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It's a great pleasure to be here today, Jim. Over the years, the Antitrust Law Section of the ABA has played an important role in the development of competition law, and in the work of the Federal Trade Commission. I am delighted, therefore, to have this forum for my first major address as Chairman of the Commission. I want to share with you some ideas I have about the FTC and about competition. Antitrust law has come a long way in the last few years. Competition in general, however, has not done so well, despite trucking, airline, and oil deregulation.

There are three propositions that will underlie my efforts over the next two years. The first is one I'm sure you're all familiar with. Proposition number one is, simply, that competition leads to the optimal allocation of society's resources and to maximum consumer welfare. Now this concept is frequently associated with the so-called Chicago School of Economics. Last week, <u>The Wall Street Journal</u> ran a long article about so-called "law and economics" as if it were something brand new. And yet, I would submit one of the finest summary statements of this concept was written not by Aaron Director, not by Richard Posner, not by Robert Bork, or Jim Miller, or Bill Baxter, but by Mr. Justice Black, for the Supreme Court, in <u>Northern Pacific Railway v. United States</u>: The Sherman Act, he wrote, was designed to be a

> comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Justice Black emphasized the nurturing relationship between competition and our democratic political and social institutions. This is a point to which I shall return.

I'm not going to try to prove to you today the proposition that competition maximizes consumer welfare. I would hope all of you accept it as true and proven.

Proposition number two is that restraints on competition misallocate resources and reduce consumer welfare. Again, I don't intend to prove this proposition today. You can't buy the first without taking the second -- a tie-in that undoubtedly passes the rule of reason test.

Let me turn then to Proposition number three, the one I intend to focus on today. It is critical to understanding what I intend to do at the FTC. Stated bluntly, it is that the principal source of restraints on competition is government -- the State. The State, by interfering with the market when there is no market-failure justification, denies citizens the economic, social, and political benefits of free and unfettered competition.

Now, I don't claim to be the first to have discovered a connection between the State and restraints on competition. I submit, however, that the extent of the State's role in making successful cartels possible has been overlooked or understated. At least today, almost everywhere we find cartel behavior, we find government in the background. It is either controlling the market or behaving as the world's dumbest customer. With apologies to Willie Sutton -- we are going to spend a lot of time looking at markets where the State is involved, because that's where the cartels are.

Why does the State so frequently interfere with competition? Often it simply makes mistakes. Perhaps more frequently the State interferes with competition because it is lobbied by the politically strong, i.e., the relatively wealthy, who face an uncertain future at the hands of the market. Together the politically strong and the legislators devise legislation to limit competition from those who are politically weaker. The losers are the relatively poor, whose best hope for a better future is a free and unfettered market. Of course, the State almost always justifies its interference with the market by claiming to act on behalf of the poor and the weak.

The Federal Trade Commission is, of course, part of the State, and historically has been part of the problem, along with the Antitrust Division of the Department of Justice. Before I point a finger at anyone else, therefore, I shall discuss how the antitrust enforcers have restrained competition in the past.

Looking backwards, we should be appalled that antitrust doctrines have been so anticompetitive. Antitrust doctrines, frequently based on myths, have regularly been invoked to prevent competitive pricing, competitive distribution arrangements, competitive joint ventures, and competitive mergers. If a firm engaged in good, hard competitive pricing, it was liable to be sued for predatory pricing, or for violating the Robinson-Patman Act. If a manufacturer tried to implement an efficient distribution system, it could face challenge under per se rules against tie-ins, resale price maintenance, and non-price vertical restraints. If competitors formed joint ventures that affected pricing decisions and marketing areas, they were likely to be struck down as per se illegal, without regard to possible efficiencies. Procompetitive mergers were similarly foreclosed by antitrust enforcement. For a time, a merger creating a firm with a market share of about 5 percent could be challenged as anticompetitive.

Tremendous progress has been made towards eliminating anticompetitive antitrust enforcement.

The theory that predatory pricing is commonly used to acquire market power was put to rest just this year, when the Supreme Court in Matsushita recognized that predatory pricing schemes are "rarely tried and even more rarely successful." The per se ban against non-price vertical restraints was overturned nine years ago in GTE Sylvania. The per se rule against boycotts was effectively repudiated just last year in the Court's Pacific Stationery decision. The theory that all horizontal agreements that affect price or territories are inherently anticompetitive was discarded in the Court's decisions in BMI and NCAA. The highly restrictive merger decisions of the 1960's have been repudiated by lower court decisions and by the merger enforcement guidelines. Clearly, progress has been made.

