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## Does Antitrust Regulation Violate the Rule of Law?

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## DISCUSSION

### DOES ANTITRUST REGULATION VIOLATE THE RULE OF LAW?

*By Elbert L. Robertson*

PROFESSOR ROBERTSON: Does antitrust regulation violate the rule of law? I think the rule of law part of this we've got down pat pretty well across a wide range of papers today with Maurice having starting us off. We understand what the basic idea of the rule of law is, and that we are under a legitimate system of law if it is one that is generally binding, authoritative, transparent, fair, knowable, informative, one that offers opportunities for due process, etcetera. The general concept is that in a legal system under the rule of law, the law is equally binding on us all and we're tied together by that system.

However, the next part of this title that is probably a little tricky and perhaps maybe a little eccentric as it relates to this antitrust regulation stuff. You might ask: What in the world do you mean by antitrust regulation? Most of us here are antitrust lawyers or competition lawyers and we understand that antitrust basically is one thing and regulation is something else. Antitrust following from the Sherman Act is sort of the legal rules of the game for the process of economic competition, even though as we all know the word competition is not even in Section 1 of the Sherman Act, at least literally the word is not there. It was read in.

We know that antitrust law and process are the rules of the game. However, economic regulation is thought and taught to be largely something else. Standard textbook definitions would say it is a process of assigning prices and quantities for economic goods, done oftentimes by government bureaucrats, because markets have failed to achieve desired allocative outcomes. So in contrast, antitrust law sort of sits on the proposition that there are markets that are functioning to some degree but just need to be cleaned up some way or other. While regulation sits on the idea

that markets have essentially failed, and therefore intervention is warranted to try to get the next best possible results in terms of prices and outputs of goods that would be produced and this is the proper goal of the regulatory scheme. So when I talk about antitrust regulation, I'm not talking about two concepts that are necessarily exclusive. Are they? And my answer is, if you read down a little bit in the piece, absolutely not.

I think that antitrust wherever it is really effective and meaningful it is regulation. In fact it is the most effective form of regulation. And this separation which I refer to, is both artificial and ahistorical. This reminds me of that hilarious film noir moment in *Casablanca* where the police chief commandant is escorted into the casino and exclaims suddenly, "Gambling in Casablanca? Well, I'm shocked! This is shocking!" He says while a few of his gambling chips are in his pocket with his cronies in abundance. Totally shocked! Antitrust regulation.

We shouldn't be shocked by this at all. The fact is a lot of antitrust process, activity and law by necessity involves effective regulation. And it's a different type of regulation in most cases than standard traditional rate-structure regulation because when antitrust law regulates and decides, it often is deciding between a plaintiff and defendant. So it is also therefore deciding about a winner and a loser.

Another very important part of what the antitrust impulse is increasingly ignored and undermined in the modern world of Chicago School doctrinal dominance. It is the extent to which competitors and would-be competitors (and derivatively consumers) are injured, harmed, damaged, and sometimes even ruined by illegal, unfair anticompetitive devices and not effectively compensated. Under rule of reason processes facing a ninety percent plaintiffs' defeat rate. Plaintiffs prospects of either corrective or compensatory justice, I think have been skewered, largely out of the picture by contemporary economic formalism, and I think one of the classic paradigmatic examples of this is the demise of the *per se* rule which brings us back full circle to Maurice's paper at the beginning of the day which cites so eloquently, all of the problems, the problematic of the rule of reason.

And as I said, I agree strongly that those structural and functional infirmities exist, but what exacerbates the problem even more are not just to the structural and logical infirmities of the rule of reason. It's the fact that *per se* bright line rules which reflect presumptions of illegality premised on factual

predicates and precedent have been increasingly, and are increasingly being run out of town on the rail. Under Chicago school influence *per se* condemnation for Section 1 complaints involving vertical restraints under the *per se* standard have disappeared. (See *Leegin*.) *Per se* rules should never have existed in the realm of Section 2, but we know some of the same issue about the dominance of false negative space over false positive space is an issue in Section 2 context as well. When you think of Justice Scalia's rhetoric in his *Trinko* dicta, it serves as fair warning about how far the extremes of that way of thinking can go.

