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Foreword—Antitrust Law and Policy: Still under Construction

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FOREWORD—ANTITRUST LAW AND POLICY: STILL UNDER CONSTRUCTION

C. Paul Rogers III*

ANTITRUST law and policy is nothing if not fluid. For almost one hundred twenty years, it has evolved, changed, widened, narrowed, advanced, retreated, circled back, and re-evolved. The rule of reason, which caused a firestorm when the Supreme Court created it in the famous *Standard Oil* decision of 1911,¹ became well entrenched in subsequent Supreme Court opinions like *Chicago Board of Trade*.² It fell out of favor in the Warren Court days, but has made a startling comeback in recent years. The bright line per se rule, in contrast, has retrenched. Distrust about its potential overbroad use has led, at least in part, to the so-called “quick look,” a third analytical methodology. (If the quick look was supposed to bring clarity to antitrust analysis, it has failed. The first Supreme Court decision to consider directly, rather than obliquely, the quick look split five to four on the appropriateness of its application.)

In section 2, the prohibition against monopolization, the pendulum has swung dramatically as well. Where courts once paid lip service to the requirement of exclusionary conduct and nailed monopolists for almost any activity in the marketplace, the range of permissible monopolistic behavior has expanded exponentially as judicial recognition has taken hold that big is not necessarily bad. Somewhat quixotically perhaps, the Supreme Court has more recently tried to provide more content to and thus guidance about what a monopolist can and cannot do, even as it has in the section 1 arena relied more on the seemingly amorphous rule of reason, which frequently requires a balancing of apples and oranges.

The fluidity and continuing evolution of antitrust policy is perhaps more comprehensible when one considers what is in the mix. It is hard to fathom another area of law where politics, economics, and philosophy are thrown into a legal scheme in which Congress provided such a broad-brush statute as the Sherman Act. Recall that the act outlaws “[e]very contract, combination . . . , or conspiracy, in restraint of trade” as well as conduct which monopolizes or attempts to monopolize, without defining any of the operative terms. Is it any wonder that we have yet to settle on

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1. *Standard Oil Co. v. United States*, 221 U.S. 1, 58-59 (1911).

2. *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

what the goal or goals of antitrust law should be, although we are arguably getting closer to some form of consumer welfare model?

Also, not surprisingly, given the economic and political "inputs," to use a favored antitrust term, that influence antitrust policy, the law has long struggled with indeterminacy and unpredictability. Those are serious issues, considering that potential criminal liability or treble damages or both can be and often are at stake. With the Supreme Court, the Courts of Appeal, Congress, the Department of Justice, and the Federal Trade Commission all having, to a greater or lesser degree, antitrust policy and decision-making roles, it is little wonder that antitrust has struggled for coherency in the midst of change.

Thus, with all of these moving parts, antitrust scholars continue to face a tall order in trying to figure out where antitrust has been, where it is now, and where it is going. This symposium, put together by the editors of the *SMU Law Review* and titled *Evolution and Change in Antitrust Law*, presents an important slice of that effort. Included are attempts to make sense of doctrinal issues, such as Professor Marina Lao's insightful assessment of the essential facilities doctrine and its place in our modern technological world, Professor Jim Ponsoldt's concern for the continuing primacy of the per se rule for price fixing and market allocation agreements, and my analysis of consumer welfare as a requirement for group boycott illegality. Professor Peter Carstensen argues that at least some of the confusion about contemporary antitrust doctrine is not top down but rather stems from misapplication and misinterpretation of Supreme Court decisions by lower courts and, in some cases, by the Supreme Court of itself. Professor Rudy Peritz's whimsical but thought-provoking essay offers a quick tour of the history of U.S. antitrust policy and argues that consumer welfare should be the single focus, allowing freedom of contract is necessary to that end, and sparing antitrust enforcement is good antitrust policy.

Professor Spencer Waller provides additional historical perspective in his thorough look at the influence of John Paul Stevens, the only sitting Justice who was an antitrust practitioner before taking the bench, on the development and application of the rule of reason. Similarly, Professor Bill Page examines the Government's early twentieth century prosecution of U.S. Steel, as an outgrowth of the infamous Gary price-fixing dinners of steel executives, to measure the case's impact on and lessons learned about section 1 of the Sherman Act's concerted action requirement. Professor Ed Burnet considers a very contemporary question of procedure and doctrine: the impact of quick look analysis on the grant of summary judgment in antitrust cases. While the quick look is rather new to the antitrust fold, the use of summary judgment in private antitrust conspiracy litigation has evolved and changed markedly over the last forty years.

Thus, the symposium collectively takes a look back, engages in a positive assessment of where antitrust doctrine now stands, and, in many

cases, a normative analysis about where it should be heading. The past certainly contains lessons for the present and future in antitrust, as elsewhere in our legal system. Of course, it is always a challenge to assess whether we should be guided by what went before or whether what went before was mistaken policy which we should avoid at all costs. These are issues that antitrust scholars and policy-makers continue to wrestle with, as illustrated by the articles that follow.

I would like to acknowledge and thank current and past members of the SMU Law Review Board of Editors including Andrew Cookingham, Bailey Pham, Meghan Kruzeiger, Matireya Tomlinson, and Brooke Scheib for embracing the idea of this symposium issue and then providing the heavy lifting.

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Antitrust Law and Policy

