May 1987

Anticipating Antitrusts Centennial: Foreword

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Recommended Citation

Link to publisher version (DOI)
https://doi.org/10.15779/Z38C729

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Foreword

Milton Handler†

As far back as 1982, I conceived the idea of a preparatory conference in anticipation of antitrust's centennial, which I assumed would be observed in 1990 along the lines of the current celebration of the bicentennial of the Constitution.1 By suggesting an intensive examination of our antitrust jurisprudence well in advance of its anniversary, it was my hope that by 1990 we could develop a consensus on such clarifications and revisions as might be necessary for antitrust to cope with the changing conditions of the remaining years of this and the ensuing ones of next century. Initially, the Senate Judiciary Committee planned to have a series of hearings where the outstanding experts in and out of government could give testimony regarding the changes they deemed desirable. That plan, however, never came to fruition. Accordingly, I then arranged under the aegis of my lectureship at the Association of the Bar of the City of New York a symposium consisting of two sessions, each to run an entire day. This issue of the California Law Review contains papers based on the presentations made at the first of those sessions.2

The Sherman Act has commanded the support and confidence of the American people over the decades in which it has been in force. This support comes from both political parties, from bench and bar, and from the business and academic communities. Though enacted during a Republican administration, it has been an article of faith for both parties and has been vigorously enforced by Republican and Democratic administrations alike. It is only in the present administration, however, that a

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1. In my Article, Reforming the Antitrust Laws, 82 COLUM. L. REV. 1287 (1982), I outlined a series of specific changes that I personally advocate, most all of which can be achieved by action of the Supreme Court without the need of further legislation. I have borrowed from the wording of that Article in these introductory remarks.
policy of nonenforcement has set in, much to the distress of those who believe that without antitrust the free market cannot long remain free. Antitrust enforcement was sporadic, highly selective, and of limited efficacy prior to the 1940's. For more than three decades, however, we have witnessed an explosion of governmental and private litigation in which the most remote corners of antitrust doctrines have been explored and ingenious procedural innovations adopted. While the overbreadth of certain doctrinal additions has caused deep concern to those who felt that antitrust's reach was being unduly extended, the fundamentals of antitrust have continued to be accepted by the American people.

For more than a half century, I have urged in lectures and writings that the law be strengthened wherever weaknesses become apparent and that the rules of excessive severity be modified or scrapped. I have thought, therefore, that before we reach the milestone anniversary, we would do well to review the present status of antitrust and to advocate such changes as may be desirable to promote the public interest.

The rules and principles in every field are characterized by expansion and contraction, by false starts that are corrected, by renewed growth, and by new directions. Law being an experimental discipline, a dynamic jurisprudence is marked by growth and constant change. Thus, since its inception antitrust has faced many aberrations that have been rectified by the Supreme Court or by Congress. Let me note a few examples.

Shortly after the enactment of the legislation, the Court held that the Sherman Act did not apply to a series of mergers resulting in ninety-eight percent control of the sugar industry. The ruling rested on the fallacious principle that federal jurisdiction over commerce does not embrace manufacturing and production. In the American Banana case, the Court took a restrictive view of the extraterritorial application of antitrust laws. These decisions were soon sapped of their vitality. The literal reading of the statute in the Trans-Missouri Freight Association case, which rejected a rule of reason, was repudiated in 1911 by the Standard Oil decision. This, in turn, led to enactment of the original Clayton Act and its outlawry of specific trade practices. In 1950, the Celler-Kefauver Act overturned the Court's expansive view of the permissible limits of horizontal integration, which had sanctioned combina-

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3. See e.g., 1-2 M. Handler, Twenty-Five Years of Antitrust (1973).
7. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
tions a little short of a sixty-four percent market share.\(^{10}\) In later times, the per se rule of \textit{Schwinn} \(^{11}\) was expressly overruled in \textit{Sylvania}.\(^{12}\) These are only a few of the many changes that have come about as the result of our experience in administering the antitrust laws.

In this Symposium, the talented authors considered the changes that have occurred in recent decades, stressing antitrust’s new look through the integration of sophisticated economic analysis into the law. The program was divided into five parts. In each part an extensive paper was delivered, followed by comments from differing antitrust specialists.