That being said as a broad introduction of the theme, the enterprise in this, the core part of the enterprise in this paper is sort of picked up by a challenge that was suggested in a paper by Tom Arthur in a 2000 super volume of articles in the Antitrust Law Journal in response to *Cal Dentist*. In fact, Mark Patterson who's here today published his famous "market power" piece in that volume, it included a series of really great articles that in light of quick-look rule of reasons demise in the *Cal Dentists* ruling.

Tom Arthur wrote a very powerfully provocative Chicago School oriented article in which he essentially throws down the gauntlet and says. . . This is what we should do! Let's just get all of these horizontal restraint Section 1 cases out of the federal courts. The rule of reason is a mess. It's a morass; settling these cases is impossible without running into all of the problems that Maurice has suggested. Why don't we give this to the FTC to resolve? They are going to do a better job in the federal court because first of all federal courts involve lawyers, and judges who are generalists. I'm just wondering, just give the stuff to the FTC. We are here; we have the economic expertise and superior competence to settle these types of issues.

And I make the historical point that of course the FTC did in fact come into being largely because after Justice White announced the rule of reason and *Standard Oil*, there was such an outcry that Woodrow Wilson was able to get the FTC established because just the thought of having the American economy sort of subject to the blowing winds of the rule of reason was enough almost to send people back out into the streets rioting like they were ready to do in 1890 when the Sherman Act was initially passed. So Arthur threw down the gauntlet. Now I pick it up.

The other part of what I would like to talk about a little

bit is whether or not administrative agency expertise in economic matters, and I say this once again remembering that the FTC and Commissioner Calvani gave me my first job in Washington some twenty-five years ago, and I like to think that the fine group of economists I worked with back in those days might very well be capable of doing something that the federal courts can't do, which is to find efficient effective antitrust results that will promote the broader goals of the American economy in a more effective way than the federal courts under the rule of reason currently are able to do.

I like to think or at least ponder whether or not that is true. I pondered it for a moment and I have decided that it's false. And it's false for a couple of important reasons. First of all, serious formal structural infirmities exist within administrative law decision-making processes as well, which do not categorically privilege agencies over courts. That being said, if we get around the legal process question of whether or not the delegation/non-delegation doctrine ultimately gives that responsibility to the FTC more so than it would give it to the federal courts since the federal courts still would have ideally the last say on these legal questions the way our system works.

Putting that aside for a moment and we'll come back to that, I don't think that it necessarily is going to work very well because the Commission and pretty much any other regulatory body that does conventional law economic decision-making already follows a cost-benefit variant of the rule of reason. As I said earlier to Maurice, ultimately the rule of reason is all we have. We can even characterize the *per se* rule as the *per se* rule of reason. It's just more sharply attenuated based on factual presumption. And in following the rule of reason it falls into all the pitfalls and that you pointed out so well in your paper.

Now, I've spread around a copy of the DOJ/FTC guidelines, and I took this out of Einer Elhauge's text. If you just look at it, it doesn't take very long at all. Just eyeball it. Would you look at the purpose definitions scope, the terms for collaboration, and these are our guidelines. These are our horizontal guidelines. They boil down to one thing. They all boil down to the principles of a very seminal old antitrust case, *Addyston Pipe and Steel*.<sup>1</sup> Because the sum total of these conditions essentially is that horizontal restraints that are merely ancillary to the main purpose of a legitimate contract are

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<sup>1</sup> *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899).

going to be evaluated on the rule of reason, and if they generate sufficient enough efficiencies, they are going to be allowed. That's the Commission's position. That is the Department of Justice's position. That's the rule of reason.

But that is also the rule of reason with all the problems, Maurice, that you pointed out that the rule of reason has, and that doesn't necessarily get us all that far for the same reason that the rule of reason as you pointed out doesn't get us all that far. Not only is that a problem, the other part is that the FTC and the other administrative bodies even if their adjudicatory capacities don't have private enforcement or state enforcement powers that would settle what I think is the other important part of the question which is whether or not private clients injured by these devices are going to be able to correctively compensated. The answer is they don't do it. So we'll be back to the court again anyway if the antitrust law was going to provide that compensation, and the antitrust laws I don't think can be just or effectively under the rule of law unless they can provide.

