This will necessarily be a very serious talk. Let me explain.

In one of his least noted but arguably most insightful public speeches of 2005, then-Attorney General Alberto R. Gonzales reported that after a team of researchers had worked “furiously for days,” he could “confidently report” “that there are no jokes about antitrust law.”¹

For those of us who are from time to time called upon to pontificate about antitrust and who are always scouting for good material, this official report was highly distressing if not outright devastating. And that is not all. In April 2004, a business blogsite asked this question:

Do you crack jokes about antitrust law? If you can, you should give yourself a lot of credit, because The Daily Show got all geared up to do a segment on the Madison free-drinks antitrust problem and they gave up. They didn’t know how to make it funny.²


Peter Carstensen can tell you about the Madison free-drinks antitrust problem. It involved a class action lawsuit accusing 24 downtown Madison taverns and the Madison-Dane County Tavern League of conspiring to fix prices on beer and liquor by agreeing to eliminate weekend drink specials. One can feel the frustration that John Stewart must have experienced in not being able to say something even mildly funny about this. I can advise you that Peter didn’t find the court’s opinion particularly funny, either.

Always skeptical about the Justice Department’s pronouncements on antitrust, the American Antitrust Institute conducted its own furious research and determined, not surprisingly, given our general regard for General Gonzales, that the Attorney General's conclusion was erroneous. Unbiased research on the Internet reveals that there are quite a few antitrust jokes, in fact. The problem is that few of them qualify as actually being funny.

I will limit these remarks to matters that relate to food, since that is our topic and this is after all a luncheon. Here is one of the tub-thumpers I will relate.

A grocery retailer was dismayed when a brand new grocery opened up directly next-door to his emporium and erected a huge sign that read “Best Deals.” He was still more horrified when another competitor opened up a food store next-door on the other side and announced its arrival with an even larger sign, reading “Lower prices.” The shopkeeper was panicked until he got an idea. He put up the biggest sign of all over his own shop. It read: “Main Entrance.”

So, our lecture has already covered price-fixing, competitive pricing strategies and counter-strategies regarding new entrants in the food industry. I could turn next to a wonderful law review article in the Washington University Law Quarterly by Neil B. Cohen and Spencer Weber Waller titled “Taking Pop-ups Seriously: The Jurisprudence of the Infield Fly Rule,” but let’s go instead to the topic of food mergers and acquisitions. The most humorous recent addition to the antitrust genre, though a poem rather than a joke, was the FTC’s analysis of the merger of two pickle companies, presented by then-Commissioner

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3 http://www.ahajokes.com/shop11.html

Tom Leary. Titled “The Spell of the Gherkin.” I can’t recite the entirety here, but it contains, by way of example, these immortal lines:

The cases we face are all over the place

But, the strangest I’ve seen so far

Was the time we took a good long look

At pickles in a jar.5

So, we are gathered here in St. Louis, which was once the home of a large American beer company and is now the home of a chemical company whose reach over agriculture threatens to change the whole world’s food supply, to talk about a serious topic, the role of antitrust in the system that puts food on our tables. Let me stress the word “system” because the fact that it is not really a part of the antitrust vocabulary has caused us to miss the forest while looking at the trees. How did we get into this pickle?

On a rainy day in the late summer of 1967, I said goodbye to Washington University, where I was a political science grad student, and drove north on I-55 to enroll as a law student at the University of Chicago, where the law and economics movement was still in its cocoon, but soon would conquer the field of antitrust. The essence of this conquest, which was completed with the election of Ronald Reagan, was not only that economists rather than lawyers should play the leading role in determining antitrust policy, but that the type of economics they would apply would be based in Chicago School price theory. Microeconomics would be the motor for markets relatively free of government intervention. The unit that mattered most was not the Vlasic pickle firm, not the entire pickle industry, not the more encompassing food sector of the economy, but the narrowly defined market for U.S. refrigerated pickles. One product in one geographic market: that is what Chicago School antitrust primarily looks at. How competitively structured the market might be became secondary to the effects that could be proven about an alleged anticompetitive

5 http://www.antitrustinstitute.org/Archives/220.ashx
behavior. Defining the market became the ultimate challenge, since only the effect in that specific market would matter. Or in the scholarly observation of Tom Leary:

Now, you may say in a scornful way:

"Who cares what the parties claim?

A nickel's a nickel and a pickle's a pickle;

They're all exactly the same!"

But, you see, they're not. Some like them hot

And some like them cold and clear.

We had to say: "What will you pay

For one, if the other grows dear?"6

In some instances, it is likely sufficient to look at a single market to determine what the near-term effects on price will be if, for example, two pickle companies merge.

But let me remind you of the scientist who looks through a microscope at a phenomenon. With the lens focused a certain way, he sees a cell. Turn the control knob a little and he sees a sub-cellular organism. Turn it the other way and he sees multiple cells. Each sight can be accurately described and will reflect a certain truth. But looking at only one focal point without considering how it interacts with the other focal points will ultimately be misleading. Our culture nurtures the story of the committee of blind men who examined the different parts of the elephant, each describing accurately what he felt, but none describing the elephant. It is time to ask whether antitrust, with its monomaniacal focus on narrowly defined markets, has missed the elephants in the economy.7 Put another way, could we comprehend Picasso’s Guernica by viewing only one corner of the painting?

