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# The Direction of Antitrust in the Decade Ahead: Some Predictions—Panel Discussion

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Donald I. Baker, Thomas E. Kauper, William F. Baxter, Gordon B. Spivack, James T. Halverson, Robert Pitofsky, George A. Hay, and Alan H. Silberman

## PANEL DISCUSSION

### *Moderator*

DONALD I. BAKER

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### *Commentators*

THOMAS E. KAUPER

*Professor,*

*University of Michigan Law School*

WILLIAM F. BAXTER

*Professor, Stanford Law School*

GORDON B. SPIVACK

*Member of the New York Bar*

### *Panelists*

JAMES T. HALVERSON

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District of Columbia, and  
Minnesota Bars*

GEORGE A. HAY

*Professor,  
Cornell Law School*

ROBERT PITOFSKY

*Dean, Georgetown University  
Law Center*

ALAN H. SILBERMAN

*Member of the Illinois Bar*

MR. BAKER: Now we will hear from the first of our three commentators, Tom Kauper. I will only say three things about him: First, he served longer than anyone else in the history of the Antitrust Division as Assistant Attorney General; second, he may have served longer than anyone else on the Council of the Antitrust Section; and third, he was there during Watergate and the Saturday Night Massacre, and those of us who were there with him will never forget it.

MR. KAUPER: I was struck going through the papers for this presentation by the way in which lawyers almost invariably proceed: as we make

predictions for the future, we tend to proceed with our feet moving straight back. That seems to be the theme running through a lot of the papers today.

Jim Halverson, for example, points out that in his quintet of cases—*Rothery*,<sup>1</sup> and so on<sup>2</sup>—the courts have rediscovered the *Addyston Pipe*<sup>3</sup> case; *Addyston Pipe* goes back a very long way. I think we have correctly rediscovered the *Addyston Pipe* case, but as a prediction of the future, it is taking us back somewhere to the turn of the century.

Alan Silberman has rediscovered Justice Holmes' opinion in the *Dr. Miles* case.<sup>4</sup> That, of course, takes us back to 1911.

We tend, over and over again, to rediscover the same truths. I was struck not very long ago by a statement from the Antitrust Division suggesting that we should use the antitrust laws to deal with organized crime. The last person who said that was John Mitchell, and let me remind you where that took him.

I want to talk a little bit this morning about each of the papers as they have been presented, offer some predictions, and comment a little bit about the role of institutions and procedures in the antitrust of the future.

Like Jim Halverson, I think the rediscovery of *Addyston Pipe* is indeed very significant. Whether we characterize it in terms of joint venture, or we talk in terms of rules which apply to horizontal integration, the approach taken in the *Addyston Pipe* case is one which is indeed the direction in which the law is moving.

*Addyston Pipe*, however, does leave some questions unanswered. The implication in *Addyston Pipe* is that anything which is ancillary is valid. It does not fully take into account the fact the conduct invoked can *both* restrict output and enhance efficiency; *Addyston Pipe* simply draws a balance in favor of efficiency in such cases. This is an issue we are going to continue to pursue through a series of cases. But I see no reason to believe we will see any significant departure from the approach these cases are now taking. We will continue, of course, to have the hard-core

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<sup>1</sup> *Rothery Storage and Van Lines, Inc. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 107 S. Ct. 880 (1987).

<sup>2</sup> The other four lower court decisions he discusses in detail are *Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7th Cir. 1984); *Polk Bros., Inc. v. Forest City Enterprises, Inc.*, 776 F.2d 185 (7th Cir. 1985); *National Bancard Corp. (NaBanco) v. Visa, U.S.A.*, 779 F.2d 592 (11th Cir.), *cert. denied*, 107 S. Ct. 329 (1986); and *Dimidowich v. Bell & Howell*, 803 F.2d 1473 (9th Cir. 1986).

<sup>3</sup> *United States v. Addyston Pipe & Steel Co.*, 85 F.271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899).

<sup>4</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

per se rules with respect to cartel behavior. I don't see anything that is going to work any change in that. But, as to the balance, we will see the development as we go along of a much more structured, rule of reason kind of analysis.

I was struck by the fact that Jim Halverson's paper really doesn't deal with the problem of boycotts. The boycott characterization may be the most perverse of all of the characterizations that we have been inclined to use in antitrust. It is a curiosity in its condemnation of means instead of ends or effects. What will happen to boycott rules over the next decade (which is the rather limited time frame we are supposed to be talking about this morning)?

I am confident that we are going to continue to see erosion of the boycott per se rule—indeed, it may disappear altogether, at least in cases involving some kind of integration. I think we will see the kind of rule of reason approach now being utilized in a lot of the health care so-called boycott cases. That is a very healthy development. I don't think anything has messed up the law, particularly in a lot of the health care cases, as much as the boycott rules have, as courts have struggled to find some kind of an intelligible way around them. I think that tendency will continue.

