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Is There a Ratchet in Antitrust Law?

Frank H. Easterbrook*

The editors of the *Texas Law Review* asked me to respond to the essays by Professor Sullivan and Mr. Litvack, doubtless as a representative of the Chicago Branch of the Stanford School of Antitrust. I have tried not to disappoint them.

I

The theme of both essays is that there is (or should be) a ratchet in antitrust law. Once there was a Golden Age of Antitrust, in which judges tempered economic learning with political and class consciousness, protecting the good society and the yeomen of business—Justice Peckham’s “small dealers and worthy men”¹—from the depredations of large and rapacious firms. During that Golden Age, America and its judges were brave and generous. Now hard times are upon us, and the spectre of Sterile Economics, with no place for people but only for theorems, haunts the law. Judges must resist the temptation to accept easy solutions.

The ratchet permits movement in one direction only. What was once declared illegal must be illegal always, subject perhaps to some tinkering at the edges. Business practices not yet illegal are, however, candidates for condemnation. Neither Litvack nor Sullivan has anything harsh to say about the Department’s or the FTC’s relentless efforts to condemn additional mergers by extending the potential competition doctrine, or about the FTC’s attempt to abrogate the *Colgate* doctrine and thus condemn all efforts by manufacturers to influence resale prices.² The unsuccessful campaign of litigation against

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1. *United States v. Trans-Missouri Freight Ass’n*, 166 U.S. 290, 323 (1897).

2. *See Russell Stover Candies, Inc.*, FTC Dkt. 9140, 43 ANTITRUST & TRADE REG. RPT. 135-69 (July 8, 1982), declining to follow *United States v. Colgate & Co.*, 250 U.S. 300 (1919) (Manufacturer may terminate dealer that does not adhere to suggested resale prices.). *See also, e.g., General Motors Corp.*, FTC Dkt. 9077, 43 ANTITRUST & TRADE REG. RPT. 78-111 (July 8, 1982), declining to follow *FTC v. Official Airline Guides, Inc.*, 630 F.2d 920 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981) (A monopolist of one product may decline to deal with prospective customers for capricious reasons; only refusals to deal that reduce consumers’ welfare are unlawful.).

IBM, which would have extended the scope of antitrust condemnation significantly, is the subject of Professor Sullivan's praise.

My thesis is that there is no ratchet in antitrust and there ought not to be one. The Sherman³ and Clayton⁴ Acts authorized the Supreme Court to invent and enforce a law of restraint of trade in the common law fashion. The Court has consistently drawn on the common law tradition.⁵ The common law evolves as circumstances change and learning grows. Courts do not reject wisdom just because it comes late. This is so in torts and contracts; it is true in antitrust as well.

The doctrines that Litvack and Sullivan invoke are the products of common law evolution. The genesis of the rule against resale price maintenance is the common law prohibition of restraints on alienation. That principle merged, in 1911, with a concern about dealers' cartels (which may have used manufacturers as cats' paws) to produce the per se rule for resale price maintenance in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁶ The resulting rule embodied the concern for a dead hand that produced misallocation of resources by banning free trade and the concern for five hands that misallocated resources through cartels. One could express this rule in shorthand as protecting the "freedom of traders," one of Justice Black's favorite phrases.⁷

The shorthand had a life of its own, however, and in usual common law fashion was used as the justification for prohibiting practices that affected *only* the individual judgment of businesses and threatened none of the hazards that the Court perceived in *Dr. Miles*. Thus in 1968 the Court invoked the freedom of traders to prohibit maximum resale prices as well as minimum ones, in a decision that stood the ra-

3. 15 U.S.C. §§ 1-7 (1976).

4. 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1976).