Some flawed ideas of the past, however, remain enshrined in antitrust law. Their anticompetitive consequences continue to afflict the American people. The very ancient myth that vertical price restraints are inherently anticompetitive remains alive today. As a matter of economic doctrine this notion has been thoroughly debunked. Even those who oppose resale price maintenance agree that it has the potential to enhance efficiency. It can be a means to combat free-riding and to encourage the provision of desirable point-of-sale services. Perhaps recognizing this argument, the Supreme Court in its recent Monsanto decision eroded the per se rule to some extent, emphasizing instead the seller's freedom under Colgate to select its own customers. But the Court has not been prepared to address the question of whether the per se rule should be eliminated altogether. The myth about the harmful effects of resale price maintenance thus retains some vitality. Perhaps the Supreme Court will decide to hear the case of Sharp Electronics and deal with this issue next term.

Nor is resale price maintenance the only area in which the state of the law is confused. We have made progress in analyzing mergers, but the courts are still struggling to develop a coherent framework for analyzing the relationship of patents to antitrust.

Well, that's some of the damage that has been done by the antitrust enforcers. What can be done about it?

I intend to address, and I hope to secure, changes in some of the aspects of antitrust law that reflect mistaken judgments of the past.

As I noted earlier, one of the areas in which past mistakes have been corrected concerns mergers and acquisitions. Although progress has been made, it is not yet time to rest. The Commission's 1982 Horizontal Merger Statement and the Department of Justice Merger Guidelines of 1982 and 1984 mark a major step forward in the formulation of a rational approach to government regulation of mergers and acquisitions. They put the focus on the correct question: Does the merger increase the likelihood of collusion, tacit or explicit, and therefore lead to higher prices? The Guidelines themselves make it clear that this is the critical question, and that the various numerical criteria are just means toward answering this question, and should be applied with considerable flexibility. Unfortunately many have focused on the numbers rather than on the underlying question. The Commission, however, is not today applying the Guidelines' numbers literally. Rather, the major -- and I think correct -- focus of our deliberations is on whether a credible story can be told about how and why a merger increases the likelihood of higher prices. I have therefore asked my staff to consider the feasibility of providing still better guidance on the criteria we employ in evaluating mergers. It may be time to give a better explanation of what we are doing, and why we are doing it.

For our part, as we enforce the antitrust and consumer protection laws, we will be careful to avoid -- to the extent our congressional mandate allows -- doing more harm than good.

But even the other kinds of mistakes -- those the courts have already recognized and corrected as a matter of substantive law -- cannot be ignored by the Commission. They live on in orders entered when those mistaken ideas were current. Unfortunately, the Commission has been rather reluctant to vacate old order provisions, seeming to require proof that an old provision currently restrains competition before agreeing to modify or terminate it. The Commission has taken this position even when the provision, on its face, prohibits behavior that is now generally recognized as likely to promote competition.

I suspect it is time to take a different approach. I believe, generally, orders should be vacated after some reasonable time unless there is an affirmative reason to continue them in effect. In a similar vein, I am inclined to propose a sunset provision for future orders. Firms will remain subject, of course, to the general prohibitions of the antitrust laws. But I believe we should not render permanent the mistakes we may make in restraining a firm's conduct beyond the general proscriptions of the antitrust laws.

Well, I've just described some of the damage done by the antitrust enforcement agencies. But we also see that some of that damage has been undone. The courts get a sizable share of the credit for undoing that damage, as do Ronald Reagan's appointees. The American consumers have reason to be grateful for their efforts. But they should also pay attention to how long it takes for government to correct government mistakes. The market tends to correct its mistakes relatively quickly. Government mistakes are forever -- at least forever in the context of an individual's working lifetime.

The American consumers have not fared so well, however, in respect to competition in areas other than antitrust. Federal, state, and local government efforts to restrain competition continue almost unabated. Let me describe some.