Last point and this is looking back from the perspective of the *Leegin* case which I think is the last big major decision of the Supreme Court on issues of horizontal restraints, *per se* rule of reason, in which the sort of last vestige in the vertical restraint context of regarding minimum resale price maintenance was wiped out, as a *per se* criteria, and is now going to be judged like everything else, under the rule of reason. Universal space of *per se* shrinking, shrinking, shrinking. And why? Because the argument is that the universal space of protection from false positives has to grow, grow, grow. Very much consistent with Chicago ideology.

So we have Justice Kennedy who says, look, wide evidence out there, the retail price maintenance can be a good thing, and while there may be some evidence out there that in some cases it may be a bad thing, the *per se* rule should only be applied when something is so inherently bad that it's almost always a bad thing otherwise we might generate false positives, and lord knows we never want to do that. But if some false negative through, we'll work it out. But false positives, no, that we can't do.

The administrative challenge from the perspective of doctrine like *Leegin* doctrine, puts a very interesting I think spin on this problem in terms of the interpretive statutory interpretive dimensions of the force of the rule of reason. This is what I mean. The rule of reason now is the predominate

paradigm. It's almost the only paradigm.

And that means when we interpret the Sherman Act we read the Sherman Act, we got a huge varying of the rule of reason to figure out how we're going to crank out the results and whether or not Section 1 has been violated. And we see like under these guidelines we get enough efficiency, no violations. That means, for example, a case like *Topco*<sup>2</sup> horizontal divisions, enough efficiency, no per se. None. I mean broad categories of law that under *stare decisis*, precedent wouldn't have allowed these behaviors for *per se* reasons are now going to be reshaped. Well, as *stare decisis* is increasingly disregarded, isn't the rule of law increasingly impaired? Predictability? Reliability? Fairness? We don't have to worry about that, but the rest of us do.

Antitrust lawyers and competition lawyers and in Europe hopefully you will continue to be concerned about that and if you are, you be careful about the extent of which you employ the rule of reason. That's it.

MR. McGRATH: There are two specific points in Elbert's paper that I thought were interesting to me as a European lawyer. One was I was less shocked about the idea that antitrust may invoke regulation and without going into too much detail given the time I'll just give an example of a particular regime in the UK where we don't just have a prohibition on anticompetitive—but we also have a market investigation regime which involves looking at an entire sector and if there is a problem with that sector, then rules can be introduced to change how that sector operates. And it's a long running practice in a monopoly regime, in its later incarnation from 2003 but goes back much further than that.

And it is a very administrative system. It's a system based on very in-depth financial analysis of a sector, profit margins, and other measures, financial measures of a sector, and according to what was previously viewed as public interest now is in principle competition test but it is a very, very broad competition test.

And it is a very uncertain regime. I think they didn't necessarily expect after a few years they would be required to sell some of the crown jewels of the estate but that is how the regime operates in the UK and that's part of in a very raw term could be classed as antitrust law. And I also remember from my time at the OFK that it was commonplace to talk about competition

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<sup>2</sup> United States v. Topco Ass'n, Inc., 405 U.S. 596 (1972).

policy not competition law. It was a matter of law and they were uncomfortable with the idea that they were a competition enforcement law enforcement agency.

Also moving on to the false positive point. I do still think that it's not a bad thing to be weary of false positives, and I think an authority should be very humble and very reluctant to interfere with what commercial entities have autonomously decided. I see it in a form of Hippocratic oath, do no harm. Do not go in there and mess about with things you do not understand. An example I would give is the French authorities recently banned the exclusivity agreement between France Telecom and Apple about exclusive marketing of the iPhone in France. Now I don't know the case in detail, but I don't see quite what the problem is. Apple does not have market power in mobile phones. France Telecom might have a bit of market power but not sufficient to make that a real problem. They just went in and banned it, and I think this would have a chilling huge effect on pro-competition, pro-consumer investment.