Donald F. Turner, a former assistant attorney general in charge of the Justice Department’s Antitrust Division and a co-author with Professor Areeda of the landmark work on predatory pricing\(^{13}\) and the first five volumes of \textit{Antitrust Law},\(^{14}\) presented the first paper—“The Durability, Relevance, and Future of American Antitrust Policy.” He maintains that the use of “populist” goals in developing antitrust standards would increase vagueness in the law and could discourage conduct that promotes efficiency in the market. In contrast, continuing with the substantive rules of antitrust, Professor Turner argues that the “key to clarifying and rationalizing antitrust rules is the imposition of presumptions and proof requirements” based on market share and other objective criteria.\(^{15}\) Among the specific areas for which he offers objective presumptions of legality and illegality are tying and mergers. With respect to the offense of monopolization, Turner analyzes the Supreme Court's recent opinion in the \textit{Aspen} case\(^{16}\) and argues that due to its use of “some dangerously broad language,” the Court “invites a plethora of section 2 refusal-to-deal cases by competitors against rivals whose alleged monopoly power is based on narrowly defined markets.”\(^{17}\) Finally, turning to the procedural rules of antitrust, Turner contends that the award of treble damages should be limited to “clear violations,” that jury trials should be eliminated, and that, as in \textit{Matsushita},\(^{18}\) the bases for summary judgment should be expanded.

Commenting on Professor Turner’s presentation, Robert Pitofsky,


\(^{17}\) Turner, \textit{supra} note 15, at 810.

Dean of the Georgetown University Law Center and a former member of the Federal Trade Commission, postulates that antitrust is “unlikely to return to the anti-bigness, anti-business, anti-efficiency posture” of the 1960's,19 but directs most of his criticism toward the “minimalist” antitrust program of the Reagan administration and the Chicago School. In particular, Dean Pitofsky criticizes the notion that antitrust should concern itself only with conduct that reduces output below competitive levels or involves cartel pricing. He then takes issue with the Chicago view that resale price maintenance is justified by the free-rider phenomenon.

The core paper of the second part of the program was delivered by Professor Lawrence A. Sullivan of the Boalt Hall School of Law at the University of California at Berkeley, the author of the leading one-volume treatise on antitrust20 and a scholar known for his doctrinal differences with the Chicago School. In his paper, entitled “The Viability of the Current Law on Horizontal Restraints,” Professor Sullivan reviews the Supreme Court's recent decisions in Professional Engineers,21 Maricopa,22 Broadcast Music,23 NCAA,24 and Indiana Federation of Dentists25 against the historical backdrop of Addyston Pipe26 and Standard Oil.27 He describes the developing “implosion” of the per se rule and the rule of reason into a unified continuum of antitrust analysis. Then, after addressing the standards for a finding of horizontal conspiracy under section 1, he posits several hypotheticals as the springboard for analyzing the issues likely to arise during the end of this century. These concern matters such as joint research programs, foreign entry into American markets, extraterritorial conduct by foreign competitors, deregulation, and intrabrand competition.

Three commentators critiqued Professor Sullivan's presentation. Thomas E. Kauper, another former chief of the Antitrust Division and presently Henry M. Butzel Professor of Law at the University of Michigan School of Law, takes issue with Professor Sullivan by arguing that there has not been a straight line continuum from Addyston Pipe to NCAA. Rather, the law has come full circle and returned to Judge Taft's analysis. Professor Kauper goes on to contend that, notwithstanding the

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27. Standard Oil Co. v. United States, 221 U.S. 1 (1911).
large facial differences between the asserted antitrust goals of the Chicago School and those of more traditional theorists, there is an "emerging synthesis" of the relevant "elements" of antitrust analysis: (1) proof of adverse allocative effects; (2) use of a less restrictive alternatives test; (3) the relevance of "coercion;" and (4) the appropriate response to ambiguity and the unavailability of perfect information.\(^2\)

Offering a different viewpoint, Professor Eleanor M. Fox of the New York University School of Law argues that there is a "battle for the soul of antitrust."\(^2\) Comparing the Chicago School with the adherents of the "New Coalition"—who believe that "economics is one of the tools used to carry out the spirit of the law" and not the law's final determinator—she contends that the New Coalition, as seen in the Maricopa, NCAA, Aspen, and Indiana Federation of Dentists decisions, "better describes the history of antitrust and the current state of the law."\(^3\) Professor Harvey J. Goldschmid of Columbia University School of Law takes an intermediate position, arguing that we should retain Justice Stone's sophisticated per se analysis in Trenton Potteries and strive for a more refined and clarified version of the "skimmed down" rule of reason under Professional Engineers, NCAA, and Indiana Federation of Dentists.