In terms of vertical restraints, the big question remains the one we have been debating in these halls now for some time: that is, what is to be done with resale price maintenance? I am inclined to agree with George Hay that the time has come to stop playing with this. What we are doing, and what we have been doing for decades, is operating with a per se rule which we ameliorate the harshness of by tinkering around with the notion of agreement. That has been going on as far back as the *Colgate* case.<sup>5</sup> Anyone who has ever tried to teach a group of relatively uninformed students about the *Colgate* case by explaining to them that in *Colgate* there was no agreement will immediately realize the difficulty of trying to explain away something that actually constitutes an agreement as a non-agreement.

We either ought to characterize resale price maintenance as a per se violation and then deal realistically with the issue of agreement; or, alternatively, not characterize this as a per se violation at all, try to evolve a new set of rules, and stop tinkering around with the kinds of situations we get into in *Monsanto*<sup>6</sup> and so on, in terms of agreement.

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<sup>5</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>6</sup> *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984).

I am not sure we will see any further resolution of this set of issues. We continue to have the courts struggling through *Monsanto* and now into the *Sharp* case.<sup>7</sup> It is my hope that Congress does not intend to resolve this issue, as it may do. That would, of course, answer a number of questions and at least make predictions a little bit easier.

But, while we can talk about tie-ins, exclusive dealing, territorial restrictions and so on, the critical issue for the next decade with respect to vertical restraints is the issue of resale price maintenance. I would hope that we would see it resolved, if for no other reason than the elimination of the continuing debates in halls like this.

So far as merger policy is concerned, I think we are going to see some changes but only in terms of degree. I don't agree with all of Bob Pitofsky's criticism of the Guidelines, although I am on record as agreeing with some of them. But we will likely see a move towards a somewhat more severe or more restrictive policy, particularly if there is a change of administration. But it will be a matter of degree. There is simply too much consensus that the policies of the 1960s were too severe to believe that there is any realistic possibility that we will see any move back in that general direction. So I wouldn't look for any radical change.

Let me say an additional word or two about George Hay's paper because I think there are a couple of other things there. George is always confident in his predictions, which he is prepared to disclaim immediately upon something else happening. But, I think most of his predictions are probably correct.

We have debated predatory pricing now off and on for some 13 years, since the publication of the Areeda-Turner article.<sup>8</sup> While it has been an interesting debate, one may wonder whether we haven't once again been engaging in an intellectual exercise that really does not have a great deal of meaning. If we accept the skepticism that the Supreme Court has expressed in both *Matsushita*<sup>9</sup> and *Monfort*<sup>10</sup> in terms of the conditions under which predation might occur successfully, it seems reasonably clear that there just aren't enough cases out there at this time really to be very much concerned about; that, while all the talk about theory and average variable cost and marginal cost and total cost is interesting, it is

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<sup>7</sup> *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 780 F.2d 1212 (5th Cir. 1986), *cert. granted*, 107 S. Ct. 3182 (1987).

<sup>8</sup> Areeda and Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

<sup>9</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>10</sup> *Cargill, Inc. v. Monfort of Colorado, Inc.*, 107 S. Ct. 484 (1986).

not a subject of any very great practical consequence. I think that will become clearer over the next several years.

There is, of course, the development of the theory of raising rivals' costs which, as I sometimes listen to Steve Salop present it,<sup>11</sup> seems to be a principle without limit. Were courts to begin moving seriously in that direction, we might see a considerable revival of Section 2 of the Sherman Act. I don't believe that is likely to happen, but, nevertheless, the theory is there.

I was one of those who attended the famous, or infamous, Airlie House Conference on the antitrust alternative—the “shadow antitrust,” if you like. It was an interesting conference. A lot of people were trying to resurrect theories of the past and to find some way to revive a much more intrusive antitrust policy. Much of the discussion there focused on the theory of raising rivals' costs. I think that theory, whatever its boundary, will be the focal point of some litigation in the next decade. I am not confident about making a prediction of its outcome, but the theory does at least offer some hope to plaintiffs.

I want to use the few minutes remaining to me to talk a little bit about the institutions and procedures of antitrust, because those, too, may see some significant change over the next decade.

In his opening remarks, Jim Rill spoke of the increasing antitrust role being played by the states. I am not quite as sanguine as he about the outcome of that increasing activity. One must keep in mind that states may operate both under federal law—where they do, after all, have some standing as private plaintiffs—and under state law, where states can operate under their own interpretation. I think there is a significant danger in the latter. Insofar as states proceed under federal law, the federal courts, which are, after all, in our system the formulators of antitrust rules, have the ability to curtail, control, or at least keep consistent, the efforts by the states to use antitrust enforcement in those cases where they have come into the federal courts to do so.

I am somewhat more concerned about the use of state law. It would probably be unduly alarmist to suggest that we will go back to the day of a completely non-uniform antitrust policy, but that danger does exist and there is some risk that we will see conflicting state decisions dealing with the same kind of conduct. All of us may have to become experts on something that I think most of us probably don't know very much about, and that is the doctrine of preemption. Whether the doctrine of

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<sup>11</sup> See Krattenmaker and Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 YALE L.J. 209 (1986).

preemption will be adequate to keep a degree of uniformity in these developments, I am not sure. I'm uncomfortable about it.