5. Compare, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978) (Congress "expected the courts to give shape to the statute's broad mandate by drawing on the common-law tradition." (footnote omitted)), and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 47-59 (1977) (overruling a prior case in common law fashion), with *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 643 (1981) ("The intent to allow courts to develop governing principles of law, so unmistakably clear with regard to substantive violations, does not appear in debates on the treble-damages action."). See also *Cabell v. Chavez-Salido*, 454 U.S. 432, 436 (1982) (Frequently "broad principles are articulated, narrowed when applied to new contexts, and finally replaced when the distinctions they rely upon are no longer tenable."). All that can be said of the contrary assertion by four Justices in *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2478-79 (1982), is that it is unconsidered dictum. The parties to the case did not seek the discarding of per se rules; they sought only to have their practices characterized in a way that permitted evaluation under the Rule of Reason.

6. 220 U.S. 373 (1911).

7. E.g., *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 465 (1945); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966).

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tionale of *Dr. Miles* on its head.⁸ The preceding year it had used the per se rule against territorial allocations, again with regard to the slogan rather than the functions the slogan summarized.⁹

Cases usually come to the Court long before scholars begin to examine the problem giving rise to the litigation. So it was with resale price maintenance. By the time Lester Telser, extending the work of Aaron Director, supplied a scholarly analysis of the problem in 1960 and showed that restricted distribution is in consumers' interests,¹⁰ the legal rules and their rhetoric had long been a standard part of the training of every antitrust practitioner and judge. The rules had developed without a sound understanding of their consequences.

It was to be expected that Telser's work would make itself felt slowly, if at all, and then only through its gradual influence on students, scholars, and practitioners. People who have taken a position are reluctant to relinquish it no matter how clear the proof. "One thinks that an error exposed is dead, but exposure amounts to nothing when people want to believe."¹¹

Robert Bork and Richard Posner, among others, amplified Telser's analysis and made it available to the right audiences.¹² And that work began to have effects. *Dr. Miles* and its progeny had been based on suppositions about the consequences of vertical restrictions on dealing. If it could be shown that the suppositions were wrong, at least some people would be willing to change the rule. Part of the change took place in *Continental T.V., Inc. v. GTE Sylvania Inc.*¹³ when the Court abolished the per se treatment of location agreements. Other aspects of the rule may or may not survive the next ten years.¹⁴ Whether

8. *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). Note 7 of the Court's opinion contains a clear statement of the economic argument against prohibitions on vertical restrictions, which the Court misunderstood as supporting its position. *Id.* at 151 n.7. See also Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

9. *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

10. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

11. 1 HOLMES-POLLOCK LETTERS 219 (M. Howe ed. 1941) (statement by Oliver Wendell Holmes). See also T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962).

12. R. BORK, *THE ANTITRUST PARADOX* 280-98, 429-40 (1978); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 YALE L.J. 775 (1965), 75 YALE L.J. 373 (1966); Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968); Bork, *Vertical Restraints: Schwinn Overruled*, 1977 SUP. CT. REV. 171; R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* 147-67 (1976); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975); Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 48 U. CHI. L. REV. 6 (1981).

13. 433 U.S. 36 (1977).

14. *Compare California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (endorsing in dictum per se treatment of resale price maintenance), *with Eastern Scientific*

they do is not, however, important to my point: one's support of a particular legal rule should depend on the contents of that rule, and *not* on whether a court articulated the rule or some variant twenty or eighty years ago. No serious scholar believes today that resale price maintenance or any other vertical restriction is harmful to competition in the absence of substantial market power, and several believe that these practices are harmless even with market power.¹⁵ Whether these scholars are right or wrong, however, the objections to their position must be on the merits and not on the basis of precedent or a misty-eyed vision of a Golden Age.

The story is much the same for predatory conduct, the villain of Professor Sullivan's piece. It was commonly thought that the Standard Oil Trust achieved its position through predatory conduct, and the Court's 1911 opinion in *Standard Oil Co. v. United States* reflected that assumption.¹⁶ The story of predation—the deep-pocket firm slashing prices until its poorly financed rivals surrender, and then charging monopoly prices—has a ring of truth. All of us have read of price wars followed by the exit of one or more firms. The concern about predatory conduct is, moreover, in the mainstream of antitrust. Only through predatory conduct (or some related exclusionary practice) may a monopolist maintain its position. But for exclusion, competition will spring up.