My final point, I'll abuse my privilege slightly to sum this up, I think there is an important distinction between the different areas of rule of law. There is a distinction between what the law is and how the law is applied. And I think to seek perfect consistency and predictability on what the law is a chimera and that reaction comes through in Elbert's presentation. And I also think it's nice to have but if you don't get the administration of the law right, if you don't get the procedure right, then you are lost. That is a must. So I think I'm probably being very European on that point and really pressing on procedure but I think you have to get that right.

PROFESSOR DOGAN: I have a variety of thoughts that relate not only to this conversation, but also to many different comments that have been made throughout the day. Different people have talked about whether antitrust law or competition law is working well. At the moment, for example, we're discussing whether regulatory antitrust works well or not, and under what circumstances. And these kind of comments – about how well antitrust law is performing or can perform – have occurred throughout the day. I keep coming back to a question – under what metric are we measuring antitrust's performance? What is the measure for deciding whether the law is working well or not? And I guess it states the obvious that the answer turns on our predispositions about the normative goals of antitrust law.

It depends on whether we're more concerned about

protecting the ability of businesses to dictate their own business ventures without interference from the government or whether we're more concerned about competitors who are harmed by those businesses when they act in exclusionary ways. That itself is a judgment that is influenced by one's economic and political viewpoint. And so I have been feeling all day like these conversations end up being circular because our views of the law's efficacy turns on our view of what antitrust law ought to be doing.

One final point. Even if we can't fully agree on the normative goals of antitrust laws, I think there's some opportunity for empirical work on the costs and benefits of alternative legal approaches. So, for example, I think there's a baseline level of agreement that if a firm's behavior has a demonstrable adverse welfare effect, and if we can identify the behavior reliably without the risk of false positives, it ought to be found a violation of the law.

It seems to me that in the merger context, and perhaps in the retail price maintenance context, there could be some empirical work, event studies, and other studies that look at the effect of the behavior on prices in the market. That might be a satisfying way of going about determining what kinds of behavior, as a rough guess, ought to be presumptively viewed as competitive or anticompetitive.

PROFESSOR STUCKE: First, one of the things that you picked up on, and *Leegin*, the court now can say under our new economic wisdom we're no longer bound by the policies underlying the Sherman Act. You may disagree with what are the policies. But the court can say we are determined by what we perceive to be the new economic wisdom. And Justice Breyer said how are we going to determine that? Are we going to count heads of economists? And the people at the Supreme Court at that time hearing oral arguments laughed.

Basically the court can say here is the new economic wisdom and we feel the purpose of the antitrust law is to protect interbrand competition at the expense of intrabrand competition. Then that is going to be itself another element of subjectivity that the court will then weigh. And do we really want the court, any court, not only in the United States but also elsewhere particularly when the Sherman Act is both criminal as well as a civil status to govern the standards based on its perception of new economic wisdom.

Now with respect to your point about first do no harm,

that assumes that markets operate independently of the government or the legal institutions, and that if markets left alone will achieve allocated efficiency. Well, I think you have to recognize that markets and government and legal institutions are reinforcement, that the legal institutions provide the framework in order to achieve allocated efficiency. It can effectively lower transaction cost. And there are many instances, for example, in consumer protection law where the law seeks to prevent market failure and to foster transactions and the like. So I think it's more nuance in terms of yes, you have to have a respect for false positives but you also have to look at false negatives.

PROFESSOR WALLER: I had two brief comments and then I have Harry, Christian, and Elbert in the queue and whoever wants to weigh in before we break.

My two comments are in part building on Maurice's which is I think humility is important but I think it's a two-way street. And I think we have strong evidence that largely unregulated commercial arrangements contributed significantly to the economic wreckage that we're trying to sort out here. So humility and public and private decisions is clearly a good thing and in too short supply. I think we are in a situation of competition administrative law on both sides of the Atlantic. I think we're there already and I think it's just a question of what is good administrative law. And that is a lens that we haven't gotten into exclusively but does really guide us to what agencies should do and courts should do after agencies have done their decision making process. In the U.S., it's very peculiar. We have one administrative agency that was set up as an administrative agency.

Obviously those of you who know me, I start from a very different place than Tom Arthur does, but I get close to his destination which is we really did set up the FTC to be the principal administrative agency for really complex stuff and obviously not the price-fixing stuff which is part of our criminal law system. But that in my mind is the only law enforcement aspect of antitrust that is really left in the U.S. And the Justice Department has the sole statutory authority to bring these cases. They do so under democracy—publicly, they do so vigorously. And they do a reasonably good job at it.

