Principles, Cases, and Materials

Daniel Francis

Christopher Jon Sprigman

AMERICAN BAR ASSOCIATION

Antitrust Law Section

ANTITRUST

PRINCIPLES, CASES, AND MATERIALS

DANIEL FRANCIS
CHRISTOPHER JON SPRIGMAN

2023

INTRODUCTION

Welcome to *Antitrust: Principles, Cases, and Materials*! This is the first edition of a new antitrust casebook designed to offer an accessible, thorough, concise, and up-to-date introduction to the world of antitrust. Since May 2023 it has been available to all for free download pursuant to a Creative Commons license, and in a hard copy print-on-demand format priced at cost. The book is accompanied by a resource pack, including teaching slides and draft syllabuses, available to all on the same terms. You will find everything online at www.antitrustcasebook.org. We will update the materials each year.

In writing this book, we've been motivated by our hope that this casebook can play a role in making the antitrust classroom, and ultimately the antitrust profession, a more diverse, inclusive, and welcoming space. **Everyone belongs in the antitrust conversation!** Antitrust implicates countless fundamental questions about the rules that govern the economy, and about the place of the market in our shared life. It concerns each of us directly as consumers, workers, and citizens. And it is an endlessly rewarding field of study, work, and debate. We have aimed for an accessible and straightforward text, while acknowledging antitrust's many complexities and tensions. We have made a particular effort to capture recent materials: as a result, some older cases that are now primarily a matter of historical interest have received a briefer treatment or been omitted entirely. This has enabled us to maintain full coverage without undue length.

We are deeply grateful to those who have helped us improve this book before launch. In Fall 2022, a working draft of this book was used as the foundation for the antitrust courses at New York University and the University of Washington, and provided for comment to students in the antitrust class at George Mason University. And in Spring 2023, a revised draft of the book was used as the foundation for the antitrust courses at the University of Florida and New York University. We are profoundly grateful to the teachers who were willing to try out our book in beta-draft form, and to everyone—teachers, students, and colleagues—who took time to share feedback.

The book has also benefited enormously from the work of a board of distinguished and generous editorial consultants and commenters from all corners of the antitrust world. They are listed below, and we have been honored and grateful to have their help and support.

We want to express particular gratitude to Professor Douglas Ross of the University of Washington. His contribution to this project has been immense, including the structure and substance of the book as well as the teaching materials, which he helped to create. We also want to thank Jonathan Gleklen, 2021–22 Chair of the ABA Antitrust Section, for coming up with the idea for this project in the first place, and trusting us to take it forward.

Finally: the work of improvement is never done! We would love for you to help us improve this casebook. If you spot an error or a typo; if you want to suggest additional or alternative materials reflecting a broader array of perspectives; if there's something you really like; or if you want to suggest a cover image for the next edition: let us know! Shoot us an email at the addresses below with "Casebook Feedback" in the subject line. We will be very grateful for your input. You will be contributing to the quality of the product, and helping those who will use future versions.

Welcome to the world of antitrust. We hope you'll love it as much as we do.

Daniel Francis and Christopher Jon Sprigman
daniel.francis@law.nyu.edu; christopher.sprigman@nyu.edu
New York City, NY, May 2023

Creative Commons License. This work is licensed under a Creative Commons Attribution-NonCommercial-ShareAlike 4.0 International License. https://creativecommons.org/licenses/by-nc-sa/4.0/. In rough summary, this license allows noncommercial sharing and adaptation of the work, subject to certain requirements including attribution, noncommercial use, and the sharing of any adapted or altered versions under the same license.

NOTES ON EXCERPTING

We have taken a free hand with edits to the excerpts, always in the interests of readability. In particular:

- We have freely eliminated footnotes, internal quotation marks, citations (including string cites), ellipses, and brackets, as well as subtitles, and we have amended or completed citations, without specifically indicating that we have done so.
- The ellipsis ". . ." signals the omission of less than one paragraph of material.
- The bracketed ellipsis "[. . .]" signals the omission of one paragraph or more.
- Editorial commentary is sometimes interpolated in the format: {*Eds.: Our comment here.*}
- Footnote numbers in excerpts generally follow the numbering in the original.

We have also applied the same rules, for the same reasons, to footnote citations throughout the book as appropriate, in the interests of clarity and readability.

ACKNOWLEDGEMENTS

Editorial Consultants and Commenters

For comments, ideas, suggestions, feedback, and criticism, we are deeply indebted to: Cem Akleman; Laura Alexander; Alexander Billy; Stephen Calkins; Michael A. Carrier; Ian R. Conner; Trish Conners; Eleanor Fox; Douglas Geho; Jonathan Gleklen; Nikolas Guggenberger; Scott Hemphill; Bruce Hoffman; Erik Hovenkamp; James Keyte; Keith Klovers; Sanjukta Paul; Alvaro Ramos; Douglas Ross; Steven C. Salop; Bilal Sayyed; Joseph Simons; Danny Sokol; Phillipp Tillmann; and Joanna Tsai.