It is no surprise, then, that antipathy to exclusionary conduct lies at the heart of antitrust doctrine. Yet here, too, additional experience and additional thought are valuable in modifying received doctrine. Apparently-exclusionary conduct is of legitimate concern only if it works to drive out equally or more efficient rivals. If it does not work, even in theory, then the best inference is that the low prices are based on efficiencies. Perhaps no rival will leave the market. If a rival leaves, the departure may be attributable to inefficiency relative to the larger firm. (Of course, the low prices might also be unprofitable competitive mistakes by a large firm. In that event, there is no need for antitrust. Consumers receive a windfall, and the certain lack of profits is as discouraging as the uncertain prospect of antitrust liability in preventing

Co. v. Wild Heerbrugg Instruments, Inc., 572 F.2d 883 (1st Cir. 1978) (resale price maintenance lawful when no more restrictive than lawful territorial restrictions), and Valley Liquors, Inc. v. Renfield Importers, Ltd., 678 F.2d 742 (7th Cir. 1982) (restricted distribution lawful whenever manufacturer lacks market power).

15. See, e.g., R. BORK, ANTITRUST PARADOX, *supra* note 12, at 291-98.

16. 221 U.S. 1, 47, 75-77 (1911). See L. BRANDEIS, COMPETITION THAT KILLS IN BUSINESS—A PROFESSION 236, 254 (1914) (calling cutthroat prices "the most potent weapon of monopoly").

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recurrence.) The role of theory lies in clarifying the circumstances under which exclusion could work, and therefore in providing the basis for a conclusion whether a given practice was exclusionary (and thus illegal) or competitive (and thus desirable).

One of the ironies of antitrust law is that so many predatory conduct suits are brought by firms that did not leave the market in response to the supposedly heinous behavior of the defendants. One is tempted to say that such suits speak for themselves. If the conduct was designed as predation, it did not work. If it did not work in driving out the rival, it was either (a) consistent with competition, or (b) self-penalizing, because it involved short-term losses without the realization of long-term gains. In either case there is no reason to wheel out the antitrust cannon. The experience in ninety years of litigation over predatory conduct by surviving rivals is a basis for reexamination of doctrine in the common law fashion.

The other basis for reexamination is the developing scholarly analysis of exclusionary conduct. The first salvo came from John McGee, another of Aaron Director's students, who reexamined the Standard Oil case and found no evidence of predatory pricing.¹⁷ McGee's work led to further inquiries and to further skepticism by scholars about the efficacy of supposedly exclusionary conduct. Once more, Robert Bork and Richard Posner were in the vanguard,¹⁸ although they were only two voices among many. Once more, this scholarly work led courts to begin to look anew at the assumptions of earlier years and to modify doctrine in the common law fashion to reflect more accurately what was known about the probable explanations for particular conduct.¹⁹

The story diverges from that of vertical restrictions on dealing in a significant way. As Professor Sullivan points out, there is no received scholarly wisdom about exclusionary conduct proving that existing legal doctrines are without economic foundation.²⁰ Many scholars have devised models of strategic behavior that lead to monopolistic out-

17. See McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & ECON. 137 (1958). See also McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289 (1980).

18. R. BORK, ANTITRUST PARADOX, *supra* note 12, at 144-60; Bork, *Rule of Reason*, *supra* note 12; Posner, *Exclusionary Practices and the Antitrust Laws*, 41 U. CHI. L. REV. 506 (1974).

19. See, e.g., *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1438 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir. 1977). These cases are among the many following Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975), an article that used the same economic principles that informed the work of McGee, Bork, Posner, Telser, and others, to derive concrete rules. See sources cited *supra* notes 16-17; Telser, *Cutthroat Competition and the Long Purse*, 9 J.L. & ECON. 259 (1966).