One could make a good argument beyond price fixing is you have two agencies, one of whom is an administrative agency by design with procedures and various things and one is the rest of the antitrust division which is acting like an administrative

agency through guidelines, consent decrees, other kinds of things but isn't constrained by our administrative procedures act and also doesn't get the benefit of deferential court review. So we have a very peculiar system. Maybe it all sorts out in the end in a very pragmatic way that it works like administrative law, but I'm still enough of a rule of law person that if you do it that way somebody, i.e. Congress, should really say so.

But I do think the focus is what is good administrative law because I think we've evolved in a variety of ways for perfectly sensible reasons, just a lot of hydraulic pressures to have agencies make these complex trade-offs subject to some kind of deferential court review. But again you have to make sure the agency is doing its job and the court is doing its job.

PROFESSOR FIRST: Three points from the discussion. One of the things I hear about rule of law is predictability, *stare decisis*, and then I think about the common law's ability to change and overrule precedent. So I want to put in my plug right now for non-*stare decisis* and not at this moment saying, guess what, let's freeze the rule of law right now, because actually I think some people, not everyone, would like to not be stuck with the current rules of law, which in many ways people think actually are deficient, and to be able to take account of whether for better or worse we are stuck to some degree with these economists, or to take account of other economics than what the court has considered. So there is a bit of a trap in the "we love the rule of law" because the rule of law right now is not what I love. So that's the first thing.

The second thing is to thank you Elbert for plugging *Topco*. Peter Carstensen and I did a piece about it. There is a series, for those of you who don't know, called *Antitrust Stories*. This is a series of books that Foundation Press has put out in various areas, property, tax, antitrust, and as we know we have lots of great stories. So Peter and I did a story, not a story because it's the truth about the *Topco* case. And for those of you who don't recall, *Topco* involved an agreement among a group of sort of mid-sized supermarket chains basically in an idea to divide markets using the licensing of the *Topco* brand private label to keep each other out of each other's market.

This is a famous *per se* case, avoiding a "ramble through the wilds of economic theory." We can't do this, says Justice Marshall, and the case is the poster child for why the Warren Court is so God-awful. But *Topco* was really interesting in one part because so far as you can tell from the facts it really was

a cartel of potential competitors and they were trying to keep each other out of their markets.

But I want to give you a sense of what a *per se* trial was in 1967. It consisted of no depositions taken by the government. No expert witnesses for the government. The government didn't even depose Topco's expert witnesses. The trial consisted of a government lawyer presenting answers to interrogatories and resting. That took four minutes. And then Topco itself took seven trial days to present its defense. This was the trial. And very efficiently, in the end the Supreme Court decided that this was *per se* illegal. And Peter and I think that actually that was the right decision substantively, although there was not really a full record. You probably could do more to understand the facts.

The trick is how much more do you really need, but what you probably don't need is a full rule of reason. There really wasn't a good justification. Post-*Topco* history was Topco then had to license its label. The members couldn't keep each other out of each other's markets. They all entered. They competed vigorously. They have new private labels now and Topco is the second largest group of grocery store product sellers, second after Wal-Mart. They have been fine. Great victory for antitrust. So that's my *Topco* story. Be sure to buy the book. I actually don't get royalties. My colleague Eleanor Fox who is the editor probably gets the royalties. But there are lots of great stories.

A third point. This is a concern for enforcement modesty, and having spent a little time at the New York State Attorney General's office, you get a little sense of what your concern is about false positives in enforcement and doing no harm. But just a little counter-story on the other side. This again is a 1960s story. In 1966 a complaint was finalized, a 104-page complaint, against General Motors, to break up General Motors. It was finalized, leaked to the *Wall Street Journal* in 1967, but as we know, it was never filed. So just take a moment. Think about how different the world may have looked if the government had filed that case—it couldn't have been modest to do that. To take on General Motors and file that case. Suppose the government had won. We wouldn't have had voluntary restraints on exports, keeping Japanese cars out. There was a cartel to restrain competition in smog technology. That might not have happened, and if it had happened you wouldn't have had a president who squelched further enforcement against the cartel, as Ronald Reagan did in the 1980s. Very different history. So if

we're worried about false positives, we also need to think about false negatives.