Special Thanks

Professor Douglas Ross has been a friend to this project from the very beginning, and he has made huge contributions to the casebook and to the accompanying materials. We, and this book, owe him a special debt.

Professors Cem Akleman, Trish Conners, Jay Ezrielev, Bruce Hoffman, Mark Rosman, Nicole Sarrine, and Bilal Sayyed also volunteered to use our book in their respective antitrust classes (as the primary text at the University of Florida and a supplementary text at George Mason University) as part of our pilot program in 2022–23. We are very grateful for their trust and their helpful feedback.

Our colleagues and friends at the ABA Section of Antitrust Law have been immensely supportive. Jon Gleklen (Section Chair 2021–22) conceived the idea for this book and recruited us to write it back in the summer of 2021. We're grateful for his vision and trust! We are also grateful for the support of Tom Zych (Section Chair 2022–23) and Fiona Schaeffer (Section Chair 2022–23) in supporting this project through to launch, as well as to the Section's hard-working staff, who have generously contributed their time and skill.

Special thanks to Madhav Tankha for superb graphic design work, and to Taylor Owings for taking the cover photographs of Michael Lantz's sculpture *Man Controlling Trade* at FTC headquarters in Washington, DC.

Above all, thanks to the many students at NYU, the University of Washington, the University of Florida, and George Mason University who took time to share feedback on earlier drafts with us. We're very grateful.

*

Needless to say, while we have benefited enormously from the help and support of a village of wise and generous friends, everything herein is exclusively the authors' responsibility, including all errors, omissions, and views.

