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# SOAP, CREAM OF WHEAT, AND BAKERIES: THE INTELLECTUAL ORIGINS OF THE *COLGATE* DOCTRINE

EDWARD P. KRUGMAN\*

On June 2, 1919, the Supreme Court handed down its decision in *United States v. Colgate & Co.*<sup>1</sup> Colgate had been indicted for combining with wholesale and retail dealers to fix the retail prices of Colgate soaps and toilet products. To effect this combination, Colgate was alleged to have engaged in:

Distribution among dealers of letters, telegrams, circulars and lists showing uniform prices to be charged; urging them to adhere to such prices and notices, stating that no sales would be made to those who did not; requests, often complied with, for information concerning dealers who had departed from specified prices; investigation and discovery of those not adhering thereto and placing their names upon "suspended lists"; requests to offending dealers for assurances and promises of future adherence to prices, which were often given; uniform refusals to sell to any who failed to give the same; sales to those who did; similar assurances and promises required of, and given by, other dealers followed by sales to them; unrestricted sales to dealers with established accounts who had observed specified prices; etc.<sup>2</sup>

The district court sustained Colgate's demurrer and dismissed the indictment, resting on:

The pregnant fact . . . that no averment is made of any contract or agreement having been entered into whereby the defendant, the manufacturer, and his customers, bound themselves to enhance and maintain prices, further than is involved in the circumstance that the manufacturer, the defendant here, refused to sell to persons who would not resell at indicated prices, and that certain retailers made purchases on this condition, whereas, inferen-

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<sup>1</sup> 250 U.S. 300 (1919).

<sup>2</sup> *Id.* at 303.

tially, others declined so to do.<sup>3</sup>

The Government appealed, and the Supreme Court affirmed.

The opinion was brief, the Court unanimous. Justice McReynolds had some doubts whether the district court had construed the indictment correctly,<sup>4</sup> but he was bound by the rules governing review on writ of error to accept the construction as given,<sup>5</sup> and the failure to charge an agreement was fatal: "In the absence of any purpose to create or maintain a monopoly," the Court held, the Sherman Act "does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal; and, of course, he may announce in advance the circumstances under which he will refuse to sell."<sup>6</sup>

*Colgate* is one of the most frequently criticized antitrust decisions;<sup>7</sup> for many years its path in the courts was not one of ups and downs but only of fractional changes in downward slope.<sup>8</sup> At bottom (rock bottom), the case holds that an announced system of resale prices enforced by unilateral refusals to deal, without more, does not constitute a section 1<sup>9</sup> violation, but it was an article of faith among antitrust practitioners that virtually anything would be enough to take a distribution scheme out of *Colgate* and into *Dr. Miles*.<sup>10</sup> Nevertheless, in *Monsanto Co. v. Spray-Rite Service*

<sup>3</sup> United States v. *Colgate & Co.*, 253 F. 522, 527 (E.D. Va. 1918), *aff'd*, 250 U.S. 300 (1919).

<sup>4</sup> See *Colgate*, 250 U.S. at 302, 306.

<sup>5</sup> *Id.* at 301-02.

<sup>6</sup> *Id.* at 307.

<sup>7</sup> See, e.g., P. AREEDA, ANTITRUST ANALYSIS § 522 (3d ed. 1981).

<sup>8</sup> The history of *Colgate* to 1960 was canvassed in *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), in which Justice Brennan accurately described *Colgate* as having been "narrowly limited" by *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922), and subsequent decisions. *Parke, Davis*, 362 U.S. at 42. As Justice Brennan pointed out, the catalog of *Colgate's* conduct quoted at the beginning of this Article could *not* be relied upon in giving advice on permissible conduct, because the Supreme Court in *Colgate* affirmed the dismissal of the indictment only as construed by the district court, not as originally written. See *id.* at 36-37. Thus, "without an allegation of unlawful *agreement* there was no Sherman Act violation charged." *Id.* at 37 (emphasis in original).

