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Foreword

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Symposium: Antitrust in the Twenty-First Century

FOREWORD

*C. Paul Rogers III**

As the beginning of a new century approaches, the United States finds itself in a new world characterized by truly global markets and rapidly evolving technology. This new world is, to say the least, far different from the one into which antitrust was born, and is one which promises to continue to evolve in previously unimagined ways.

Domestically as well antitrust permeates our daily activities. Antitrust policy has influenced our telephone service, health care systems, professional sports, and computer industry to name a few obvious examples. No significant corporate acquisition or merger can proceed without antitrust scrutiny. The price of any good or service sold, if not arrived at appropriately, may run afoul of antitrust principles. Private university tuition, the salaries law firms pay associates and ABA law school accreditation standards have all recently raised antitrust hackles.

This Symposium presents a look at the role of antitrust policy in this dynamic new world, domestically and globally, presenting the views of many of our leading antitrust thinkers on the history and future of antitrust as we enter the twenty-first century.

Anne K. Bingaman discusses her vision of the role of antitrust in the twenty-first century, suggesting that antitrust enforcement, far from being obsolete, will be a necessary force for the protection and promotion of competitive diversity in the next century. Bingaman writes that the nation's economic health depends on preventing firms with market power from imposing artificial restraints, and that the Antitrust Division is already taking policy steps needed to adequately address the challenges posed by accelerating technological changes and the globalization of markets.

Peter C. Carstensen reviews and analyzes four major studies from the 1980s which he believes should be central to antitrust policy in the next century. In Carstensen's view, the works of Robert Axelrod, Naomi Lamoreaux, David Ravenscraft and F. M. Scherer, and Leonard Weiss provide support for the idea that collusion in concentrated markets is a

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durable strategy, that concentration is more likely to produce economic costs than gains, and that few economic gains result from combinations that create concentration. Carstensen draws from these four studies in advocating relatively strict antitrust rules, vigorously enforced, and based on simple and straightforward standards as the proper direction for antitrust in the twenty-first century.

Daniel J. Gifford's article assesses the "problematic" state of antitrust law, examining both the problems with current case law and the multiple sources of antitrust law which have arisen as a result of the judiciary's failure to provide suitable guidance in antitrust decisions. Gifford writes that the government is in danger of losing the control it formerly exercised over antitrust policy as antitrust case law becomes dominated by private actions and the increasing activities of the state attorneys general.

Paul H. LaRue's essay addresses the soundness of the Robinson-Patman Act at the brink of the twenty-first century. LaRue examines the Act's coverage of secondary line injury and, in particular, the rule derived from the *Morton Salt* decision. LaRue points out the apparent incompatibility of that decision with the Robinson-Patman Act and other antitrust laws, and discusses the implications of the *Brooke Group* decision for the future of the *Morton Salt* rule.

Gary Minda's article considers some of the reasons for the decline of antitrust as a political and legal movement and examines some of the current competitive problems posed by the "informational economies" of the information superhighway. Minda writes that a complete rethinking of how some fundamental antitrust concepts actually work in postindustrial markets is needed if antitrust is to remain relevant in the next century.

William H. Page and John E. Lopatka take a look back at Richard Posner's 1971 article "*A Program for the Antitrust Division*" and analyze the effect the article has had on antitrust policy in the twenty-five years since its publication. The authors reexamine Posner's recommendations in light of the antitrust enforcement, case law, and scholarship of the past quarter century. Page and Lopatka support Posner's notion of an "efficiency standard" for antitrust, but argue for a revision of Posner's suggested policy on express and tacit collusion.

James F. Ponsoldt explores the future of antitrust in the context of municipal market participation. Ponsoldt argues that, for purposes of the *Parker* doctrine, municipal market participant conduct should receive the same treatment afforded the private market participant. The author contends that the balancing of federalism and free market concerns as addressed in the *Lafayette*, *Midcal*, and *Ticor* decisions constitutes the best policy toward municipal market participant conduct, and that such a policy is the only viable alternative to the privatization of municipally owned business.

William L. Reynolds offers a look at the "checkered" history of antitrust policy, and the importance the quality of Supreme Court opinions

has had on the ebb and flow of antitrust enforcement. Reynolds examines the body of antitrust common law adjudication as seen through the lens of the Legal Process School, and concludes that specific rules in antitrust doctrine have succeeded only when those rules have been the subject of "reasoned deliberation" by the Supreme Court.

David F. Shores explores the role economic theory has played in antitrust analysis, urging courts to strike an appropriate balance between allowing economic theory to completely subordinate factual analysis and ignoring economic theory altogether. Focusing primarily on the Supreme Court's recent *Brooke Group* and *Kodak* decisions, Shores's article contrasts the doctrinal treatment economic theory was afforded in the former decision with the limited purpose the theory served in the latter. Shores concludes his piece with an assessment, in light of the *Brooke Group* and *Kodak* decisions, of the future role of economic theory in antitrust analysis.

Together these articles cover much of today's antitrust waterfront. It is apparent that antitrust law and policy will continue to play a vital role in the shaping of our markets domestically and abroad. Antitrust champions and guards our market economy and is, as a result, inescapable. Through hawks and doves, it has persevered for the last one hundred plus years. It is now very much a part of our social fabric, popping up, in what must seem to the layperson, strange places.

The articles in this Symposium certainly confirm the impact of antitrust and provide some of the most progressive thinking available about its current shortcomings. Admonitions, suggestions for change and, occasionally, votes of optimism come through. The pieces which follow are well worth the careful study of those involved with or interested in our economic and competitive future.