Presenting the initial paper of the third segment of the program was William F. Baxter, the first chief of the Antitrust Division during the Reagan Administration and the person who has served as the lightning rod for those who disagree with the present administration's enforcement policies. Presently the William Benjamin Scott and Luna M. Scott Professor of Law at the Stanford School of Law, Professor Baxter addresses "The Viability of Vertical Restraints Doctrine." He concludes that the "political standoff" with respect to vertical arrangements is "likely to prove quite stable over time."\(^3\) Professor Baxter first analyzes the seminal decisions that held that resale price maintenance is per se unlawful and finds that they are "more metaphysical than analytic."\(^3\) As a tool for assessing the competitive consequences of vertical arrangements, he proposes the use of a "2 \times 2 matrix" in which "there are dominant firms and groups along one axis" and "subtypes of market power, possessed and only coveted," along the other.\(^3\) Applying this analysis to numerous hypotheticals, Professor Baxter attempts to separate those vertical arrangements that threaten competition from those that do not.

Commenting on Professor Baxter's presentation was Earl E. Pol-

\(^{29}\) Fox, The Battle for the Soul of Antitrust. 75 Calif. L. Rev. 917, 917 (1987).
\(^{30}\) Id.
\(^{32}\) Id.
\(^{33}\) Id. at 938.
lock, a leading antitrust practitioner, and Sanford M. Litvack, who was the chief of the Antitrust Division under President Carter. Mr. Pollock argues that in many respects the current treatment of vertical restraints is simply a restoration of the law as it stood "before [the] changes wrought by the Warren Court," and that the present political standoff differentiating between price and non-price vertical restraints is likely to continue for some time. Mr. Litvack likewise takes the position that the rules on vertical price fixing are unlikely to change.

In the fourth segment of the program, Phillip Areeda, Langdell Professor of Law at the Harvard Law School and the author of the leading multi-volume treatise on antitrust, presented a broad overview of section 2 of the Sherman Act in "Monopolization, Mergers, and Markets: A Century Past and the Future." Beginning with the "elusive" definition of monopoly—the power to exclude competition or to control price—Professor Areeda works his way through the intent and conduct elements of the offenses of monopolization and attempted monopolization and the possible changes wrought by the Aspen decision. In particular, he analyzes the competitive effects of exclusionary behavior and essential facilities (arguing that, at bottom, the outcome of most cases rests on a policy choice), predatory pricing (balancing the need for administrability against both the need to stop true predation and the danger of discouraging price competition), attempted monopolization (arguing against the use of vague standards that might ultimately transform section 2 into a federal prohibition of business torts), merger enforcement (taking issue with the Reagan administration's view that only mergers that create a new danger of supra-competitive pricing, but not mergers that reinforce preexisting anticompetitive pricing, should be interdicted), and, finally, relevant market analysis (bemoaning the artificiality of the existing truncated analysis and arguing for analysis of competition along a continuum instead of within segmented markets).

The first of the three commentators to address Professor Areeda's proposition was Frank H. Easterbrook, a leading proponent of the Chicago School and a judge on the United States Court of Appeals for the Seventh Circuit. Judge Easterbrook argues for applying to antitrust the economists' concept of "comparative advantage"—that is, an advantage relative to the cost of the next best alternative. Contending that "courts are not very good at divining the reasons for and effects of complex business practices," and that "[c]ompetition is the long-run solu-

35. See supra note 14; see also 6-7 P. AREEDA, ANTITRUST LAW (1986).
tion to monopoly," Judge Easterbrook argues that courts thus should not intervene in the operation of the market unless the conduct at issue is a practice whose competitive consequences are well known and understood. Absent such knowledge, courts should stay their hands and let the market work its will.