<sup>9</sup> Sherman Act, ch. 647, § 1, 26 Stat. 209 (1890) (codified at 15 U.S.C. § 1 (1988)).

<sup>10</sup> 220 U.S. 373 (1911). In *Dr. Miles*, the Supreme Court held that resale price maintenance by *agreement* constituted a per se section 1 violation. The general view as to the scope of *Colgate* was best put by Judge Moore in *George W. Warner & Co. v. Black & Decker Mfg. Co.*, 277 F.2d 787, 790 (2d Cir. 1960): "The Supreme Court has left a narrow channel through which a manufacturer may pass even though the facts would have to be of such Doric simplicity as to be somewhat rare in this day of complex business enterprise."

Co.,<sup>11</sup> the Supreme Court picked *Colgate* up from the ground, dusted it off, and turned it into the prime exemplar of “the basic distinction between concerted and independent action—a distinction not always clearly drawn by parties and courts.”<sup>12</sup> Justice Powell’s discussion of *Colgate* in *Monsanto* was a lesson to inattentive pupils who had been distracted from their basic lessons:

A manufacturer of course generally has a right to deal, or refuse to deal, with whomever it likes, as long as it does so independently. Under *Colgate*, the manufacturer can announce its resale prices in advance and refuse to deal with those who fail to comply. And a distributor is free to acquiesce in the manufacturer’s demand in order to avoid termination.<sup>13</sup>

Indeed, *Colgate* was placed on the level of a “doctrine” that must be protected from being “seriously eroded” by permitting inferences of agreement to be drawn too lightly.<sup>14</sup> Nor, apparently, was this a difficult result to reach: like *Colgate*, *Monsanto* was a unanimous opinion.<sup>15</sup>

What is one to make of a doctrine that has been repeatedly given up for dead, only to be revived and declared alive and vibrant sixty-five years after it was announced? I suggest that *Colgate* strikes a chord in judges that goes beyond the antitrust laws and into notions of individual liberty. I suggest, moreover, that the specific notion of liberty at stake is one of economic liberty, of a type directly descended from *Lochner*-era substantive due process.<sup>16</sup> I do not suggest, of course, that *Monsanto* was a constitutional case, or that any of the Justices who decided it had constitutional issues anywhere in the front of their minds. But I do think that *Colgate* was a constitutional case of sorts, and I am certain that the *Colgate* decision itself was heavily influenced by the *Loch-*

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<sup>11</sup> 465 U.S. 752 (1984).

<sup>12</sup> *Id.* at 761.

<sup>13</sup> *Id.* (emphasis added; citations omitted).

<sup>14</sup> *Id.* at 763.

<sup>15</sup> See *id.* at 753. Even Justice Brennan, whose 1960 opinion in *Parke, Davis* had been one of *Colgate*’s principal premature obituaries, joined in the Court’s opinion in *Monsanto*. *Id.* His one-paragraph concurring opinion was confined to pointing out that *Dr. Miles* remained good law; of *Colgate*’s apotheosis he had nothing to say at all. *Id.* at 769.

<sup>16</sup> See *Lochner v. New York*, 198 U.S. 45, 57-64 (1905) (holding state law setting maximum working hours for bakers unconstitutional under due process clause). *Lochner* typified Supreme Court cases decided from 1897 to 1937, during which time the Court closely scrutinized the ends and means of economic regulations pursuant to the due process clause. See generally L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-2 to 8-7, at 567-86 (2d ed. 1988) (discussing *Lochner* era).

ner mind-set—which was then thoroughly good law. As a matter of intellectual history, therefore, if not strictly as a matter of precedent, *Monsanto* is kin to *Lochner*.<sup>17</sup>

To support this claim, I begin not with *Colgate*, but rather with a case decided four years earlier by a different court. The court, of course, was the one we pay tribute to in this issue, and the judge who wrote the opinion was one of the brightest lights of the Second Circuit's first quarter century. The case was *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*,<sup>18</sup> and the judge was Emil Henry Lacombe.