20. Sullivan, *Monopolization: Corporate Strategy, the IBM Cases, and the Transformation of the Law*, 60 TEXAS L. REV. 587, 617-18 (1982).

comes. Some of these models are farfetched, but others seem to reflect conditions that obtain in real markets. They are cause for serious reflection. I have argued at length that these models of strategic behavior are not a sufficient basis for antitrust condemnation of ambiguous business practices, a view shared even by proponents of some of the strategic models.²¹ Professor Sullivan apparently disagrees, for he adopts the strategic view without considering its limitations.²²

This disagreement must be resolved on the merits. Particular business strategies either exclude equally or more efficient rivals, to the profit of the excluder, or they do not. If they do not work profitably, then to condemn them is to condemn competition, and competition is what the antitrust laws are designed to preserve. It is no answer to say that in 1911 or even in 1961 some court condemned a practice on the basis of the best theories then available. We do not design airplanes on the basis of the best theories available in 1911. Why design antitrust law on that basis?

II

Mr. Litvack argues that if antitrust law is to move, the Antitrust Division (and presumably the FTC) should push it in one direction only. The Division is a prosecutor, the argument goes, and the goal of prosecutors is to extend the law, not to contract it. Anything else ex-

21. See Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981). See also Eaton & Lipsey, *Exit Barriers Are Entry Barriers: The Durability of Capital as a Barrier to Entry*, 11 BELL J. ECON. 721, 728 (1980) ("Application [of a strategic behavior model] to policy is clearly premature."); Spence, *Competition, Entry, and Antitrust Policy*, in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS 45, 79-81 (S. Salop ed. 1981) (cautioning against applying strategic models to hunt for predation in antitrust cases). Spence and others who formulate models of strategic interaction are also careful to observe that the conclusions of their work depend on adherence to the conditions. Thus Spence points out that the presence of uncertainty—a feature of all real markets—may render unavailable the monopoly gains that could be had from strategic commitments in a world of certainty. Porter & Spence, *The Capacity Expansion Process in a Growing Oligopoly: The Case of Corn Wet Milling*, in THE ECONOMICS OF UNCERTAINTY AND INFORMATION 259 (McCall ed. 1982).

22. Sullivan is quite selective in his use of economics. For example, although he relies on the new models of strategic behavior to reject as "dated" McGee's treatment of predatory pricing, he also makes some arguments so dated that no economic support could be advanced for them today. One of these arguments is that large firms that lease their goods thereby increase the entry barriers facing rivals. Quite the opposite is true. A firm that owns a computer may resist junking it to buy a new one from an untried vendor. The new entrant thus may have access to only a small part of the growth of demand. But when the existing machines are under leases cancellable on 30 days' notice, the new vendor has a shot at selling to almost the entire installed base. Customers can cancel old leases and buy or rent as they please, confident that new leases from the dominant firm would be available again if something should go wrong. If leasing really is a monopolistic device, moreover, the rentals presumably are at a monopoly level. Although a firm that paid a monopoly price some years ago to buy a computer might not want to buy another, a firm that is paying monopoly prices today to lease a computer would leap at the chance to lease or buy at the competitive price. The dominant firm's leases thus give entrants a decided edge.

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ceeds the bounds of prosecutorial discretion, unfairly taxes the resources of private plaintiffs, and demoralizes the staff.

The argument about prosecutorial discretion rings hollow, coming from a former Assistant Attorney General who, like many before him, refused to enforce the Robinson-Patman Act²³ at all, and based this refusal on an economic approach that amounted to nothing more than disagreement with the Congress that enacted the statute.²⁴ The Robinson-Patman Act is a small-business protection statute; the Department finds it objectionable because that protection comes at a substantial cost in economic efficiency. Thus it declines to prosecute. And when in 1978 the Solicitor General represented the FTC in litigation, taking a view of the statute that seemed almost compelled by its language and history, Mr. Litvack's predecessor declined even to sign the brief.²⁵ These decisions seem wholly legitimate. Prosecutorial discretion encompasses a refusal to file classes of cases as well as refusals to file particular examples of a class.

