

Antitrust law in the Federal Circuit

Conflict in the public purpose

Perspectives on the public purpose

- Accommodating scientific and technical realities
- The economic perspective: monopoly busting versus monopoly creating
- Managerial desires: uniformity

The conflict is fundamental

- It needs an empirical approach (already available)
- More theory, esp. political and social theory
- A political dimension is inevitable

Theoretical perspective

- Incommensurable problem
 - there may possibly be reason but certainly no rule
 - As Justice Scalia wrote a long time ago, “...like asking whether a line is longer than a rock is heavy”
 - Consumer welfare here is not a simple, single-valued, maximizable function; its logical and mathematical properties are technically speaking, pathological.

Theoretical perspective

- Possible exam questions in a graduate seminar might be:
 1. *Is the Federal Circuit a patent-holder exercising its legitimate rights or an anti-competitive monopoly?*
 2. *Is its choice of law subject to an unilateral refusal to deal analysis or a compulsory licensing analysis?*
 3. *Since the circuit-conflict mechanism is not available, who should decide questions 1 and 2?*

The political dimension

1. Is the question of uniformity as important now as it seemed in 1981?
2. Is the need for stable computational property regimes trumped by the need for inter-patent uniformity?
3. Have we now learned enough from the Federal Circuit experiment to proceed to beta-test the next version?

3. Yes

2. No

1. No