Judge Lacombe was the prototypical New Yorker. A graduate of Columbia College and Columbia Law School,<sup>19</sup> he spent ten years in private practice and then became an Assistant Corporation Counsel for the City of New York, where he had a great deal of success bringing civil actions to recover assets from the remnants of the Tweed Ring.<sup>20</sup> He was named a federal circuit judge in 1887 and, upon the passage of the Evarts Act<sup>21</sup> four years later, was one of the two founding members of the Second Circuit Court of Appeals.<sup>22</sup> He is said on good authority to have twice declined nominations to the United States Supreme Court because he did not wish to leave New York.<sup>23</sup> He was not a novice to the antitrust laws; by 1915, when *Cream of Wheat* was decided, he had completed a dialogue with the Supreme Court in *United States v. American Tobacco Co.*<sup>24</sup> and had written one chapter in the endless *Lawlor v. Loewe* ("Danbury Hatters")<sup>25</sup> litigation.

The facts of *Cream of Wheat* tell the familiar story of a manu-

<sup>17</sup> I acknowledge that many will see the bend sinister in this relationship.

<sup>18</sup> 227 F. 46 (2d Cir. 1915).

<sup>19</sup> He graduated from the College at the age of 17 and was so young when he graduated from the Law School that he had to wait for two years before he could begin to practice. N.Y. Times, Nov. 29, 1924, at 13, col. 5.

<sup>20</sup> *Id.*

<sup>21</sup> Act of March 3, 1891, ch. 517, 26 Stat. 826. The Act of March 3, 1891 is known as the Evarts Act in recognition of its principal sponsor, Senator William Evarts of New York.

<sup>22</sup> N.Y. Times, Nov. 29, 1924, at 13, col. 5. The other founding member was Judge William Wallace.

<sup>23</sup> Wyzanski, *Augustus Noble Hand*, 61 HARV. L. REV. 573, 577 (1948). As a lifetime New Yorker, I would be the last to suggest that Judge Wyzanski was retailing unverified gossip.

<sup>24</sup> 164 F. 700 (C.C.S.D.N.Y.), *rev'd*, 221 U.S. 106 (1908), *on remand*, 191 F. 371 (C.C.S.D.N.Y. 1911).

<sup>25</sup> 187 F. 522 (2d Cir. 1911) (Lacombe, J.), *cert. denied*, 223 U.S. 729 (1912), *on remand from* 208 U.S. 274 (1908), *renewed appeal following remand*, 209 F. 721 (2d Cir. 1913), *aff'd*, 235 U.S. 522 (1915).

facturer trying to maintain control of a multi-tier, independent distribution system in the face of an aggressive, price-cutting retailer. "Cream of wheat," it turns out, is simply "purified middlings," a byproduct in the production of wheat flour from wheat that was "produced by every flouring mill in the United States engaged in the manufacture of wheat flour."<sup>26</sup> It was "a staple commodity regularly quoted and dealt in in all grain markets."<sup>27</sup> The Cream of Wheat Company bought such middlings, exercising (as all agreed) great care in their selection, and packaged them for ultimate sale to consumers,<sup>28</sup> thereby warming the hearts (or at least the mouths and stomachs) of generations of American children on cold winter mornings. It was a commercial success, but it accounted for less than one percent of the United States middlings market.<sup>29</sup>

In January 1913, Cream of Wheat changed its pattern of distribution, probably (as Judge Hough commented in his opinion in the district court) in response to the then-recent spate of "price regulation" cases.<sup>30</sup> Under the new distribution scheme, the company would in principle sell only to wholesalers, and it accompanied each sale with a retail and wholesale price list that its customers (and their customers) were "requested" to maintain.<sup>31</sup> Cream of Wheat's price to the wholesaler was \$3.95 per case of thirty-six packages in car-load lots and \$4.10 per case in smaller units; the "requested" price to retailers was \$4.50 a case, which would enable the "ordinary groceryman to get a modest profit on selling at 14 cents the package."<sup>32</sup>

A&P, of course, was emphatically not an "ordinary groceryman." At the time the action was brought, A&P owned over a thousand stores in the East and the Midwest, a large proportion of which were "Economy Stores"—stores having but a single employee at which "plaintiff seeks to compensate for lack of conve-

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<sup>26</sup> *Cream of Wheat*, 227 F. at 47.