I think one has to recognize that what drives this development is an unhappiness with federal enforcement and with what is happening with private plaintiffs in terms of standing, antitrust injury, *Brunswick*,<sup>12</sup> and so on. It is really a form of backlash. That backlash can result, or could result, in changes in federal law in an attempt to control the backlash. That may be almost inevitable if this development continues.

I think there are also serious questions about the treble damage remedy. Nobody has raised that yet. But, the fact of the matter is that lots of questions are being asked about that remedy, about its utility, whether it is being abused, and whether it is being used for anticompetitive purposes. I think that debate is going to go on over the next decade, and I think it is possible that we will see some change in the treble damage remedy.

There will also be reexamination of the role of the Federal Trade Commission. This morning Jim Rill announced his new commission to study the FTC. I have always wondered why those commissions focus only on the FTC. There is, after all, another arm of federal enforcement—the Antitrust Division of the Justice Department. It is not unreasonable to believe the two ought to be examined together.

We may have overburdened this podium in the past with discussions of whether we should do away with the antitrust jurisdiction of the FTC and give it to the Department of Justice. Let me suggest only slightly tongue-in-cheek, that there is another way to do this, and that is to do away with the antitrust jurisdiction of the Department of Justice and confer everything on the Federal Trade Commission. That may seem a little bizarre. After all, the Justice Department has to have criminal authority—you can't give that to the Federal Trade Commission—but price-fixing cases are detective cases that could be handled by U.S. Attorneys or the Criminal Division. Everything else could perhaps be put over in the Federal Trade Commission.

I'm not a very good predictor. Lawyers are generally not good predictors. We like to look to the past and to know what's authoritative. So when we make predictions I'm reminded a little bit of the story of Professor Smith. Professor Smith wrote a long law review article. Having had a flash of memory from his Sunday school days, he made the mistake of quoting in the text of the article the famous line, "Blessed are the meek, for they shall inherit the earth." When you deal with law review

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<sup>12</sup> *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).



editors you have to have footnotes, you have to prove everything, so he dropped a footnote which said, "Matthew 5:5." Law review editors, believing that there are in fact truths, performed here in a typical way. They sent him back an inquiry asking which version of the Bible he had used. Whereupon, Smith rewrote the footnote, adding "King James version." After another query about *other* versions, he rewrote the footnote again, referring to the Revised Standard Version, the English Version, and pointing out slight differences in the text, which, he explained, were not significant. Once more came back an inquiry, asking him to expand on the differences, which he did. He went through biblical scholars. The footnote is now beginning to resemble a page. He sent it off, thinking he was now done with the nasty law review editors. Back came one more inquiry: "Professor Smith, which version of the Bible is authoritative?" He did not hesitate. The answer shot back: "God only knows."

So much for predictions.

MR. BAKER: Our second commentator is Bill Baxter, who probably came as close to being a household word or a source of household debate as anybody who has held the job of Assistant Attorney General. He wrapped up the Telephone Case that Tom Kauper brought and some of us tended along the way, and for that he will never be forgotten. We will let him deal with ski slopes and other things. Bill, in addition to being professor of law at Stanford, is of counsel to Shearman and Sterling.

MR. BAXTER: The most remarkable thing about these four papers to me is the degree of consensus, very near unanimity, although not complete unanimity, that we will continue to have an antitrust law that has as its goal economic efficiency. The only real exception to that theme is in Bob Pitofsky's paper, and I will come back to that.

Certainly, the fact of efficiency orientation should not be surprising. Rather, it is the unanimity that is surprising. The history of antitrust is not one of efficiencies, but rather, a history of domestic protectionism, the use of antitrust laws to shelter politically favored entities from competition of other groups. The change over the last 10 to 15 years has been a very remarkable and a very important one. It is important that the new orientation continue.

If it is to be true that we will continue to talk about an antitrust law that pursues efficiency, then we have a whole lot of smaller questions to ask about how much we know about efficiency, how much more we can learn about it. It is questions about efficiency—what it means, how we measure it—that these four papers are really about.

George Hay's paper on unilateral behavior starts off with the implicit assumption, which is a very important one, that Section 2 in the future will be conduct-oriented rather than status-oriented. *Alcoa*<sup>13</sup> is an example of a status case. I think we have learned that interpreting Section 2 to apply to the status of being a monopolist yields unwanted results. Where, after all, is the United Shoe Machinery Company now? We do not know how to deal with the remedy problems to which a status interpretation of Section 2 gives rise. We can deal with conduct cases by saying, "Stop the conduct."

What I mean when I say that we do not know how to deal with status cases is that we have chosen not to regard the behavior of a company that has a very large share of a sheltered market, a company that merely sets a price in excess of marginal cost and collects monopoly rents, as violating the antitrust laws. We have made that choice because we don't know what to do about a remedy. That recognition of the limits of judicial competence is an important development.

