise in crafting effective damage remedies for public and individual consumers.

The federal enforcers enjoy greater resources, particularized knowledge of specific industries, expertise in fashioning equitable relief and a broader scope of focus.

In light of the commonality of antitrust statutes and enforcement priorities, federal and state agencies should be encouraged to coordinate their activities in ways that maximize those comparative strengths, subject, of course, to grand jury secrecy and to the constraints of our HSR confidentiality provisions. The Commission has recognized the benefits of coordinated enforcements, both to the agencies and to the targets of our enforcement actions.

Taking advantage of opportunity, the Commission has adopted procedures that facilitate federal state coordination in appropriate cases. For example, FTC Rule 4.11 (C), which implements certain statutory provisions of the Federal Trade Commission Act, permits the Commission to share non public investigational materials with other enforcement agencies so long as that information is used only for official law enforcement purposes and the information is maintained in confidence.

Because HSR materials are statutorily confidential and cannot be shared with State Attorneys General without the consent of those filing those papers, the Commission has adopted what is called "The Protocol for Cooperation and Merger Enforcement between the Federal Agencies and the State Attorneys General."

The protocol provides a means for coordination, including incentives for merging parties to consent to granting State Attorneys General access to the HSR materials.

Coordinated enforcement does not always mean that State AGs will follow an enforcement lead taken by a federal agency. At last week's class action workshop, Assistant Attorney General Trish Connor of Florida detailed cases where coordinated filings were initiated in the first instance by federal agencies, in other

instances by State Attorneys General and also by private litigants. In fact, in one case, federal and state involvement in an enforcement matter occurred because the defendant in a pending private litigation requested it.

In most instances, coordinated enforcement can take one of four forms. First, there are actions where the FTC and State Attorneys General seek similar remedies. One example is our recent settlement in Perrigo where the Commission and state AGs each received disgorgement of profits and injunctive relief.

Second, there are matters where the Commission and State Attorneys General seek complementary remedies. In Toys "R" Us, the Federal Trade Commission obtained injunctive relief, and the states obtained troubled damage relief.

Third, there are cases where the FTC provides evidentiary support for State Attorneys General under Rule 4.11 (C) but brings no action on its own. The Contact Lenses case is a case that illustrates this type of cooperation, and finally there are cases where the States provide evidentiary Amicus support to the Commission.

The Staples case is such a case where the States assisted in gathering local data, and this was quite helpful to the Commission. In Ticor, the States' Amicus

brief in the Supreme Court was expressly cited by the Court as reinforcing the Commission's case.

Now, least you think that all of this coordination only occurs in the antitrust mission, let me make very clear that the level of cooperation and coordination in our consumer protection mission is equally as high and in some ways even more routine than in the antitrust area.

Consumer Sentinel and our Internet labs are available to State AGs and other federal enforcement agencies such as the FBI and the Postal Inspectors, and we routinely engage in coordinated enforcement sweeps and strike forces targeting particular types of consumer problems.

The Postal Service, the Secret Service, the FBI, they all have, on occasion, detailed agents and analysts to work with the Commission on our identity theft initiatives where we share enforcement initiatives, and another extremely important initiative, the National Do Not Call Registry, there was coordinated participation by the State AGs, the State Utilities Commissions and the FCC, which were integral to the success of that enforcement effort.

As I mentioned earlier my fourth term for today is challenge. It is a challenge to maximize the benefits of coordinated enforcement while at the same

time minimizing unnecessary conflict or duplication of efforts, and I would like to recommend a few modest ideas that might help us rise to this challenge.

A first good step would be to strengthen and expand existing coordination mechanisms. For instance, there are periodic meetings of the so-called Executive Working Group for antitrust, the EWG, which includes the FTC Chairman, the Assistant Attorney General in charge of the Justice's antitrust division and representatives of the State AGs offices. They meet to discuss common areas of interest.

Extending those discussions to the Staff level and scheduling more frequent meetings might facilitate further coordination. Staff level meetings would enable the state and the federal personnel to assess candidly what is and what is not working, and the results of these meetings could, in fact, provide the Commission with insights leading to further refinements in existing procedures.

Joint Staff training activities would also be a useful exercise. These are just a few examples, and perhaps we could come up with more if we were to put our heads together, but we do understand the benefits of cooperative enforcement. The challenge is in making sure that this coordination happens to the greatest extent practicable.

Our challenge going forward lies in the recognition that there is much more to be done. We need to recognize the unique aspects of our diversity, and only then can we truly fulfill our commonality of purpose.

With forethought and diligence, we can work together to take advantage of these appropriate enforcement "opportunities" which will benefit the Commission, the State Attorneys General and, most importantly, the public.

Thank you.

(Applause.)

MR. PAUTLER: Thank you, Commissioner. It looks like we're out of time for this session. There were a few questions from the floor. I invite you to talk to the panelists as they leave and ask your questions of them.

Thank you.

(Whereupon, a brief recess was taken.)