<sup>27</sup> *Id.*

<sup>28</sup> *See id.*

<sup>29</sup> *Id.*

<sup>30</sup> *See Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 224 F. 566, 569 (S.D.N.Y.), *aff'd*, 227 F. 46 (2d Cir. 1915) (citing *Henry v. A.B. Dick Co.*, 224 U.S. 1, 49-73 (1913) (White, C.J., dissenting); *Victor Talking Mach. Co. v. Straus*, 222 F. 524 (S.D.N.Y.), *aff'd*, 225 F. 535 (2d Cir. 1915)).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 569 n.2.

niences by cheapness of price."<sup>33</sup> By its sheer size, A&P could realize substantial economies of scale; it was "in buying a wholesaler . . ., and in selling . . . a very large retailer."<sup>34</sup> Recognizing A&P's presence in the marketplace, Cream of Wheat continued to sell to it, despite its nominal "wholesalers only" policy, on condition, however, that A&P charge its retail customers the same fourteen-cent price that the "ordinary groceryman" needed to make a profit.<sup>35</sup>

All went well for two years, but in January 1915, A&P broke ranks and began to sell at a retail price of twelve cents, which was only made possible by its ability to purchase in carload lots at the wholesale rate.<sup>36</sup> Cream of Wheat thereafter refused to sell to A&P, and A&P brought an action for injunctive relief, alleging violations of sections 1 and 2 of the Sherman Act and section 2 of the then-newly enacted Clayton Act.<sup>37</sup> Judge Hough denied the preliminary injunction,<sup>38</sup> and the Second Circuit, through Judge Lacombe, affirmed.<sup>39</sup>

As between the two opinions, Judge Hough was troubled by the ambiguities in the recent Clayton legislation,<sup>40</sup> whereas Judge Lacombe was not. Ultimately, however, neither judge went off on fine points of statutory analysis. Rather, both considered the case clear-cut as a matter of policy, and both decided it on that basis. It is in their expression of that policy that one hears the unmistakable echoes of *Lochner*.

#### Judge Hough:

If it be granted that section 2 does apply, and that defendant's selection of customers results in unlawful restraint of trade, can it be possible that such person's evil ways are to be amended, not by stopping his business, but by adding to his list of customers

<sup>33</sup> *Id.* at 568-69.

<sup>34</sup> *Id.* at 569.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 569-70 & n.2.

<sup>37</sup> Ch. 323, § 2, 38 Stat. 730 (1914). Section 2 of the Clayton Act was the predecessor to the Robinson-Patman Act, 15 U.S.C. § 13 (1988).

<sup>38</sup> *Cream of Wheat*, 224 F. at 567, 575.

<sup>39</sup> *Cream of Wheat*, 227 F. at 49.

<sup>40</sup> See *Cream of Wheat*, 224 F. at 575. In a charming "Note" appended to his opinion, Judge Hough stated: "Aided by counsel, I have examined all the public documents I could find relative to the Clayton Act, hoping to find something of assistance in interpreting the statute. The point raised by this motion was not, so far as I know, discussed or considered." *Id.*

one or many persons chosen by Congress? Numerous individuals and corporations have been enjoined from restraining the trade of other people, no matter how flourishing the offenders' trade might be, nor how greatly the general volume of trade had increased during the period of restraint. But never before has it been urged that, if J. S. made enough of anything to supply both Doe and Roe, and sold it all to Doe, refusing even to bargain with Roe, for any reason or no reason, such conduct gave Roe a cause of action. If Congress has sought to give him one, the gift is invalid, because the statute takes from one person for the private use of another the first person's private property.