The more strictly we deal with Section 2 as a statute that is violated only by identifiable instances of bad behavior, a kind that we can stop, the less important it becomes that we have clearly separate meanings for the terms "market power" and "monopoly power." What we mean by "market power," the mini-monopoly power of which George Hay speaks in his paper, clearly will not do, clearly is not sufficient in its magnitude or in its potential for harm if we are really going to bring cases like *Alcoa* and contemplate divestiture remedies. But, to the extent we insist upon much more specific bad conduct, then it does not seem clear to me that we need to have the two definitions of which George speaks: mini-monopoly power is enough to support a remedy that enjoins the conduct.

Sham litigation, which I think is best seen as a species of non-price predatory behavior, is an example of the kind of bad, unilateral behavior to which Section 2 may properly be applied. Predatory pricing is another example, and of course the one most extensively discussed so far, but predatory litigation is another example. Indeed, it should also be seen as another example of a much broader genre that one might describe as predatory expenditures—a category of behavior that creeps closer and closer to Steve Salop's category of imposing costs on rivals.

One of the things I think we will see in the next ten years, a movement that poses danger of serious error, but surely we will experiment with it for better or worse, is a willingness to look at forms of predatory behavior that go beyond price.

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<sup>13</sup> *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

The most surprising thing to me in George's paper was his treatment of the essential facilities doctrine. His relative willingness to accept a more aggressive approach to the essential facilities doctrine seems inconsistent with his more general disposition to treat Section 2 as a behavioral statute and not a conduct statute. There is almost no Section 2 case that can't be cast in the form of an essential facilities question. One can imagine bauxite miners showing up at an Alcoa mill and insisting that their bauxite be afforded equal access to the production facilities that exhibited the scale economies on which Alcoa's monopoly power rested, and requesting to have their bauxite delivered in the form of aluminum at the other end of the process.

A vigorous invocation of the essential facilities doctrine really does have the potential for returning Section 2 to something much closer to a status offense. If a court, as a matter of remedy, is going to undertake to tell parties that they must deal with one another, then it is necessary for the court to tell them the terms on which they must deal today, and then again next month when prices change. That is a very difficult thing for a court to do, something it is not at all well equipped for. In fact, the essential facilities doctrine gets invoked only when the facility is already dealing with large numbers of third parties, and the court takes the easy way out by saying, "Deal with the plaintiff on the same terms as you deal with the other parties." Thus we have a requirement of discriminatory conduct that limits the reach of the essential facility doctrine.

If the doctrine continues to be thus confined, it may not do much harm. On the other hand, it should be recognized that the remedy is much more animated by fairness concepts than by efficiency concepts. The result is simply that monopoly rents are taken at a different level of production: in the pricing of access rather than in the pricing of the downstream product. There is no reason to think that giving one more person access to the essential facility is going to diminish its capacity to generate dead weight loss, although it may reduce monopoly rents.

I would agree with much that has been said about resale price maintenance being a form of vertical arrangements that will receive much attention as we go forward. I will even surprise George Hay, who has been taking my temperature surreptitiously—but, at least on this occasion not accurately—by saying that I agree with him entirely that *Colgate*<sup>14</sup> is a distracting and illogical element in the resale price maintenance problem. Agreement is really not in point. Vertical arrangement cases should

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<sup>14</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

be seen as unilateral behavior cases. Exclusive dealing is cast in unilateral form by Section 3 of the Clayton Act, which prohibits imposing the condition rather than obtaining agreement. And that is a preferable orientation for all vertical problems. The difficulty with *Colgate*—the reason we have so much difficulty explaining *Colgate* to our students—is that in every operational sense it is entirely, wildly irrelevant whether there is an agreement between the upstream party and the downstream party or not. The finding of agreement under those circumstances is a pure formality and one that we might well do without.

Now, of course, having said that, I would regard it as a substantial loss if we clarified the area by eliminating the *Colgate* smokescreen and then continue to impose the rule of per se illegality. That would be very damaging and highly inefficient. The smokescreen at least allows us to escape that result. But *Colgate* really doesn't belong in the analysis of vertical problems. The only agreements relevant in antitrust are horizontal agreements.

One of the nonefficiency notes that showed up in these four papers is Alan Silberman's suggestion that some concept of freedom for the trader is an important underlying social objective in the vertical area. It has, indeed, been mentioned; but, of course, it is a very peculiar notion because it is inherent in the problem that the trader under discussion has entered into an agreement by which he has limited his freedom—as anyone who enters into a contract always does limit his freedom by agreeing to act in a particular way. The purpose of a contract is to enable the promisor to make a credible commitment about his future behavior. The law cannot aid the trader by removing his ability to make a credible commitment. A welfare system that protects traders from self-inflicted injury by allowing them to repudiate their contracts is a strange concept indeed.

Jim Halverson's paper stresses what seems to me to be becoming a more and more obvious truth, that there is no important distinction between integration by ownership and integration by contract, that they should be treated symmetrically. A cartel is nothing more nor less than a joint venture we have decided is harmful. With the exception of some very, very narrow categories of behavior such as price-fixing and market allocation, where nothing more by way of integration is involved and a per se rule is appropriate, the ultimate question in antitrust analysis is deciding how productive an integration has to be before it will shelter, through a doctrine of ancillarity, certain restrictions on rivalry. That is the really hard question in antitrust.

