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CIVIL LIBERTIES AND COMPETITION POLICY
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INTRODUCTORY REMARKS BY BERT FOER

Competition Policy and Civil Liberties. You may ask, what do these two concepts have in common? Why are they being juxtaposed and conjoined today by AAI?

In the United States of America, virtually everyone believes in liberty and nearly everyone believes in the virtues of competition. When we get down to specifics, however, the elements of liberty, whether for an individual or a collectivity of individuals such as a corporation, partnership, or association, are often the subject of bitter controversy, and what constitutes fair or appropriate competition is often the subject of prolonged and expensive litigation. People have been burned at the stake, hanged by the neck, or, in the case of antitrust, imprisoned and bankrupted, or at the very least publicly embarrassed, because their views and consequent actions were found to be heretical to our market-based secular religion. One would naturally expect that when the protection of civil liberties and the enforcement of competition law meet on the battlefield of public policy, sparks will fly.

Oddly, then, it is noteworthy that today's conference may be the first to bring civil liberties and competition policy under the same framework. As we will hear from Jeffrey Rosen, Louis Brandeis cared passionately about both. Since Brandeis, scholars, judges, and others have certainly written about many situations that implicate both a civil liberty and antitrust. These have tended to be case-specific, without linking to a larger picture. If you think about it, however—and we intend to induce you to think seriously about it today—you will see that there are many areas of intersection between civil liberty concepts and competition policy concepts. Moreover, you will see that the dynamics of our key growth industry, information technology and management, is likely to require increased attention to these intersections. And let's be sure to observe that as we talk about civil liberties, we do

not necessarily restrict ourselves to what is or is not constitutional, but will sometimes be talking about the ethos, the values, of civil liberties, as they relate to the marketplace.

We can set the table by very briefly cataloguing some of the intersections of civil liberties and competition policy.

Perhaps what comes to mind first is the Noerr-Pennington doctrine, which provides First Amendment leeway to coordinated or collusive behavior aimed at the promotion of legislation, even anti-competitive legislation. What types of political speech are covered? Regulatory interventions? Litigation? How far does the doctrine extend, for example to the implementation of anticompetitive consent decrees? When is activity not covered because of its sham nature? Because this area of the law is fairly well-known, we will not be highlighting it today, although it will be addressed during the breakout session on the liberties and risks of collective entities.

Relatedly, although group boycotts are illegal, when may they be justified on the basis that they are primarily political or expressive rather than commercial in nature? The same breakout session will take as a starting point the famous Superior Court Trial Lawyers case, as developed by Allen Grunes, Don Baker, Hillary Greene, and our newest FTC Commissioner, Maureen Ohlhausen.

This brings us, perhaps, to the fundamental distinction between commercial and other types of speech. Or is it still a fundamental distinction? In recent cases, especially Citizens United and Sorrell, about which you will hear a great deal more in our plenary sessions, especially from Jonathan Weinberg, the Supreme Court has apparently or at least arguably elevated truthful corporate speech to the same level of protection as political speech. If the argument in Justice Breyer's dissent in Sorrell is accurate, the government faces tough new challenges in justifying regulations against a free speech defense. What are the implications for competition policy in general and for antitrust remedies in particular?

Would this new direction affect traditional distinctions between speech and actions, such that, for example, it would now be more difficult for an agency to attack an attempted

agreement to fix prices, whether secretly as in the celebrated American Airlines case, or openly, as in the case where a CEO essentially announces to reporters during a public securities briefing that he intends to raise prices if his chief competitor goes along? It may not be easy to predict where this Supreme Court is going.

Some of the implications of recent judicial activism will be the subject of a new paper Warren Grimes will present in another of our breakout sessions this morning, with comments by Rick Brunell and Gary Reback. Although it seems well-established that agreements to restrain trade are not protected speech, one may wonder whether increased use of the First Amendment as a corporate shield may lead to a chipping-away of even this venerable understanding. And if the Supreme Court overturns the Obama health care reforms in the next few days, based on a limitation on the commerce clause's ability to affect individuals, what might be the further ramifications for competition policy? For example, would this shift the burden of government regulation of the economy to the states? And given the financial status of our states not to mention some of their less desirable regulatory records, does this suggest a return to the good old days of laissez faire capitalism?