Using the word "sell" or "sale" conceals the issue. If a man prefers to keep what he has, an offer of money to salve the taking thereof does not prevent such taking from being confiscation. The Cream of Wheat Company is a purely private concern, except as regulated by its creating law. It is an ordinary merchant, whose business is affected by no public use whatever. The statute as construed by plaintiff descends upon that private merchant, and commands him to make a contract by which he transfers his property for price, but against his will. The contract and the price are legally mere surplusage; the constitutional violation lies in the compulsion, whereby he is deprived of his property for a private purpose. If defendant's actual scheme of interstate business is unlawful, the United States certainly, and now perhaps an individual plaintiff, can put it out of business; but neither the nation nor any individual can take away its property, with or without compensation, for the private use of any one.<sup>41</sup>

Judge Lacombe:

Much has been said about the reason why defendant ceased to treat complainant as an exception to its rule; failure of the latter to live up to some arrangement, etc. All that seems to be wholly immaterial. The business of defendant is not a monopoly, or even a quasi monopoly. Really it is selling purified wheat middlings, and its whole business covers only about 1 per cent. of that product. It makes its own selection of what by-products of the milling process it will put up, and sells what it puts up under marks which tell the purchaser that these middlings are its own selection. It is open to Brown, Jones, and Robinson to make their selections out of the other 99 per cent. of purified middlings and

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<sup>41</sup> *Cream of Wheat*, 224 F. at 574-75 (footnotes omitted). One of the omitted footnotes refers to "the inherent right of refusing business." *Id.* at 574 n.10. The other raises a fascinating (and prescient) speculation regarding a vehicle by which Congress could achieve "customer" regulation if it were so ill-advised to wish to do so. *Id.* at 575 n.11.



put them up and sell them; possibly one or more of them may prove to be better selectors than defendant, or may persuade the public that they are. It is difficult to see how into such a business as that any novel and exceptional rule of law is to be imported. We had supposed that it was elementary law that a trader could buy from whom he pleased and sell to whom he pleased, and that his selection of seller and buyer was wholly his own concern. "It is a part of a man's civil rights that he be at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice, or malice." Cooley on Torts, p. 278. See, also, our own opinion in *Greater New York Film Co. v. Biograph Co.*, 203 Fed. 39, 121 C. C. A. 375.

Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government.<sup>42</sup>

*Lochner:*

The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer. The general right to make a contract in relation to his business is part of the liberty of the individual protected by the Fourteenth Amendment of the Federal Constitution. Under that provision no State can deprive any person of life, liberty or property without due process of law. The right to purchase or to sell labor is part of the liberty protected by this amendment, unless there are circumstances which exclude the right . . . .

. . . .  
The question whether this act is valid as a labor law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupa-

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<sup>42</sup> *Cream of Wheat*, 227 F. at 48-49. In its brief on appeal, *Cream of Wheat* repeatedly pressed the point that the Clayton Act could not require the result sought by A&P but that, if it did, it was unconstitutional. Brief for Defendant-Appellee at A-7 to A-8, 20, 24, *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 227 F. 46 (2d Cir. 1915).

tion of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of purely labor law, with no reference whatever to the question of health, we think that a law like the one before us involves neither the safety, the morals nor the welfare of the public, and that the interest of the public is not in the slightest degree affected by such an act.<sup>43</sup>

There are, of course, plenty of differences between *Lochner* and *Cream of Wheat*: one was a constitutional case, the other nominally statutory; one exalted the sanctity of contract, the other emphasized that the challenged conduct was unilateral; the list can readily be expanded. But both cases stand firmly on a notion of individual liberty for economic factors, and it seems to me that unifying concept is more fundamental to both decisions than is any distinction one would care to draw.