Typically, as in most merger cases, for example, we are attempting to answer only the much easier question: “Is this merger transaction likely to lessen competition, to increase market power, to increase the likelihood of a coordinated response among the parties?” We do not have to answer the “how much” question; we’re really just asking about the sign, the direction: “Is it negative?” That’s a manageable question.

But, as soon as we start talking about efficiencies, either in merger or in joint venture contexts, we necessarily start making tradeoffs between enhancements of market power and increases in efficiency. The difficulty of the inquiry we set for ourselves is increased not by one, but by two, orders of magnitude. We now not only have to answer “Is it conducive to efficiency and how important is that efficiency?”, but also “Does it give rise to market power?” and “How much market power?” Those are both much more difficult questions to answer than the traditional binary merger question, a question about which we have not so far exhibited a great deal of ability.

Bob Pitofsky’s paper on mergers is very interesting. To me, it is largely an argument about rules versus discretion. Bob prefers rather objective rules, notwithstanding the fact that they will sometimes lead us into error. As to mergers, I share that tendency myself, as is implied by my skepticism about our ability to deal with the more difficult “how much” questions.

Where one comes out on the rule-standard issue must necessarily turn largely on the institutions with which you are dealing. If you have a high level of confidence in the way discretion will be exercised by the institution to which you are remitting the question, you are inclined to opt for standards. If you do not, you have a strong preference for rules. It is conceivable that one might want the enforcement agencies to use a fair amount of discretion, but, nevertheless, have a rule-oriented approach when the case moves into the courts, particularly in those aspects of antitrust doctrine that frequently wind up in front of jurors.

There are several other points in Bob’s paper that I would like to deal with, but the clock forbids: the so-called *Cellophane*<sup>15</sup> error, which reflects a misunderstanding of the difference between the Section 1 context in which mergers arise and the Section 2 context of the *Cellophane* decision.

The only other point I will make about Bob’s paper I will make first in a general form and then in a much more specific form.

When one talks about taking into account factors other than economic efficiency—noneconomic factors—Bob, and others, like to talk as if this

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<sup>15</sup> United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).

was something extra: you first take economic efficiency into account and then, without losing anything in the economic realm, you take something else into account in addition. But that is not true. To take these other things into account, you must sacrifice efficiency. Hence, you must be prepared to say how much efficiency you are willing to sacrifice for how much something else.

One particular illustration of the point in the Pitofsky paper concerns the significance of a trend toward concentration. Should the existence of such a trend count against a merger? If there is a trend toward concentration, there is some reason why there is a trend toward concentration in that industry—some technological change has occurred, some important change in resource cost has occurred that is moving the industry toward concentration. Now if concentration has reached a high level, we may wish to block a merger. But, the notion that we should now get tougher on mergers and throw our bodies in the path of that trend is really extremely perverse.

That gives rise to the interesting institutional question: What should a court do when it is asserted that Congress intended that the courts do something very foolish? That's a problem. But, this particular intention is said to be found merely in the legislative history. The statute says nothing about throwing our bodies in the path of technological change. The statute says you stop mergers where the effect may be substantially to lessen competition. I would at least take the following position: Congress, of course, has a right to make foolish choices, and when it does so in statutory language that is devoid of ambiguity, the courts should be faithful servants and execute the foolishness. But I would never suggest that the court should go outside the language in the statute to the legislative history and execute a foolish course that it finds there.

**MR. BAKER:** Our last commentator is Gordon Spivack, who is really a legend in the Antitrust Division. He rose through the staff to be Director of Operations. When I came there, I had the impression that Gordon was the highest paid person in the Division on a per-word basis. You will recall, of course, we all got paid about the same thing. You would go into Gordon's office and you would lay out this thing with great enthusiasm, and he would sit there and think about it for a minute, and then he would ask you some devastating question, and you'd go and put it back together again and come back again. He was just an incredible leader.

He went from the Antitrust Division to Yale Law School, which some of us won't hold against him, and then to Wall Street, first with Lord,

Day & Lord, and now with Coudert Brothers, where he is a very active practitioner in particularly, I think, in the area of federal enforcement.

MR. SPIVACK: We have had four excellent papers, most of which I disagree with. It would take me a couple of hours to point out all the problems with what was said. Let me say one thing about each paper.

Let's start with horizontal restraints. What has the Supreme Court really done in this area? In *BMI*,<sup>16</sup> all they said was that if the only way you can market a product is by having an agreement on the price, that agreement on price is not illegal per se.

The next case up was *Maricopa*.<sup>17</sup> In *Maricopa*, there was a joint venture, there was a plausible justification in terms of efficiency, and the Supreme Court said it was illegal per se. Even though there was an issue of fact as to the significance of the efficiency, the Supreme Court granted summary judgment.