Civil liberties concerns include not only speech but religion. Antitrust applies not only to profit-maximizing firms, but to associations and other non-profit entities. Should the Sherman Act apply to religious denominations whose clergy engage in cartel-like control over the hiring of clergy by congregations? Do antitrust's concerns about preserving choice and combating the centralization of power translate to markets for religious services? And does the "ministerial exemption," enshrined in the Supreme Court 's recent decision in Hosanna Tabor suggest limitations on the Sherman Act's reach? Babette Boliek, Barak Richman and Dan Mach will develop these topics in another breakout session.

Employment issues can come up in other ways. There is an undeniable civil liberties value involved in the right of an employee to leave an employer. To what extent can it be conditioned by agreements not to compete? Can employers agree not to raid each others' employees? What chilling effects on speech occur when cartels are active? We can look to Barry Lynn to address these questions.

The rapid transformation of the information industry promises to bring new issues., which we will explore under the rubric of Competition and Liberty: Issues in Modern Media. For example, as the FTC and various states as well as foreign jurisdictions investigate Google for alleged discriminatory screen manipulations, Google claims that its answers to inquiries are opinions and Google occupies an editorial position similar to a newspaper's, protected by the First Amendment, as Neal Katyal will argue. Microsoft, on the other hand, argues that the First Amendment does not protect Google against antitrust liability. Kurt Wimmer will present this position. Even beyond the direct constitutional question is a larger question of the extent to which we want either the government or dominant private businesses to determine what information will or will not be exposed to the public. Should antitrust participate in providing an answer?

This, in turn, raises questions about the role of privacy, a constitutional right of notorious ambiguity, in competition. If companies agree among themselves about a privacy standard, for example, would this be a term of trade comparable to price, giving rise to antitrust liability? Gary Reback will share some thoughts on this. Can competition enhance privacy rights by forcing companies to offer stronger protections? Or does competition undermine privacy by, for example, incentivizing companies to take shortcuts that lead to flawed information practices?

A still larger question may be the role of quality and choice in antitrust analysis as markets for information become more and more concentrated. With market definition still a determinative element in antitrust analysis, Eli Noam will provide empirical background on the concentration (or not) of variously defined media markets. Bob Lande will discuss the limitations of a price-based competition analysis. Maurice Stucke will remind us of the article he co-authored with Allen Grunes on the marketplace of ideas, and will discuss its continuing relevance.

How should we judge whether a structural market condition ought to be of concern to policymakers? What are the relevant metrics? Where is concentration actually a problem in terms of First Amendment values? Should we be concerned about the number of independent sources of news, or the number of independent investigative reporters, or the

number of independent editors, or the number of publication owners? What should we be caring about? Susan DeSanti will help us understand where the FTC is going with these questions. Gene Kimmelman will provide insights on DOJ policies that affect the First Amendment.

A fundamental question for us, then, is this: to what extent should civil liberties values enter into antitrust analysis? A leading paper titled "The Political Content of Antitrust" addressed this question in 1979. Written by Robert Pitofsky for the University of Pennsylvania Law Review, long before he became Dean of the Georgetown University Law School or an FTC Commissioner or the FTC's Chairman, this often-cited paper has stood the test of time, although its argument has not necessarily prevailed. In a few moments, we will be honored to begin today's program with Bob taking a look back at what he had written, with his later experiences and today's challenges in mind.

If you believe, as I do, that the antitrust laws are one of the ingenious mechanisms our country has developed for protecting fundamental values of individual and collective rights against overly-centralized power, then we must recognize that competition policy is about more than economic models. For example, consider the importance of the concept of choice. A slave is a person without choice. A citizen without choices on the ballot has no leverage over government and there is no real democracy. On the commercial side, a producer who can sell to only one buyer has little freedom. A consumer who has few practical choices has little leverage and consequently diminished individual sovereignty. Choice, therefore, is essential to both our constitutional values and to our economic values, and it finds its reflection in the competitive marketplace. That is, in my opinion, the primary linkage between civil liberties and competition policy. Too much choice, on the other hand, can undermine both democracy and competition. We are obviously not dealing with absolutes.

At the end of the day, because we are dealing with balances rather than absolutes, we must come back to the political content of antitrust. But even assuming you agree with me that political values should play a role in antitrust, we need to answer very practical questions about how to bring non-economic criteria into our analytics, such that the legality of actions

can be reasonably predicted by producers, such that behavior can be judged objectively, and such that subjective decision-making, which is an invitation to corruption, can be minimized.

The point today is not to provide answers, but to make sure we are asking the right questions. So without further delay, let us turn to one of antitrust's historically great sources of wisdom, an early recipient of the AAI's Antitrust Achievement Award, and someone to whom we are all deeply indebted, Bob Pitofsky.