Where, then, does *Colgate* fit into this picture? Justice McReynolds cited neither *Lochner* nor *Cream of Wheat*, but the echoes of both are still there. "The purpose of the Sherman Act," he said, "is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."<sup>44</sup> Absent monopoly, the Act "does not restrict the long recognized right of a trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."<sup>45</sup> These are *Lochner* words, especially the reference to "an entirely private business"<sup>46</sup> and the comment concerning the trader's "own independent discretion."<sup>47</sup> The points

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<sup>43</sup> *Lochner*, 198 U.S. at 53, 57 (citations omitted).

<sup>44</sup> *Colgate*, 250 U.S. at 307.

<sup>45</sup> *Id.*

<sup>46</sup> In *Lochner*, the distinction between businesses to which the states' police power could extend and those to which it could not was between businesses or business practices affecting the "safety, health, morals, and general welfare of the public," 198 U.S. at 53, and those that were simply "private." *Id.* at 64.

<sup>47</sup> See *id.* at 61:

The act is not, within any fair meaning of the term, a health law, but is an illegal interference with the rights of individuals, both employers and employees, to make contracts regarding labor upon such terms as they may think best, or which

were neither passing nor accidental; both were immediately made a second time in quotations from previous Supreme Court antitrust cases.<sup>48</sup> They are also identical in both tone and substance to the last paragraph of Judge Lacombe's opinion in *Cream of Wheat*.<sup>49</sup>

This was not an accident, either. Although citation to the *Cream of Wheat* case did not find its way into the *Colgate* opinion, the Second Circuit case was very much before the Supreme Court. The district court in *Colgate* had cited Judge Hough's opinion,<sup>50</sup> and the Government was at pains to distinguish it in its brief to the Supreme Court.<sup>51</sup> For his part, Charles Evans Hughes quoted from the opinions of Judges Hough and Lacombe in the body of his brief for *Colgate*,<sup>52</sup> but he did not stop there. Rather, he went so far as to summarize the case in an appendix at the end of his brief, concluding with a full quotation of the last two paragraphs of the Lacombe opinion.<sup>53</sup> He also hearkened back (without citation) to *Lochner* in arguing that the rule advanced by the Government would be "a most serious perversion" of the Sherman Act. He said:

So far from being a proper construction of the Act, such a construction, to say the least, would throw its constitutionality into grave doubt. This is not a case of a public calling or of a business affected with a public interest, and the ordinary principle of liberty, conserving the right of every man freely to deal or refuse to deal with his fellow man, that is, the free and untrammelled right

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they may agree upon with the other parties to such contracts.

<sup>48</sup> See *Colgate*, 250 U.S. at 307:

"The trader or manufacturer, on the other hand, carries on an entirely private business, and can sell to whom he pleases." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 320. "A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade." *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 614.

<sup>49</sup> See *Cream of Wheat*, 227 F. at 49; *supra* text accompanying note 43.

<sup>50</sup> See *United States v. Colgate & Co.*, 253 F. 522, 527 (E.D. Va. 1918), *aff'd*, 250 U.S. 300 (1919).

<sup>51</sup> See Brief for the United States at 19-20, *United States v. Colgate & Co.*, 250 U.S. 300 (1919).

<sup>52</sup> See Brief for *Colgate & Co.*, Defendant-in-Error at 19, 34, *United States v. Colgate & Co.*, 250 U.S. 300 (1919); see also *id.* at 33. In one of the minor ironies of this area of the law, Justice Hughes had written the Supreme Court's opinion in *Dr. Miles* eight years before he successfully distinguished the case as *Colgate's* counsel. It has been said that Hughes's presence in both cases is the only point of similarity between them. Jacobson, *On Terminating Price-Cutting Distributors in Response to Competitor's Complaints*, 49 BROOKLYN L. REV. 677, 677 (1983).