The next case up was *NCAA*.<sup>18</sup> Again, you had a joint venture. The Court said, "We're not going to apply the per se rule because you can't market the product without a horizontal restraint; you need horizontal restraints to make the product available, so we have to look at this for a minute." Then they said they were applying the rule of reason. But, as soon as they saw an increase in price—what they thought was an increase in price—they held it was illegal, even though the joint venture had no market power. They go on later to say NCAA did have market power, but they went out of their way to say that even without market power the practice in *NCAA* was illegal—where there was again a plausible case for efficiency, as the dissent pointed out.

In the next case, *Indiana Dentists*,<sup>19</sup> the Supreme Court said, "We can see an anticompetitive effect, collective denial of information the consumer wants, and as soon as we see that, it's illegal regardless of market power." (The court of appeals had pointed out they didn't have market power.) The Court found that regardless of the effect on price, with no proof of an effect on price, there was an anticompetitive effect, and even though the information involved is useless, it's illegal because it was collectively denied.

Now, as I read those cases, what is going to happen is you will see two or three more quick looks under the so-called "truncated rule of reason"

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<sup>16</sup> *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979).

<sup>17</sup> *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982).

<sup>18</sup> *National Collegiate Athletic Ass'n v. Board of Regents*, 468 U.S. 85 (1984).

<sup>19</sup> *Federal Trade Comm'n v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986).

and the Supreme Court will then say, "We now know enough to say that in the context of a joint venture—which may be procompetitive—if competitors agree on sales prices, that's illegal per se, except where the agreement on price is necessary to market the product at all." In other words, they are going to return to *Citizen Publishing*.<sup>20</sup> So, I think you will find in the next ten years the Supreme Court talking more and more about per se, not less and less.

Now, as to vertical restraints, yes, the law is changing; yes, we don't know enough about it; yes, the economists can tell us a lot; yes, you have to worry about deterring efficiency-creating activity—all that is true. And yes, the real question is what's the impact? Where do we want to go? What's relevant? The antitrust laws were passed to preserve social and political values, dispersion of economic power, equality of opportunity, freedom, fairness. The courts in the vertical restraint area for 90 years have been balancing those values against each other and against economic values and drawing the line as they saw where the balance came out. That is the typical tort law, common law, approach.

In *Dr. Miles*,<sup>21</sup> they said retailers ought to have the freedom of running their own business—freedom, liberty, entrepreneurial freedom; they were defining it for you. They said, "Retailers ought to be free to run their own business. Price is such an important part of running your own business, we're not going to allow manufacturers to impose restriction on that freedom." That's what they were talking about, not an economic analysis.

But, where you can show them that what you are doing is trying to compete and you are not coercing retailers, they will allow you to do it. For example, if you want to have a price promotion, they will allow you to tell the retailer, "You can have it either way. Here is our price. Sell at anything you want, but if you want to take the promotion you've got to pass the promotion on to the retailer." In that situation, the Supreme Court will say, as the lower courts have said, "That's not an undue interference with the freedom of retailers; that's simply the manufacturer trying to compete."

That's what *Colgate*<sup>22</sup> is all about. *Colgate* is the reverse of *Dr. Miles*: "Yes, the retailers can run their business, but the manufacturers can run their business; and we define part of the freedom of running your own business to be that a manufacturer can say, 'I don't want to deal with

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<sup>20</sup> *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969).

<sup>21</sup> *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

<sup>22</sup> *United States v. Colgate & Co.*, 250 U.S. 300 (1919).



you, period,' and that's part of their freedom and we're not going to interfere with it." I don't think *Colgate* is going to be overruled.

In the tying area, for example, *Hyde*<sup>23</sup> reaffirmed the per se illegality of tying. *Hyde* said that if you coerce people to take product *B* as a price for product *A*, that's illegal, even though you could have increased the price of *A*. They rejected the Chicago School approach, that simply because you could have raised the price you can exercise that power in another way. They rejected it because it has unfair effects on the people who were trying to compete in the tied product areas. Therefore, you will have tying cases which condemn restraints in which there is no effect on the competitive market for the tied product, but simply an undue interference with the freedom of people to compete.

The process of balancing social, political, and economic values is difficult and complex. But the social and political values involved are too important to be ignored simply because they cannot be mathematically calibrated or subjected to regression analysis. The values are clearly embodied in the legislative history of the Sherman Act, the Clayton Act and the FTC Act, and in decades of precedent, and I do not believe they will be ignored by the Supreme Court in the next decade. *Hyde*, which reaffirmed the importance of legislative intent and precedent, points in that direction.

Predatory pricing: In *Matsushita*<sup>24</sup> and in *Cargill*,<sup>25</sup> the Supreme Court said predatory pricing exists. The Chicago School says it doesn't exist. The Supreme Court said, "It does exist, it is anticompetitive, and it violates the Sherman Act; anywhere you can prove it, we will condemn it."