The next commentator, Frederick M. Rowe, a past chairman of the American Bar Association's Antitrust Law Section and presently Senior Lecturer at the Yale School of Organization and Management, limits himself to the issue of relevant market, "the weakest link in antimonopolization and antimerger law." Mr. Rowe argues that the unpredictable and ephemeral nature of relevant market analysis has converted monopolization and merger enforcement into a "farce," with "punny 'horizontal' mergers that gained high shares in petty markets" being "zapp[ed]" while "large conglomerations that, by definition, d[o] not alter pre-existing market shares" are "foster[ed]." To "rescue antimerger and antimonopolization law from trivialization," Mr. Rowe contends that a "stronger 'ease of entry' concept" should replace traditional relevant market analysis.

The last commentator on Professor Areeda's presentation was Michael Malina, an antitrust lawyer and author. Mr. Malina approves of the doctrinal advances of the Second Circuit's decision in *Berkey,* and of the greater certainty in the law engendered by the courts' adoption, in whole or in part, of Professors Areeda and Turner's predatory pricing analysis. Mr. Malina then questions whether the Justice Department's Guidelines are consistent with the legislative history of the Celler-Kefauver Act and whether, in view of the "enormous flexibility" judges have in interpreting section 7, the Guidelines can do any more than provide the view of the enforcement authorities. In addition, while agreeing with Mr. Rowe that relevant market analysis leaves much to be desired, he concludes that no "better construct for examining competition" has yet been developed.

Leading off the final part of the program was Stephen G. Breyer, who, as Chief Counsel to the Senate Judiciary Committee, was one of the founding fathers of airline deregulation, and who is presently a judge on the United States Court of Appeals for the First Circuit. In a detailed

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37. *Id.* at 985.
39. *Id.* at 993.
40. *Id.* at 996.
42. *See supra* note 13.
paper called "Antitrust, Deregulation, and the Newly Liberated Marketplace," Judge Breyer analyzes four "special risks to the public that may arise in deregulated industries" and how "sound public policy [might] alleviate or avert the[m]."44 Focusing on the prominent examples of the airline and telecommunications industries, he reviews the different reasons underlying the original regulation of those industries—airlines because competition allegedly would have been "excessive," and telecommunications because it was allegedly a "natural monopoly." After an exhaustive analysis, Judge Breyer argues that deregulation should provide indirectly through the marketplace the benefits that regulation was supposed to provide directly. He notes, however, that for deregulation to do so, courts, Congress, and the bar will have to pay particular attention to four special policy needs: (1) the need for a strong antitrust policy to maintain competitive market structures; (2) the need to avoid protecting competitors in a manner that is detrimental to competition generally; (3) the need to use sound economic regulatory principles where regulation continues in related segments of a deregulated industry; and (4) the need to minimize the potential anticompetitive impact of "bottlenecks"—residues of potential monopoly power in newly deregulated industries.45

Professor Louis B. Schwartz of the Hastings College of Law is less sanguine than Judge Breyer about the results of deregulation. Thus, he questions whether in the present minimalist antitrust environment the anticompetitive consequences of the acts of the newly deregulated industries can be effectively monitored and—no pun intended—regulated.

Alfred E. Kahn closed the program. Presently the Robert Julius Thorne Professor of Political Economy at Cornell University, Professor Kahn is the nation's preeminent authority on deregulation; as chairman of the now-defunct Civil Aeronautics Board, he initiated the deregulation of the airline industry. Agreeing with much of Judge Breyer's presentation, Professor Kahn reflects on the "inevitable schizophrenic tension between a strong belief in economic deregulation wherever even highly imperfect competition is feasible, and an equally strong belief in vigorous enforcement of the antitrust laws."46 Professor Kahn concludes that notwithstanding the danger of judicial overregulation in the telecommunications industry and a noninterventionist policy by the Department of Transportation in the airline industry, deregulation is a fundamentally beneficial, procompetitive policy for the future.

I take some pride in concluding that the Symposium was a great success. I am confident that the modest beginnings that we have now

45. Id. at 1044-45.
made, if followed by similar discussions by other bar associations and in the universities, should develop a far-reaching consensus on how our antitrust doctrines and their enforcement can be improved to better serve the interests of the American people.