<sup>53</sup> See Brief for *Colgate & Co.*, *supra* note 52, at 41-43.

to contract or not to contract, applies.<sup>54</sup>

### CONCLUSION

One could say a great deal more about the relationship between *Lochner* concepts and early antitrust law,<sup>55</sup> but I do not propose to do so. History should be enjoyed for its own sake, and Lacombe opinions are worth reading simply to admire his craft and style. Read enough of them and one will come to agree with the *New York Times* obituary writer who praised Judge Lacombe's ability to achieve a "thorough mastery of many facts" in presiding over "some of the most important litigation of his time" but still thought it worth pointing out that "critics of modern liberal tendencies were sometimes disposed to find the Judge too regularly on the side of property."<sup>56</sup>

*Plus ça change, plus c'est la même chose.* In the last few years, there has been a revival of interest in the relationship between political liberty and economic liberty, as exemplified not merely by the tumultuous events in Central and Eastern Europe and the Soviet Union but by the American reaction to them. This is not without controversy; as this Article is being written, a current "critic of modern liberal tendencies" writing in the *New York Times* is opposing the Supreme Court nomination of Judge Clarence Thomas on the grounds, among others, that Judge Thomas has been quoted as saying that "economic liberties [are] a vital part of the rights protected by constitutional government."<sup>57</sup> It is also the case that antitrust law and antitrust enforcement have become enormously more sophisticated, as the courts have moved away from simplistic, often bipolar, reasoning to attempts to analyze alleged restraints in real-world economic terms. In *NCAA v. Board of Regents*,<sup>58</sup> for example, the Supreme Court gave fresh vigor to rule-of-reason analysis, which used to be a code-word for "the defendant always wins." And in *Matsushita Electric Indus-*

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<sup>54</sup> *Id.* at 15.

<sup>55</sup> Indeed, a great deal more has been said in May, *Antitrust in the Formative Era: Political and Economic Theory in Constitutional and Antitrust Analysis, 1880-1918*, 50 OHIO ST. L.J. 257 (1989), which contains a comprehensive exposition of the role of "laissez-faire constitutionalism" in early antitrust decisionmaking.

<sup>56</sup> N.Y. Times, Nov. 29, 1924, at 13, col. 5.

<sup>57</sup> Tribe, "Natural Law" and the Nominee, N.Y. Times, July 15, 1991, at A15, col. 4.

<sup>58</sup> 468 U.S. 85 (1984).

*trial Co. v. Zenith Radio Co.*,<sup>59</sup> the Court held that plaintiff must proffer and support an economically plausible reason why defendant would have engaged in an alleged restraint in order to escape dismissal on motion.<sup>60</sup>

These two trends do not always coexist comfortably; it is possible to argue that both the unilateral/concerted distinction of *Colgate* and the price/non-price distinction of *Continental T.V., Inc. v. GTE Sylvania Inc.*<sup>61</sup> make little economic sense. In this respect, the law of vertical price-fixing is inherently in tension if one tries to view it solely in economic terms, for as *Monsanto* demonstrates, those two questionable distinctions "are at the center of . . . any . . . distributor-termination case."<sup>62</sup> What I have tried to suggest is that this tension is not merely an aberration but rather reflects deep-seated instincts of judges who, by training and inclination, see economic and political issues as two sides of the same coin. Whether this is a good thing, or whether it is a phenomenon of judges who are older and whiter than the general populace (a proposition with which Judge Thomas would no doubt disagree), I leave to individual taste. Few today would dispute Justice Holmes's gibe that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics,"<sup>63</sup> but the libertarian instinct underlying *Lochner* did not simply disappear when the case itself was overruled. It is alive and well in the law of vertical price-fixing and, I suspect, in many other places as well.

Judge Lacombe would be pleased.

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<sup>59</sup> 475 U.S. 574 (1986).

<sup>60</sup> *Id.* at 587-88.

<sup>61</sup> 433 U.S. 36 (1977).

<sup>62</sup> *Monsanto*, 465 U.S. at 760-61.

<sup>63</sup> *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).