

Vertical Restraints and the Secularization of Antitrust

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Professor Baxter paints a very bleak picture of the present antitrust rules concerning vertical arrangements.¹ My message is more optimistic—not because of any basic dispute over his assessment but rather because of a different vantage point. His analysis focuses on how far we have yet to go; I would emphasize how far we have come.

I agree with Professor Baxter that the anomalies in the current treatment of vertical restraints are likely to continue. And the doctrinal reform he proposes is at best many years away—possibly well into the second century of the Sherman Act. On the other hand, since the 1960's there has been significant progress in making sense out of this area of law, and I see nothing in my crystal ball to threaten that progress.

First of all, the present state of the law is not all that new or radical. It is not as if someone painted a mustache on the Mona Lisa or desecrated the Holy Ark. Instead, in many respects, the current treatment of vertical restraints is just a restoration of the law before changes wrought by the Warren Court.

Consider, for example, so-called “restraints on alienation,” which the Supreme Court in *United States v. Arnold, Schwinn & Co.*² held were per se illegal. Prior to *Schwinn*, the controlling test was the rule of reason, which apparently had never been applied to invalidate a restraint on alienation.³ And, ten years later, in overruling the *Schwinn* per se rule, the Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*⁴ merely restored the rule of reason test.

Similarly, in the area of resale price maintenance, the Court in *Montano Co. v. Spray-Rite Service Corp.*⁵ restored the test of “agreement” as it existed before decisions such as *Albrecht v. Herald Co.*,⁶ with their

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1. Baxter, *The Viability of Vertical Restraints Doctrine*, 75 CALIF. L. REV. 933 (1987).

2. 388 U.S. 365 (1967).

3. See Pollock, *Franchising, Customer Restrictions, and Building a Better Mousetrap*, 10 ANTITRUST BULL. 381, 389-99 (1965).

4. 433 U.S. 36 (1977).

5. 465 U.S. 752 (1984).

6. 390 U.S. 145, 149-50 (1968).

rather strained concepts of "conspiracy." The Court in *Monsanto* found no occasion to consider overruling the per se rule adopted in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*⁷ to resale price maintenance.⁸ However, the Court again required a "conscious commitment to a common scheme,"⁹ and even went far to resuscitate *United States v. Colgate & Co.*¹⁰

Likewise, although the Court in *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*¹¹ paid lip service to the per se rule for tie-ins, it reinstated the stringent "economic power" test which prevailed before its dilution in *Times-Picayune Publishing Co. v. United States*.¹²

Thus, viewed over a longer time horizon, the current treatment of vertical restraints—far from being revolutionary—reflects essentially a roll-back to the status quo ante.

Second, President Reagan has already appointed—for life terms—nearly forty percent of the nation's federal judges, a larger number than any previous president. That number, moreover, will clearly increase during the remaining period of his administration—including, very probably, the number of Reagan appointees on the Supreme Court.

In these circumstances, arguments for return to Warren Court standards will for many years face tough sledding, to say the least.

Third, even in future administrations more committed to antitrust enforcement, persistent budget deficits will continue to require a discriminating allocation of government resources (whether the Gramm-Rudman statute ultimately survives or not). In that milieu, vertical restraint cases are likely to be at the bottom of any list of priorities. I can well imagine another administration raising the level of merger enforcement, maintaining a hard-nosed approach to horizontal price fixing, and no doubt rescinding the Vertical Restraint Guidelines (if Congress doesn't beat the administration to it). But when it comes to actually bringing vertical restraint cases—cases like, for example, *Schwinn* or *United States v. Cuisinarts, Inc.*¹³ or *The Coca-Cola Co. case*¹⁴—the Anti-trust Division and the FTC will in all probability choose to allocate their depleted resources to other matters.

Fourth, and perhaps most important, is what might be called the secularization of antitrust—a trend that I think will not be reversed. What has happened is, in large measure, the stripping of the semi-reli-

7. 220 U.S. 373 (1911).

8. The issue had not been raised in the court below. *Monsanto*, 465 U.S. at 761 n.7.

9. *Id.* at 768.

10. 250 U.S. 300 (1919).

11. 466 U.S. 2 (1984).

12. 345 U.S. 594 (1953).

13. 4 Trade Reg. Rep. (CCH) ¶ 45,080, at 53,436 (Crim. D. Conn. Sept. 17, 1980).

14. 91 F.T.C. 517 (1978) (appeal mooted by Congressional action).

gious overlay to antitrust. Particularly in the area of vertical restraints, there is increasingly widespread recognition that "the Emperor has no clothes"—that earlier presuppositions about "vertical foreclosure" and the like, based on a kind of civil rights approach to the antitrust laws,¹⁵ simply cannot withstand rational analysis.

Why has this occurred? Partly, of course, because of the sheer power of ideas; and in that regard considerable credit must go to both Chicago School economics and Baxter's leadership when he headed the Antitrust Division. But, more fundamentally, the persuasiveness and acceptance of those ideas have been due in no small measure to developments in the larger economic world, including growing doubts about the efficacy of governmental intervention, the increasing internationalization of markets, and concern over the competitive strength of the American economy. There has been, in short, a major change in public attitudes and perceptions. As a result, it is going to be a long, long time—if ever—before the old incantations clothe the Emperor.

In the interim, the law of vertical restraints will likely remain much the way it is now, reflecting more or less a standoff between history and precedent, on the one hand, and logic and efficiency on the other. For example, although I agree with Baxter that as a policy matter the present dichotomy between price and non-price restraints makes little sense, I doubt that it will be eliminated in the foreseeable future. Nor do I expect to see soon the *explicit* overruling of the current per se rules (except perhaps for maximum resale price maintenance). But, as *Jefferson Parish* illustrates, it is quite possible to give obeisance to a per se rule while in effect applying a rule of reason test.¹⁶ And, as *Monsanto* illustrates, it is also possible to give obeisance to a per se rule while cutting back sharply on its scope and bite.¹⁷

I do not mean to suggest that populism is dead in this country. Indeed, just recently, in language reminiscent of early New Deal days, a high official of the Reagan administration attacked the "bloated" big business "corpocracy" and warned of "a price to be paid as the forces of populist correction seek what they take to be their due."¹⁸ But, as I have suggested, equally potent countervailing forces will forestall any substantial regression to the Warren Court's treatment of vertical restraints. The resulting standoff may not be very neat or symmetrical in doctrinal

15. See Pollock, *Antitrust, the Supreme Court, and the Spirit of '76*, 72 NW. U.L. REV. 631, 639 (1977).

16. See *supra* text accompanying notes 11-12.

17. See *supra* text accompanying notes 5-10. See also *Business Elec. Corp. v. Sharp Elec. Corp.*, 780 F.2d 1212 (5th Cir. 1986) cert. granted 107 S.Ct. 3182 (U.S. 1987) (No. 85-1910).

18. *Treasury Official Assails 'Inefficient' Big Business*, N.Y. Times, Nov. 8, 1986, § 1, at 1, col. 4. (speech of Treasury Deputy Secretary Richard Darman).

terms, but it could certainly be a lot worse—considering from whence we came just a few years ago.