In *Matsushita*, they didn't grant summary judgment; they sent it back to the court of appeals and said, "See what the facts are. The facts you have given us so far don't raise an inference of predatory pricing." In *Cargill*, they rejected the Justice Department's argument that a competitor shouldn't have standing to sue. In *Cargill*, there wasn't any allegation of predatory pricing. But, where you find predatory pricing, the message is that it ought to be condemned.

In both those cases, the Supreme Court recognized the conflict in the lower courts and in the commentators about the "cost-based standard," and refused to adopt any specific standard. Even George Hay says in his paper that you can have pricing above total costs which is predatory

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<sup>23</sup> *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984).

<sup>24</sup> *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

<sup>25</sup> *Cargill, Inc. v. Monfort of Colo., Inc.*, 107 S. Ct. 484 (1986).

in intent and in effect. Therefore, I would caution against the Court's adopting any purely cost-based standard.

On barriers to entry, let's suppose you have someone who has 60 percent of the market and one competitor and he sells above variable cost, below total cost, for the specific intent of driving the only competitor out of business, and he does that because he has greater access to capital; he drives the only competitor out of business even though the only competitor has lower costs. Then, he raises prices 150 percent and two other people come back into the business and prices go down to competitive levels. I think the Supreme Court is going to say that he engaged in an attempt to monopolize; he unfairly excluded the company that was in business from engaging in business on a basis other than efficiency; he excluded him simply because he had greater access to capital. Unfair exclusion from the market is the root meaning of monopoly. In the case I have just posed, without any barriers to entry, there was an unfair exclusion from the market. Where there are sales below cost for the specific intent of putting somebody out of business, even if the other fellow has lower costs, without barriers to entry, I believe the Supreme Court will say that violates the law.

In the merger area, I am not going to defend the 1960s cases. I had no difficulty doing that while I taught the merger course at Yale for ten years. We keep hearing about this anti-bigness, anti-efficiency, anti-business animus of the 1960s. Who brought these cases? *Brown Shoe*<sup>26</sup>—they always parade out *Brown Shoe*—was brought by Judge Stanley Barnes and Herb Brownell. Judge Barnes and General Brownell weren't anti-efficiency, anti-business, or anti-bigness. *Von's*<sup>27</sup> and *Pabst*<sup>28</sup>—the other 1960s cases usually attacked with such vehemence—were brought by Bob Bicks and William Rogers; they weren't anti-bigness, anti-business, or anti-efficiency.

We were simply trying to create rules to carry out the intent of Congress. The present rules are based on the idea that you can disregard the intent of Congress. The present rules take us back to *United States Steel*<sup>29</sup> in the 1920s. Section 7 was designed to overrule that approach.

I do, however, disagree with Bob Pitofsky, who says you shouldn't take all facts into account in merger cases. You have to. Certainty is important, efficiency is important, and predictability is important; but the unique-

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<sup>26</sup> *Brown Shoe v. United States*, 370 U.S. 294 (1962).

<sup>27</sup> *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966).

<sup>28</sup> *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

<sup>29</sup> *United States v. United States Steel Corp.*, U.S. 417 (1920).

ness of industry facts is too important in trying to evaluate mergers to be bound by using only market shares, efficiency, and barriers to entry. You have to listen to the facts of a particular case. That's why the government first issued the 1982 *Guidelines*, then they issued the 1984 *Guidelines*, and then they abandoned guidelines. They were learning because they were faced with the facts of specific cases. I don't agree with where they came out, but I think it just reemphasizes that mergers are an area in which we all have too much to learn to adopt any per se rules.

### QUESTIONS & ANSWERS

MR. BAKER: Just to move this thing along quickly in the little bit of time we have remaining, I would like to pose two questions to the panel and ask for a show of hands on what their advice would be. The first one concerns the future of merger policy. Assume your client is trying to negotiate a merger today; the HHI increase would be from 2000 to 2500 in a real market; the client wants to know whether it should pay a 5 percent premium in order to push the deal through fast and get the H-S-R process done in 1988. How many would recommend paying them the 5 percent in order to get it done in 1988?

[Mr. Spivack and Mr. Pitofsky raised their hands.]

MR. BAKER: My second practical question comes out of the boycotts, etc., kind of thing: There is a situation of no market power and no good reason for denying somebody access to the joint venture. Let's assume it is a five-member joint venture in an industry with several other similar ventures, no market power. Your client just doesn't like the applicant, doesn't want him in, but has no justification. Would you advise your client that you have a 70 percent chance of prevailing if you're sued? Would anyone advise that there's a 70 percent chance of prevailing in a suit? No market power, no good reason. Fifty percent chance?

MR. SILBERMAN: Sixty-five.

MR. BAKER: How about 50?

MR. HAY: Fifty, maybe.

MR. BAKER: I think that tells us a little bit about there being some lag between the theory and how it actually works out in the day-to-day environment. It may be that it's not one of those cases worth fighting.

I will give each of the first four speakers one minute to respond to the commentators' remarks on their papers.