At all events, William Baxter's decision not to file cases alleging resale price maintenance, tie-ins, and some related practices is not a refusal to enforce the Sherman Act. It is, rather, a decision to allocate limited prosecutorial resources to merger and price-fixing cases, where Baxter thinks they will do the most good. True, this means that some aspects of the Sherman Act as it has been construed in some cases will not be enforced by the Department. But the Act itself will be enforced, and surely Mr. Baxter will follow the policy of Thomas Campbell, his prosecutorial counterpart at the FTC, in filing a restricted distribution or tie-in case if harm to consumers' welfare can be established.²⁶

What Baxter and Campbell are doing has a long and respectable history. After the Supreme Court's merger decisions in *Brown Shoe Co. v. United States*,²⁷ *United States v. Von's Grocery Co.*,²⁸ and *United States v. Pabst Brewing Co.*,²⁹ Donald Turner issued merger guidelines (for which Mr. Litvack offers praise) announcing the Division's unwillingness to proceed against mergers that plainly would have been un-

23. 15 U.S.C. §§ 13-13b, 21a (1976).

24. See U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977).

25. See Brief for the Federal Trade Commission, *Great A&P Tea Co. v. FTC*, 440 U.S. 69 (1979) (Oct. Term 1978, No. 77-654). The Court ultimately decided the case by construing all doubts in favor of the economic approach to competition, a treatment that would have shocked Representative Patman, and thus reversed the Commission's decision.

26. Compare the FTC cases cited *supra* note 2, with the statements of Mr. Campbell in an interview with BNA reported in 43 ANTITRUST & TRADE REG. REP. (BNA) 238-40 (July 22, 1982).

27. 370 U.S. 297 (1962).

28. 384 U.S. 270 (1966).

29. 384 U.S. 546 (1966).

lawful under those cases.³⁰ The refusal to proceed against mergers that were unlawful under prevailing interpretations of the law is more serious than a refusal to proceed against resale price maintenance because, as a practical matter, only a suit by the government can halt or undo a friendly merger,³¹ while private actions are effective against other practices.

Perhaps it is true that Baxter's and Campbell's prosecutorial decisions discourage the staffs of the Division and the FTC. It is not clear, however, why we should find this troublesome. The staff is not running the show and ought not to be. Of course the staff would feel better if the top of the hierarchy shared its views, but it cannot be true that the government should be organized so that the rank and file is in charge. The staff embodies the institutional wisdom of the Division and is entitled to a respectful hearing on points of dispute, but to no more.

The role of the Division and the Commission is not just to prosecute the dickens out of businesses, always searching for "more" than whatever the law provided before. The highest officials must leaven their zeal for enforcement with some concern for competing interests. It is too simple for a "mission" agency such as the Antitrust Division, the EPA, or OSHA, to set off in pursuit of one objective (cleaner air, more safety, lower concentration) without regard to costs. There is some right amount of enforcement, and some proper mix of objectives, for which the political appointees must be responsible. The mix cannot be found by consulting cases; the cases are bound to contain a melange of conflicting statements and little guidance on how to handle the conundrums.³² The political appointees must find their own mix, largely on the basis of the wisdom they bring to their offices.

Just as the Division has never prosecuted every kind of behavior that a court would condemn, so it has never attempted to take all anti-

30. Compare *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962) (defining a market of shoe retailing and holding that a merger achieving a 5% share is unlawful, especially where the market is fragmented and no other firm would be larger), and *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) (holding that, in the unconcentrated grocery store market in Los Angeles with several larger firms, a merger producing a firm with 7.5% of sales is unlawful), and *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966) (defining Wisconsin as a market and holding a merger unlawful because, although markets are generally unconcentrated, and it is easy to import beer from other states, the merger produced a firm with 24% of sales there and over 4% nationwide in a market experiencing increased concentration), with Department of Justice Merger Guidelines, 1 TRADE REG. REP. (CCH) ¶ 4430 (1968), § 3(ii) (a state is not a market when imports are unhindered) and § 6 (in unconcentrated markets the acquisition by one firm with a 5% share of another firm with a 5% share, or of 10% and 4%, will not be opposed).