MR. AHLBORN: Two brave comments and I have to reverse the order. One was on the market investigation. Harry, what you just said if you had market investigation you asked that would have been exactly the way to go about it. If you look at it from an antitrust perspective that I think is easy. You look at you have an agreement, you have no agreement. Market investigation is sort of industrial policy. I don't like this structure, I'll break it up. I don't like the information flow, etcetera. So I think for me I find it sort of not only do no harm; it's just roll up the sleeves and play around it.

My other point is sort of type one, type two, I think there are two of them. One on the export investigation, I happen to think that agreement of behavior and investigated. The more important one is what signal does that have in hope people change their behavior, as a result of the case. And that to me is more important sort of type one and type two area and puts a bar on the complexity of what antitrust can do. Let's assume the Commission got it wrong in Microsoft, or in some of the other cases, almost irrelevant what signal it sends out. As to how people change their behavior is really what matters and sort of on a very limited information what business people have in order to come to view on how they behave, and therefore I think sort of the rules have to be relatively simple because otherwise if you make it too complex, you send out the wrong signals.

PROFESSOR ROBERTSON: Two quick points. First goes to Stacey's question about empirical evidence and this is brought up both in Breyer's and Justice Kennedy's majority opinion in *Leegin*. The facts are in. Minimum vertical resale price maintenance basically results in higher prices. The ground shifts. Discussions about what interbrand is versus intrabrand and whether or not that additional gravy that ensued as a result of the high prices is going to result in a better optimal mix in terms of the goods provided to people, consumers, and the jury is out on that. We don't know. But we know one thing, the *per se* rule is gone as a standard. So much for empiricism.

Second point about what is good administrative law in this context. And from a legal process perspective, I would have to wonder assuming that the delegation is profit, to the commission, what is it really going to mean in order to have adjudicatory and rule-making processes predicated on ancillary restraint structures when ancillary restraint structures are so

easily deconstructed? When we teach *Addyston Pipe and Steel* what is the first thing we ask the students? What is the main purpose and isn't it circular to talk about a lawful contract before we determine what the main purpose is? I mean that level of deconstructability is still going to be an issue that is going to be faced by the administrative law judges and experts in the agency. How far is that advancing the ball in terms of the rule of law concerns?

PROFESSOR WALLER: Elbert, you're right, but just for what it's worth, it's the FTC that did the heavy lifting, the highly suspect classification from Detroit automobile case through tenors, and that's the formulation of the quick look that has gotten the most respect and support from the courts. It didn't come out of the DOJ.

MR. CALVANI: We have heard not one but two defenses of *Topco* today. That is very unusual—perhaps bizarre.

PROFESSOR FIRST: We pile on.

MR. CALVANI: Undoubtedly a Woodstock retrospective on competition law.

PROFESSOR FIRST: I want to thank you. That's one of the nicer things I've heard said today.

MR. CALVANI: Sex, drugs and rock 'n roll, and now Woodstock/New Age competition law. The dual or concurrent jurisdiction of the Antitrust Division of the Department of Justice and the Federal Trade Commission is a perennial topic. Academicians in search for a research topic ought to note the very nice natural experiment that has been taking place for a long time.

Both agencies have current jurisdiction over Section 7 of the Clayton Act and both of them handle mergers. It would be very interesting to measure how the agencies have done. Perhaps one could compare their output and come to some reasoned judgment about which has done a better job. Serious work on this topic would help inform the debate.

PROFESSOR DOGAN: How do you define better?

MR. CALVANI: Perhaps one could study post-transaction output or price? Doubtless design of such a study would not be easy, but the results could be very interesting.

PROFESSOR GREENE: Picking up on Commissioner Calvani's last point. I believe that the FTC, at times in conjunction with the DOJ, has undertaken in a more generalized manner a portion of the type of historical analysis you advocate. I am thinking in particular of the FTC's retrospective review of

hospital mergers and the FTC/DOJ's workshop and data dissemination focused on agency merger enforcement decisions over the course of a half dozen years. I would hope these and such other initiatives will increase in the future. Of course, even with the benefit of hindsight there will be cases in which reasonable minds will disagree about the lessons to be learned.