6 Id.

7 The AAI recently held a conference on systems competition. See http://www.antitrustinstitute.org/Archives/Systems_Compeitition_Audio_and_Materials.ashx.
The food sector of the national economy contains not only firms, product markets, and industries, but also systems, which may cut across industries, as the Monsanto system which Diana Moss will be describing in a few minutes cuts across the cotton, corn, and soy industries. A system usually has at its center a core, typically called a platform, with which the components of the system interact. A system could be an internally integrated firm, but more typically it works through a variety of arrangements, some involving ownership, some involving contracts both long- and short-term, some perhaps simply involving custom and practice. Typically, a system functions at many levels of a distribution chain, all of which are critical to the efficient operation of the system. And, as Barry Lynn warns us, a system may be no stronger than its weakest link.\(^8\) One cannot look at farming or ranching without considering their sources of supplies, to whom they sell their crops or livestock, and how these will be distributed to final consumers. The absence or weakness of competition at any level will inevitably affect the other levels.

For example, as Wal-Mart and other retailers grow more and more powerful, they are able to exert downward pressure on their suppliers, who then do the same to their suppliers, on down the chain. The pressure eliminates the less efficient or more poorly capitalized players or forces them to merge, and concentration increases at the various levels. But in a system there are all kinds of feedback mechanisms and causation can flow in more than one direction. Were the big retailers responsible for the concentration of the packers, or was the large-scale retailer a response to concentration at the packer level? Is concentration the result of various natural and unassailable economic forces or the result of strategic decisions made at the firm level to distance a firm from the relentless pressures of competition? What is the role of government, when large mergers are approved on condition that minor divestitures are made where there are direct overlaps in highly concentrated markets, but there is no concern for the immense buyer power created in the post-divestiture merged company?

The near-sightedness of the Chicago School seems to be recognized today. Certainly the failure of regulation to deal with too-big-to-fail financial institutions has caused people like Alan Greenspan and Richard Posner to admit that they may have given too much credit to unfettered markets. Where Chicago said that markets rarely fail, the public knows that

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\(^8\) See Barry C. Lynn, *End of the Line.*
markets fail with some frequency. Where Chicago said that government is usually the problem and rarely the solution, the public knows that government can at least sometimes work more effectively than unfettered markets to promote the public weal. Where Chicago said that economic man is rational, the public knows that irrational economic behavior is common. Where Chicago said that business decisions are based on profit maximization, the public knows that strategies are essential and they are aimed at obtaining and maintaining competitive advantage. Where Chicago said that concentration is generally good, the result of natural forces moving the economy toward more efficiency, the public knows that concentration of economic power carries with it concentration of political power and efficiency is not the only value we want reflected in our economic institutions. The Chicago School microeconomic paradigm has been revealed to be insufficient and in some ways harmful, but as yet no clear post-Chicago model has emerged.

Today we broadly agree that business strategies must be taken into account in our antitrust analyses. We know that vertical relations can no longer be ignored. We recognize that intellectual property rights must be brought under control. We see that values other than, or at least in addition to, low prices must be part of the picture: innovation, choice, and protection against systemic risk. We worry about the relationship between economic and political power but also worry about subjective tests that can introduce too much politics into economic decision-making. At the same time, we don’t want unduly to stifle efficiencies, we don’t want to undermine incentives to invest in or to strive for economic growth, which yields a larger pie that can be divided in a way that satisfies a population made uneasy by the rapidity of change that is built into our capitalist system.9

As we struggle with a deep recession, we worry about responses that will bring more concentration, more cartels, and unfortunate constraints on trade. We stand, today, at a crossroad between the Chicago School and its successor paradigm, which will manifest itself in a new relationship between the government and the private sector. The new relationship is just beginning to have its own table of contents, but it as yet has no title.

In this nameless environment, I am pleased that the Obama Administration appears to be giving food and agriculture a higher priority than its predecessors did. The Obama

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9 See Benjamin W. Friedman, The Moral Consequences of Economic Growth.
appointments at the DOJ, FTC, and Grain Inspectors, Stockyards & Packers Administration seem to have a level of creativity, energy, and concern that can move us in a better direction. As you know, the USDA just scheduled joint public workshops with the DOJ to explore the role for antitrust in the agriculture industry. The AAI applauds Agriculture Secretary Tom Vilsack and Attorney General Eric Holder for recognizing the impact of food consolidation on the U.S. economy through these hearings, and we look forward to having a seat at the table for this important discussion. The AAI hopes that its Transition Report chapter “Fighting Food Inflation through Competition” can serve as a valuable starting point for the agencies.

Even with the progress this administration appears to be making, the challenges remain great and we must be realistic about our strategies. The high levels of concentration are facts on the ground. The antagonism toward antitrust on the part of the federal courts, especially the US Supreme Court, will likely remain a substantial limiting factor on government initiatives during the next four years. Special interests in the food sector are particularly powerful. If progress is to be made on generating more competition in the food sector, there will have to be changes in antitrust thinking and enforcement more generally.

This is why it is essential to create a larger antitrust coalition than anything we have seen since 1914. Common cause must be made with a variety of interests that see or can be educated to see a need for antitrust. Independent farmers and ranchers need to make their arguments in terms that show benefit to consumers, whose organizations are critical to a coalition. There are many large companies, such as Dupont, which today and not without a dollop of historical irony, recognize their dependence on the antitrust laws. There are small businesses whose trade associations ignore that without antitrust there can be no level playing fields. There are lawyers, economists, and professors who have a stake in the antitrust enterprise itself. Perhaps there are even parts of organized labor (outside of tightly oligopolistic industries) that can support the benefits of a competitive economy. And there is the increasing presence of an international antitrust community which in many ways can help demonstrate the value of activist competition-protecting and competition-generating government. It is not enough to have a competition protection mission, as the FTC styles its antitrust effort. In tomorrow’s emerging paradigm it will be necessary for the government to play a larger role in actively generating competition where it has been lost. This can only
partially be accomplished by antitrust; which is why we need to think more broadly about national competition policy. I am grateful to Fred Stokes and the OCM for bringing this diverse group together today, in the interests of a more competitive American economy.