Almost certainly, the federal government's most substantial restraints on competition arise from the multitude of barriers to international trade that have been erected over the years, and that continue to be erected, by statute and through administrative proceedings. Of course, our government is not alone in this behavior. Indeed, it seems that through history governments have felt an obligation to injure their citizens by building up barriers to foreign trade. There has been at least one beneficial consequence of such barriers: the writing of <u>The Wealth of Nations</u>. Who knows, if governments had been able to keep their hands off foreign trade, Adam Smith might have become a lawyer. Then what kind of necktie would I wear?

When I say that governments hurt their citizens by restraining international trade, I don't mean to suggest that all citizens are hurt. Inefficient domestic producers certainly benefit, as do their employees, when imports are restricted. But the people as a whole -- the consumers -- suffer. Consider textiles. Congress tried to set up new barriers to textile imports. The people who would have been most harmed by these barriers are the poor who purchase inexpensive imported clothing. I think it is grossly unfair to force these people to pay higher prices for their clothes in order to subsidize the relatively more wealthy owners and employees of American textile companies. I see no way that such a result can be called "fair trade". The only fair trade is free trade. It's that simple.

Unfortunately, those whose investments and labor are devalued by competition from imports are easily identified. They know who they are, and they can go to their congressmen and senators to complain. But who speaks for those who are hurt by trade barriers?

That's where we come in. The Commission has attempted to be the American consumers' advocate for truly fair trade -- that's free trade -- before the International Trade Commission, the Department of Commerce, and the Office of the United States Trade Representative. We are not always welcomed, but we shall persist.

Trade restraints are not the only way the State thwarts competition. Congress, for example, has enacted various statutory exemptions to the general antitrust laws for certain special interests. We hear a great deal these days about an "insurance crisis." But I wonder how much of the crisis would be solved by market forces if entry into the insurance market were made easier. The McCarran-Ferguson Act largely exempts the "business of insurance" from the antitrust laws. That exemption, together with state regulation that precludes entry into the insurance industry, make it less likely that the "insurance crisis" will go away. Perhaps, the time has come for repeal of the McCarran-Ferguson Act.

Two other examples of special interest legislation are the Capper-Volstead exemption to the antitrust laws for agricultural cooperatives and the market order legislation that is now fifty years old. Market orders permit agricultural producers to operate cartels. The legislation may have been justified when it was first passed -- though many people doubt that. But in the intervening fifty years we have had a revolution in production, transportation, marketing, and financing, and there is no justification for market orders today. American consumers are entitled to the benefits of free and unfettered competition with respect to what they eat as much as anything else they purchase.

The Robinson-Patman Act is another federal statutory intrusion into the market that has obvious and substantial anticompetitive effects. The statute costs American consumers millions of dollars every year, while providing benefits for a relatively few firms. Perhaps the time has come for Congress to take a good hard look at the Robinson-Patman Act. When I think of the cascade of anti-consumer Robinson-Patman decisions over the years, I am reminded of a headline I saw recently in one of my favorite newspapers, the <u>National Enquirer</u>: It said, "Stop Me Before I Kill Again!"

Well, we in the federal government have a great deal to answer for in terms of the restraints we place on competition.

But we are not alone. Sometimes I think state and local governments believe that markets exist solely to be regulated.

One kind of regulation that interferes with competition is occupational licensing. The State says that before a person may become a barber, a funeral director, or in some places an auto mechanic, he must secure the State's permission. Can this always be necessary?

We at the FTC are also concerned about attempts by people who have been given some market power by the state to grab additional power. Health care providers are regulated by every state. Some regulation may be appropriate. But time after time we find doctors, hiding behind their state licenses, conspiring to prevent other doctors from establishing new types of practices that will compete with their established fee-for-service system. Or conspiring to prevent non-doctors or non-specialists from performing the medical services they are licensed to perform. For example, oral surgeons are frequently prohibited from performing oral surgery in hospitals. Podiatrists are frequently denied hospital privileges. The actions of the doctors and hospitals in these cases are often prompted not by concern for the competence of the non-specialists, but by the doctors' concerns over competition.

These types of restraints must end. Medical care already eats up a large share of the American consumers' income. With the aging of the baby boomers, the demand for health care services will increase. There may be no greater service the Federal Trade Commission can perform for the American consumers than to work at keeping the cost of health care as close to the competitive level as possible.