TABLE OF CONTENTS

INTRODUCTION .... **I**

I. THE ANTITRUST PROJECT **1**

A. Overview 1

B. The Idea of Antitrust 1

The Idea of "Consumer Welfare" 4

C. Antitrust Law in a Nutshell 7

1. The Three Pillars 7

a) Sherman Act Section 1: Restraint of Trade 7

b) Sherman Act Section 2: Monopolization 8

c) Clayton Act Section 7: Mergers and Acquisitions 8

2. Enforcement Architecture 9

3. Some Illustrative Easy and Hard Cases 10

D. The Federal Antitrust Statutes 12

1. The Sherman Act of 1890 12

2. The Federal Trade Commission Act of 1914 12

3. The Clayton Act of 1914 13

4. The Robinson-Patman Act of 1936 14

5. The Celler-Kefauver Act of 1950 14

6. The Hart-Scott-Rodino Act of 1976 15

7. Later Statutory Reforms 15

E. A Very Brief History of Antitrust 15

1. Before 1890: Common Law 16

2. 1890–1930s: Early Stirrings 19

3. 1940s–1960s: The Rise of Structuralism 20

4. 1970s–2020s: Chicago and Post-Chicago 22

Carl Shapiro, Antitrust in a Time of Populism 24

Lina M. Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents 26

F. What Is Competition? 27

United States v. Von's Grocery Co. 29

Utah Pie Co. v. Continental Baking Co. 30

Cargill, Inc. v. Monfort of Colorado, Inc. 32

Olympia Equipment Leasing Co. v. Western Union Telegraph Co. 33

G. Some Further Reading 34

II. ANTITRUST ECONOMICS: A NONTECHNICAL INTRODUCTION **35**

A. Overview 35

B. The Lens of Microeconomic Analysis 36

C. Markets, Supply, Demand, and Elasticity 39

1. Markets and Substitutes 39

2. Demand, Supply, and Elasticity 41

D. Perfect Competition 44
Real Costs are Complicated! 44
E. Monopoly 46
Where does the monopolist price? 47
F. Imperfect Competition and Market Power 49
Lerner Index 49
1. Product differentiation 49
2. Entry barriers 50
3. Capacity constraints 51
4. Imperfect information and transaction costs 51
G. The Concerns of Antitrust: Collusion and Exclusion 53
Second-Order Concerns: Errors, Error Costs, and Decision Theory 54
H. Potential Competition and Entry 54
I. Tacit Collusion and Market Concentration 55
Example: Two Service Stations 55
J. Buyer Side Power: Monopsony and Oligopsony 59
K. Price Discrimination 60
L. The Relationship Between Antitrust Economics and Antitrust Law 62
Matthew T. Panhans & Reinhard Schumacher, Theory in closer contact with industrial life: American institutional economists on competition theory and policy 62
William E. Kovacic, The Influence of Economics on Antitrust Law 63
New York v. Deutsche Telekom AG 64
M. Some Further Reading 65
III. MARKET DEFINITION AND MARKET POWER 67
A. Overview 67
What is a market? 67
A Reminder of Some Technical Terms 67
The Role of Market Definition in an Antitrust Case 69
What is market power? 72
B. Foundations of Markets: The Hypothetical Monopolist Test and *Brown Shoe* 74
1. The Hypothetical Monopolist Test 74
Horizontal Merger Guidelines § 4 74
United States v. E.I. du Pont de Nemours & Co. (“Cellophane”) 77
2. Brown Shoe Market Definition 80
Brown Shoe Co. v. United States 81
FTC v. Facebook, Inc. 82
3. Applying Market Definition Theory 84
United States v. H & R Block, Inc. 85
CASENOTE: United States v. Continental Can Co. 89
C. Special Cases 90
1. Buyer Markets 91
Horizontal Merger Guidelines § 12 91
United States v. Bertelsmann SE & CO. 91

2. Bundle and Cluster Markets 95
Krisha A. Cerilli, Staples/Office Depot: Clarifying Cluster Markets 95
a) Bundle Markets 95
United States v. Grinnell Corp. 95
FTC v. Staples, Inc. (Staples / Office Depot I) 97
b) Cluster Markets 100
ProMedica Health Sys., Inc. v. FTC 100
3. Price-Discrimination Markets 101
Horizontal Merger Guidelines § 4 101
FTC v. Whole Foods Market, Inc. 102
4. Platform and Zero-Price Markets 106
Ohio v. American Express Co. 106
CASENOTE: United States v. Sabre Corp. 109
D. Geographic Market Definition 111
CASENOTE: United States v. Pabst Brewing Co. 111
FTC v. Penn State Hershey Medical Center 112
E. Market Power, Market Share, and Entry Barriers 115
Horizontal Merger Guidelines § 5 116
United States v. American Exp. Co. 118
CASENOTE: Rebel Oil Co., Inc. v. Atlantic Richfield Co. 120
Eastman Kodak Co. v. Image Technical Services, Inc. 121
F. Oligopoly and Tacit Collusion 124
G. Some Further Reading 125
IV. AGREEMENTS 127
A. Overview 127
Choosing the Standard v. Applying the Standard 128
B. Contracts, Combinations, and Conspiracies 130
1. Unilateral v. Joint Action 130
Copperweld Corp. v. Independence Tube Corp. 130
American Needle, Inc. v. National Football League 134
2. Defining and Proving an Agreement 138
Monsanto Co. v. Spray-Rite Service Corp. 139
Matsushita Elec. Industrial Co., Ltd. v. Zenith Radio Corp. 142
Inferring Conspiracy: Interstate Circuit *and the Role of "Plus Factors"* 149
Bell Atlantic Corp. v. Twombly 150
In re Text Messaging Antitrust Litigation 156
In re Text Messaging Antitrust Litigation 158
C. Evaluating Reasonableness: Per Se, Rule of Reason, and Intermediate Scrutiny 166
1. Per Se Illegality 168
United States v. Trenton Potteries Co. 168
CASENOTE: United States v. Socony-Vacuum Oil Co. 170
2. The Rule of Reason 172
Rebecca Haw Allensworth, The Commensurability Myth in Antitrust 177

Michael A. Carrier, Rule of Reason: An Empirical Update for the 21st Century 178
Board of Trade of City of Chicago v. United States 179
National Society of Professional Engineers v. United States 181
CASENOTE: Ohio v. American Express Co. 184
National Collegiate Athletic Association v. Alston 186
3. Intermediate Scrutiny 191
NCAA v. Board of Regents of the University of Oklahoma 193
The FTC's "Inherently Suspect" Standard and the PolyGram Litigation 197
D. Some Further Reading 198
V. HORIZONTAL RESTRAINTS 200
A. Overview 200
U.S. Department of Justice and FTC, Antitrust Guidelines for Collaborations Among Competitors (2000) 202
B. *Per Se* Unlawful Collusion—Beyond Price Fixing 205
1. Price Fixing, Buyers' Cartels, and Wage Fixing 205
Scott D. Hammond, Caught in the Act: Inside an International Cartel 207
United States v. Jindal 210
2. Bid Rigging and Market Division 212
Palmer v. BRG of Georgia, Inc. 212
3. Group Boycotts 214
CASENOTE: Klor's v. Broadway-Hale Stores 215
Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co. 216
FTC v. Superior Court Trial Lawyers Ass'n 218
When Is a Boycott *Per Se* Illegal? 222
4. Hub and Spoke Conspiracies 223
Toys "R" Us, Inc. v. FTC 224
United States v. Apple, Inc. 227
C. What Is Naked Collusion? The *Per Se* / Rule of Reason Boundary 232
1. Joint Ventures and Joint Products 232
CASENOTE: United States v. Sealy, Inc. 233
United States v. Topco Associates 233
Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. 239
CASENOTE: Arizona v. Maricopa County Medical Society 246
2. Joint Facilitating Practices and Information Exchange 249
The Supreme Court's Information-Exchange Jurisprudence 250
Todd v. Exxon Corp. 252
D. What Is "Inherently Suspect"? The Quick Look / Rule of Reason Boundary 256
FTC v. Indiana Federation of Dentists 256
California Dental Association v. FTC 260
CASENOTE: The *1-800 Contacts* Litigation 265
E. Some Further Reading 266
VI. VERTICAL RESTRAINTS 267
A. Overview 267
The Idea of Free Riding 269