With regard to comparisons between the two agencies within the merger arena, I also agree that further research would be useful. One obvious, albeit more historical, point of reference are the two merger guidelines (each agency produced its own policy statement) released on the same day in 1982. The two documents diverged in some fascinating ways, which, I have argued, are probably attributable in part to the agencies' different institutional designs. Given their ongoing, overlapping jurisdiction, the natural experiment continues. Switching topics slightly here, I would argue that the FTC has not always sufficiently exploited its natural strengths and comparative advantages. Section 5 of the FTC's enabling legislation could provide a logical outlet for doing so.

Briefly turning to Harry's comments, I would second his defense of non-*stare decisis*. And, as Harry also discussed, the relative appeal of *stare decisis* at any particular point will likely reflect one's substantive estimation of the prevailing legal holdings. Society clearly benefits when legal analysis evolves to reflect increasing economic sophistication. Some have argued, and I believe correctly at times, that changes in economic usage have been ideologically driven. Overall, I believe antitrust has been well-served by its grounding in broad-based legislation coupled with common law evolution.

MR. COWEN: I was just going to comment about something that Becket raised and that seems to me, I may be wrong, things are taking place in the wrong place. If you are in an administrative authority you should act as an administrator carrying out policy defined by politicians, shouldn't you? I remember writing a long brief to the British government in the late 1990s, which asked what is competition policy? In principle I suggested that before the government set out what the law is it needed to set out what it was seeking to achieve and actually have to have a policy. We couldn't find out what it was. In the course of the proceedings in the House of Lords we decided it would be quite fun to write down what we thought government policy was supposed to be and let some Labour peers see it and then take it up or not depending on whether they agreed. If you

read Lord Cox's speech in the House of Lords on the Competition act, I'm quite happy to say I wrote it because I did. He disclosed his interest before he gave his speech.

And a couple a years ago I actually asked a researcher can you go find me what UK government competition policy is? What does the government actually think? This researcher came back and gave me Lord Cox's speech in the House of Lords. Which I was quite pleased with, but also very disappointed to think that nothing had progressed. I think that's the starting point problem. This is your question "What do we care about?" Well that's a policy matter. You can elect people to make decisions, but I think it's wrong for other judges or officials to be making that up as they go along. What worried me most about Scalia's judgment in *Trinko* is that what he said is policy not law and he appeared to be able to do that but he is a Judge not a politician, at least he is a Judge because he sits in the Supreme Court and if judges do the policy work of politicians I think that breaches the separation of powers principles and that's all completely wrong.

And the final thought which is something Phil and I were talking about over dinner, why do it in Boston and why do it before Patriot's Day. I was reading at the time Tom Payne and Tom Payne was famous for many things. He wrote this brilliant pamphlet called *Common Sense*, and in the pamphlet he said there is a fundamental difference between merry old England and the soon to be established United States of America. This was that in England the king is the law whereas in America the law is king. And that's a very neat exposition which I think we've sort of missed in this area of antitrust, or there seems to me some degree of encroachment on that principle, if you have judges deciding what policy is what is the role for an administrator or a politician? I think that's really made a mess of things. It's a final thought.

PROFESSOR WALLER: I think this discussion today, if it was a marathon time, it wouldn't be particularly impressive. But we covered a lot of ground from a lot of different perspectives, and I think that we did in fact pick the right topic, and thank all of you for contributing your different geographic, ideological, procedural, and substantive perspectives to the discussion. You're all cordially invited to the next Antitrust Marathon IV: Marathon with Authority. That would be the Irish Competition Authority in Dublin in October.

DOCTOR MARSDEN: I want to thank you again,

especially those who traveled so far. Thanks to the Consul General for putting our British taxes to such good use and hosting us. And yes, if you are able to make that very short hop across the pond on October 27, 2009, in Dublin, and we're going to be looking at issues that Terry raised: the role of the institutions themselves, different institutional models, concurrency and other policy interactions. A pleasure to see so many of you again and to meet new friends.