31. And, I have argued elsewhere, the same should be true for unfriendly acquisitions. Easterbrook & Fischel, *Antitrust Suits By Targets of Tender Offers*, 80 MICH. L. REV. 1155 (1982).

32. See Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982).

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trust doctrines to the limits that one motivated only by prosecutorial zeal might. In *United States v. Arnold, Schwinn & Co.*,³³ the Division did not argue for a per se rule;³⁴ in *Pabst* and *Von's* the Division argued for interpretations of the Clayton Act much more restrained than those the Court adopted.³⁵ In *United States v. United States Gypsum Co.*,³⁶ the Division argued for a rule of reason treatment of information exchanges among competitors, even though the *United States v. Container Corp. of America*³⁷ seemingly supported a per se approach.³⁸ The Division has appeared as amicus curiae in support of both plaintiffs and defendants with some regularity. (Appearing as amicus seems altogether better than attempting to influence the law by filing suits in which one does not believe and then contriving ways to lose the litigation.) In at least three cases during the Carter administration, the Division, as amicus curiae, took the side of the defendants in the Supreme Court.³⁹ In others it took the side of the plaintiff, but in all cases the decision about which side to take rested on both a careful analysis of the law and thought about the direction in which the law should move. The Division responded as an evaluator and analyst of the law, not merely as a prosecutor.

III

At bottom, Litvack and Sullivan object not so much to the fact

33. 388 U.S. 365 (1967).

34. Compare *United States v. Arnold, Schwinn & Co.*, *id.*, with Brief for the United States, *Schwinn* (Oct. Term 1966, No. 25).

35. Compare *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966), with Brief for the United States, *Pabst* (Oct. Term 1965, No. 404), and *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), with Brief for the United States, *Von's Grocery* (Oct. Term 1966, No. 303).

36. 438 U.S. 422 (1978).

37. 393 U.S. 333 (1969).

38. Compare *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), with *United States v. Container Corp. of Am.*, 393 U.S. 333 (1969). See Brief for the United States in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978) (Oct. Term 1977, No. 76-1560) (reasoning that a per se rule is inappropriate because exchanges of information often lead to economically efficient decisions about price and level of output).

39. Brief for the United States as Amicus Curiae, *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1 (1979) (supporting defendant on basis of economic analysis); Brief for the United States as Amicus Curiae, *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257 (1979) (opposing application of antitrust laws, resting on economic analysis); Brief for the United States as Amicus Curiae, *Group Life & Health Co. v. Royal Drug Co.*, 440 U.S. 205 (1979) (supporting application of antitrust laws to drug purchase agreement but observing that conduct in question was not a substantive violation). In other cases the Department took a restrained view of antitrust principles. *E.g.*, Brief for the United States as Amicus Curiae, *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (arguing that in the particular circumstances of the case municipal action was subject to antitrust scrutiny); Brief for the United States as Amicus Curiae, *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (arguing, as the Court held, that actions were immune from antitrust scrutiny under state action doctrine).

that antitrust law evolves as to the direction in which it is evolving. Baxter, Campbell, and the judges who are the objects of Sullivan's criticism take the view that antitrust law has the purpose of improving consumers' welfare (or, to put it slightly differently, of increasing the allocative efficiency of the economy). Litvack and Sullivan hold that antitrust has multiple purposes, including preserving the existence of autonomy of small businesses at the expense, if need be, of some sacrifice in allocative efficiency. Neither Litvack nor Sullivan would sacrifice too much efficiency; they ask courts to inquire, case by case, how much sacrifice is worthwhile.

Both of these competing positions are honorable ones, and the dispute about the goals of antitrust is of long standing. In other writings Professor Sullivan has been one of the most eloquent exponents of one position.⁴⁰ That different interpretations have been held so widely and for so long is one symptom of the fact that in antitrust, as so often for other statutes, questions of legislative purpose cannot be answered by resort to the speeches of the drafters. They must be answered, if at all, by resort to arguments about the structure and consequences of the legislation, and these arguments take a form that will not convince anyone who does not already share with the proponent a set of fundamental principles.