As all of us in this room well know, the medical profession is not the only one that seeks to restrain competition. There are others -- though not, of course, lawyers . . . although I confess that I myself distinctly remember thinking, only a few moments after I learned I had passed the bar exam, that it really should be made tougher in future years. We at the Federal Trade Commission will redouble our efforts to thwart anticompetitive restraints among all professional people -- lawyers included.

It is not only professions that states and localities have opted to regulate. They also regulate industries -- for example, taxicabs. The new Chairman of this city's Taxi and Limousine Commission has, unfortunately, opted to micro-manage the city's taxi fleet rather than advocate letting the market determine the quantity, quality, and price of taxi service. The solution to New York City's taxicab problem is deregulation, not a micro-managing taxi czar.

Who really suffers from taxicab regulation, in New York City and elsewhere? Those of us here, members of the upper-middle class -- escapees from Louis Auchincloss novels -- whose travel is limited largely to the island of Manhattan below 96th Street and the airports, are unaware of the magnitude of the shortage of taxicabs. Except when it rains. But for those who live in the poorer parts of this or other cities with similar regulation, it is often impossible to find a legal, "hail" taxicab. Studies show that the poor, the handicapped, and the elderly tend to be more dependent on taxicabs than others. And they spend a higher proportion of their income on taxis. In addition the requirement of raising an extra $100,000 in capital -- the going price of a medallion in this city -- deters many who could otherwise be learning basic entrepreneurship. In short, the existing system is unfair to everyone who has anything to do with it, except those profiting from the medallions they purchased years ago for next to nothing.

Another example of anticompetitive state behavior is the imposition of restrictions on the use of real estate. Time after time, rent controls have been adopted in jurisdictions for the stated purpose of protecting the poor. But the actual effects -- too well documented now for rent-control advocates to continue to hide behind noble rhetoric -- have been the destruction and abandonment of decent, low-rent housing, and windfall gains for lucky members of the upper classes. Who benefits? In this city, Alistair Cooke, Mia Farrow, some fellow named Edward Koch, and a lot of other folks you and I know -- perhaps even a lawyer or two.

Meanwhile ... some of the housing in the Bronx is worse than housing in Moscow. Do you remember the old joke about what happens when the Soviet Union takes over the Sahara Desert? The answer is: Soon there'll be a shortage of sand. Well, in New York City, where there's been rent control for decades, there is a shortage of housing.

Of course, to the extent unreasonable restraints on competition are enshrined in state law, they are immune from antitrust challenge. We at the FTC, however, will do all we can at all levels of government to urge legislators to leave the market alone. And we will tell the consumer-welfare story to the people who suffer the consequences of state-imposed restraints on competition.

The negative effects of these types of restrictions on our society's <u>economic</u> welfare are now understood. But I am suggesting that government interference with competition not only reduces people's economic welfare, but also threatens our democratic political and social institutions. Remember Mr. Justice Black's words in <u>Northern Pacific Railway</u>: he noted the nexus between "free and unfettered competition" and "an environment conducive to the preservation of our democratic and social institutions."

All over the country, money pours in from real estate developers and other regulated businessmen to finance local elections. Last year, for example, real estate interests spent millions of dollars on the mayoral election in this city, even though it was all but uncontested after the Democratic primary. Can it be that real estate developers are the most civic-minded people in New York City?

Regulating and avoiding competition are part of the fabric of politics in this city. Should anyone be surprised, therefore, by the recent scandals in this city's Housing Authority, Parking Violations Bureau, Taxi and Limousine Commission, Environmental Protection Commission, Financial Information Services Agency, Health Commission, Business Development Commission, Public Development Commission, and Health and Hospitals Corporation? The way to get rid of corruption in high places is to get rid of high places.

It is time to look more critically at the connection between regulation -- the State's interference in the market -- and the health of our democratic political institutions. Political freedom is inextricably entwined with economic freedom. Constant kowtowing by congresses to special interests renders the democratic process rather less useful to those whose economic interest is best served by vigorous competition.

Well, those are my thoughts about competition. It is one of the linchpins of a free society. And its principal antagonist is unquestionably the State -- no matter how much lip service the legislators may pay to it.

You, better than most, are in a position to understand the value of competition to our political and social institutions. My campaign for the next two years will be to speak out on behalf of free and unfettered competition, and for the benefits it brings to American consumers, and to American citizens. I ask you as fellow members of the Bar to join me.

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