MR. HALVERSON: I just have a one-minute remark, and that is to tell Gordon I'll be very happy to return here ten years from now and see if

the Supreme Court and the circuit courts of appeals have applied the rule of reason analysis more frequently or less frequently in horizontal agreement cases. I think there is a great degree of certainty that it will be in the direction of rule of reason.

**MR. SILBERMAN:** Bill Baxter's comments about the complete irrelevance of being concerned with the freedom of the trader illustrates, I think, the problem of the global approach. Sometimes, as Gordon's comments point out, an agreement between manufacturer and retailer does in fact reflect an exercise of pricing independence and a response to market forces, and in those cases we don't want to characterize it as price-fixing, resale price maintenance, whatever; we want to encourage it. But sometimes, the agreement is in fact one which is properly characterized as interdicting market forces and preventing local price stimuli from working, and in those situations we want to treat that as a problem for antitrust.

The response, I think, generally, Bill, is your own statement which says the following: "Coherent antitrust doctrine will develop only if we move to systems of characterizations less global than we have used in conjunction with per se rules." That's the position that I am advocating for the future.

**MR. PITOFSKY:** Bill Baxter said he disagrees with my complaint that "trend" was left out of the Guidelines, saying if there is a trend to concentration in an industry, it must be because the firms were all seeking efficiency. I don't see how you can read the newspapers over the last five years and think this wild merger frenzy we are witnessing is governed by a search for efficiency.

Second, he asks what should the courts do when Congress does something foolish. With all respect, Bill, that misstates the issue. The legislative history shows that Congress thought that trend was important, and the courts virtually unanimously agreed and implemented that view. It was the enforcement agencies that took it upon themselves to ignore both Congress and the courts.

Third, on the trade-off point, Bill of course is right. To introduce political factors complicates the tidy world of those who think of antitrust enforcement solely in economic terms, but I think that is clearly what Congress wanted. I also don't think the world of economic analysis is all that tidy.

**MR. BAKER:** George, give us a tiny 60 seconds on economics.

**MR. HAY:** Limiting oneself to recent Supreme Court decisions is a high-risk way to take the pulse of what is really going on.

MR. BAKER: I just wanted to ask the panel to comment on two things. Tom Kauper mentioned the increasing roles of the states. I mentioned at the outset the declining resources that are being devoted to federal antitrust enforcement. I think the Division stands at 58 percent of its 1980 strength. Are these important realities for the 1990s? Do other people agree with Tom that these are important changes or not? Bill?

MR. BAXTER: I'm not sure I really understand your question. Is it about the significance of state enforcement?

MR. BAKER: When you are counseling a client in 1992, are you going to have to worry mostly about the State Attorney General in your area or are you going to continue to worry mostly about the federal level?

MR. BAXTER: I think you may very well have to worry mostly about the State Attorney General. Someone has put it very nicely about governors' mansions. There is once again a very, very strong tendency at the state level to protect popular groups, to use antitrust in a manipulative and a political way. Until that is curbed by the development of a preemption doctrine, I think it is going to be a substantial problem.

Now, unless we go to a highly protectionist foreign policy and international trade policy, we are going to find ourselves subject to sufficiently strong competitive forces internationally so that domestic protectionism will be visibly destructive in most areas of the economy—not, however, in distribution perhaps, which is apparently local and where there is the most room for mischief. But, yes, I think that in 1992, state protectionism may be a major problem, although at the turn of the century I think it will not be.

MR. BAKER: Let me just ask my resources question in one more way and, Tom, I'll put it to you. You were really the one who got the modern antitrust criminal thing going on such a large scale. It seemed to me there were three parts to that program: (1) strong penalties and high visibility; (2) some reasonable probability that those penalties would be imposed; and (3) some reasonable probability that people would actually be investigated because they violated the law. Does the great reduction in federal law enforcement strength cause any risks in credibility?

MR. KAUPER: It could if it is curtailed enough. I think the practical answer at the moment is that there are probably about the same amount of resources going into that kind of activity as there were some time ago because there aren't many resources going into anything else.

I have always viewed price-fixing as akin to any other kind of criminal act; if you don't have an active, visible enforcement program, you are

likely to see price-fixing increase. Few price-fixing cases of any significance are the kinds of cases on which we want to or could rely on state enforcement. I don't think that the rise in state resources is likely to do much good in terms of price-fixing. Those investigations are very difficult for a state attorney general.

So, yes, I think there is a risk, but I think at the moment there is a sufficient commitment to that kind of investigation that I am not yet very concerned.

MR. BAKER: Do you want the last word, Gordon?

MR. SPIVACK: As Tom said, these cases, although when we get a written opinion seem simple, often involve an enormous amount of resources. That's the reason we can't rely on U.S. Attorneys to bring them. Every ten years, somebody comes up with this idea, of giving it to the U.S. Attorneys, since they know how to bring criminal prosecutions. They don't have the staying power. If you don't have a strong federal commitment, you're not going to have a strong criminal program. My own view is you could triple the size of the Antitrust Division and put them on the price-fixing cases, keep them all busy, and they would produce more welfare than the cost of their salaries and expenses.

MR. BAKER: On that note, let me close the proceedings.