Moreover, when the fundamental principles are themselves the subject of substantial disagreement within society, the disagreement is unlikely to be resolved by a series of judicial decisions or by congressional action. The disagreement is sufficiently deep that it will influence the Court's decisions and tug different ways on legislators. Thus the Sherman Act is written in the language of "competition," an economic term, and its proponents seemed concerned about cartels rather than the preservation of small firms, but the Robinson-Patman Act was designed to undermine competition and protect small firms. The Clayton Act uses economic language, but its legislative history contains powerful strains of populism.⁴¹ The Supreme Court's decisions wobble back and forth, sometimes praising competition and calling for economic inquiry, sometimes condemning efficiency as a source of evil.⁴²

40. See Sullivan, *Antitrust, Microeconomics, and Politics: Reflections on Some Recent Relationships*, 68 CAL. L. REV. 1 (1980); Sullivan, *Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?*, 125 U. PA. L. REV. 1214 (1977).

41. Compare W. LETWIN, *LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT* (1965), and Bok, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966), with Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226 (1960), and Bok, *The Tampa Electric Case and the Problem of Exclusive Dealing Arrangements under the Clayton Act*, 1961 SUP. CT. REV. 267.

42. The extremes may be *Broadcast Music, Inc. v. Columbia Broadcasting Sys.*, 441 U.S. 1, 9-

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One cannot look at the cases or the legislative history and say with certainty that the statutes have a particular goal or set of goals. It is therefore hard for Litvack and Sullivan to maintain, as they do, that those who take an economic approach to antitrust are somehow betraying the statutes—as if the statutes had a clear purpose capable of being disobeyed.

When the statute does not convey a purpose, it is necessary to proceed as if there were one. Choosing a purpose is inevitably a task of creation rather than interpretation. The legislative history and the statute's structure may place many constructions out-of-bounds, but they do not dictate the choice more precisely. I think the antitrust laws should be treated as if their sole objective were increasing allocative efficiency. Judge Bork, Professor Areeda, and Donald Turner have made this argument as well as we are ever likely to see it made,⁴³ and those who are not persuaded by their arguments are not going to be persuaded by anything else that can be said for this position. I add only a few marginal thoughts.

It may once have been possible to support an “inhospitality tradition of antitrust,” which called for courts to strike down business practices that were not clearly procompetitive. In this tradition an inference of monopolization followed from the courts' inability to grasp how a practice might be consistent with substantial competition. The tradition took hold when many practices were genuine mysteries to economists, and monopolistic explanations of mysteries were congenial. The same tradition emphasized competition in the spot market. Long-term contracts, even those arrived at by competitive processes, were deemed anticompetitive because they shut off day-to-day rivalry. The implementation of an inhospitality tradition might eliminate some sources of efficiency but was unlikely to do much damage over the long run, so long as the rules affected all participants in the market and so long as the deepest skepticism was reserved for a few concentrated markets. Whatever their merits, though, such policies must be reevaluated as the costs of executing them change. And change they have.

For many products the United States is no longer a market. The industries that appear most concentrated within the United States—automobiles, steel, computers, pharmaceuticals, and so on—are now

10, 19-20 (1979), and *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.21 (1977), on the side of economic analysis, and *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), and *FTC v. Procter & Gamble Co.*, 386 U.S. 568 (1967), on the other. The list could be extended to arbitrary length.

43. R. BORK, *ANTITRUST PARADOX*, *supra* note 12, at 15-89; I P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 103-13 (1978).

international markets.⁴⁴ The "concentration" is an artifact of market definition. When the market extends beyond the United States, the use of antitrust policy to give "breathing space" to small domestic firms by handicapping larger firms does not have that effect at all. Antitrust policy simply reduces the extent to which domestic products compete with foreign products. Small American firms lose out all the same, but to large foreign firms rather than large domestic firms. The sacrifice of some efficiency for other valuable ends fails; the sacrifice is real, but the other ends are not achieved. It makes no more sense to try to deconcentrate the domestic market and try to preserve small firms in the United States than it would make to try to deconcentrate steelmaking in Pennsylvania or airframe manufacturing in Washington. Similarly, rules that penalize long-term contracts and thus make coordination more difficult and costly may put domestic firms at a disadvantage to foreign rivals.

A similar problem crops up in domestic markets, although it is less serious. If, for example, a merger is declared unlawful in order to preserve the independence of the smaller, absorbed firm, as in *Von's* and *Pabst*, the larger firm may simply grow and evict the smaller from the industry. The growth takes longer and is, one supposes, more costly without the merger, but in the end the smaller firm is still gone.⁴⁵

A related problem is that a multi-goal antitrust policy is unpredictable and unprincipled. If some efficiency is to be sacrificed to some other ends, then judges can reconcile *any* decision, in any case, with the policy. The policy most favorable to small businesses is a policy of unlimited cartels and mergers. Monopoly prices make it easy for small, inefficient fringe firms to prosper; mergers snap up small businesses and reward their proprietors and, of course, have the same benefits for fringe firms as do cartels, if the mergers lead to higher prices. Competition is bad for inefficient firms; that's why small businesses like the Robinson-Patman Act.

Now a policy of subsidizing small businesses or preserving traditional forms of business organization might be worth the price. One can imagine tax laws or certain forms of regulation that create such

44. See Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 963-72 (1981). Of course, the ability of foreign producers to divert products into the United States varies from product to product, and defining an international market does not always show that the domestic producers, taken as a group, lack market power.

45. The beer market is as good an example as any. After a series of cases, including *Pabst*, had brought acquisitions to a halt, the largest firms began to build new and especially efficient plants and to ship nationwide. This hastened the demise of small, independent brewers. See F. SCHERER, A. BECKSTEIN, E. KAUFER & R. MURPHY, *THE ECONOMICS OF MULTI-PLANT OPERATION: AN INTERNATIONAL COMPARISONS STUDY* 248-49 (1975).

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preferences but do not seriously reduce allocative efficiency. But the attempt to create the preference through antitrust breeds erratic results. Few receive the preference, yet its costs are spread through business as a risk premium on all undertakings. The greater the risk of a new venture or a different contractual arrangement, the less likely it will be introduced. Antitrust policy produces the costs of risk without (necessarily) conferring the sociopolitical benefits contemplated. Legislation might have a better chance of targeting benefits at lower cost.

One might respond that an economic approach to antitrust is no easier to implement. Phalanxes of economists may descend on a court seeking to peddle the latest theories, and courts are rarely in a position to evaluate technical arguments. Granted. At the same time, an economic approach would lead to simplification of many antitrust questions that courts now find vexing. Almost all vertical arrangements and pricing decisions would be lawful *per se* under an economic approach. Small merger cases would be thrown out on summary judgment. Other *per se* rules, such as those against price fixing and larger mergers, would remain in place. The number of cases presenting genuinely difficult problems to be resolved by trial would be much reduced. Most questions of theory would be addressed by the appellate tribunals in the process of formulating rules, and the number of confrontations between experts in court need not be large. Certainly the problems under a wholly economic approach are no greater than those confronting the courts when they address tricky questions of market power and other economic issues and then proceed to sociopolitical issues. The *per se* rules now in place entail questions of characterization just as nasty as those we would encounter under an economic assessment.⁴⁶

IV

There has been a drift in antitrust in recent years toward an economic approach. A number of cases follow the economic view; a rather smaller number do not. Many find ways to avoid the problem. The Supreme Court seems deeply divided, disposing of cases by 5-4 or 4-3 votes. Lower courts and enforcement officials cannot be expected to find in this mass of precedent any clear path. This makes it a propitious time for the Division and the Commission to chart their own courses and lead the courts rather than follow them.

46. Compare the majority and dissenting opinions in *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466 (1982). See also Easterbrook, *supra* note 8, at 901-10.