Frank Easterbrook, Vertical Arrangements and the Rule of Reason 270

Why Would Trading Partners Ever Accept Anticompetitive Restraints? 272

Petition for Rulemaking to Prohibit Exclusionary Contracts by Open Markets Institute et al. 273

Steven C. Salop, The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test 275

Francine Lafontaine & Margaret Slade, Exclusive Contracts and Vertical Restraints: Empirical Evidence & Public Policy 276

B. The Role of Market Power 279

Ohio v. American Express Co. 279

Steven C. Salop, Daniel Francis, Lauren Sillman, & Michaela Spero, Rebuilding Platform Antitrust: Moving On from Ohio v. American Express 280

C. "Intrabrand" Distribution Restraints 281

1. Nonprice Restraints: Territorial Restrictions 281

Continental T.V., Inc. v. GTE Sylvania Inc. 283

GTE Sylvania Inc. v. Continental T.V., Inc. 286

2. Price Restraints: Resale Price Maintenance 288

Dr. Miles Medical Co. v. John D. Park & Sons Co. 288

Louis D. Brandeis, Competition That Kills 290

The Law of Maximum RPM 292

Brief of Amici Curiae Economists in Support of Petitioner, Leegin Creative Leather Prods., Inc. v. PSKS, Inc. . 293

Leegin Creative Leather Products, Inc. v. PSKS, Inc. 294

D. Exclusivity 301

Clayton Act Section 3 301

Tampa Elec. Co. v. Nashville Coal Co. 303

Incentivizing, Rather than Strictly Requiring, Exclusivity: The Surescripts Litigation 304

Roland Mach. Co. v. Dresser Indus., Inc. 306

Benjamin Klein & Andres V. Lerner, The Expanded Economics of Free-Riding: How Exclusive Dealing Prevents Free-Riding and Creates Undivided Loyalty 309

E. Tying 311

Jefferson Parish Hosp. Dist. No. 2 v. Hyde 313

CASENOTE: Epic Games, Inc. v. Apple Inc. 317

The Single Monopoly Profit Theorem 317

F. Bundling 320

G. "Most Favored Nation" Agreements 321

CASENOTE: United States v. Apple, Inc. 322

Complaint, United States v. Blue Cross Blue Shield of Michigan 322

Steven C. Salop & Fiona Scott Morton, Developing an Administrable MFN Enforcement Policy 325

H. Some Further Reading 328

VII. MONOPOLIZATION 329

A. Overview 329

B. Monopoly Power 332

Einer Elhauge, Defining Better Monopolization Standards 332

CASENOTE: United States v. Aluminum Co. of America 333

FTC v. Facebook, Inc. 334

FTC v. Facebook, Inc. 336

C. The Conduct Element: Are There Any Common Principles? ... 338

1. Exclusion ... 338

United States v. Dentsply Intern., Inc. ... 339

Theories of Exclusion ... 341

Thomas G. Krattenmaker and Steven C. Salop, Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price ... 342

2. Contribution to Monopoly ... 344

The *Microsoft* Case: Background ... 345

Findings of Fact, United States v. Microsoft Corp. ... 347

United States v. Microsoft Corp. ... 349

NYNEX Corp. v. Discon, Inc. ... 351

3. Freedom of Action and Refusal to Deal: When Is Excluding Rivals OK? ... 353

Colgate and the Right to Choose Your Trading Partners ... 356

Aspen Skiing Co. v. Aspen Highlands Skiing Corp. ... 356

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP ... 361

The Essential Facilities Doctrine ... 364

Refusal to Deal after Trinko ... 365

CASENOTE: United States v. Aluminum Co. of America ... 366

4. Justification and the Microsoft Burden-Shifting Framework ... 368

In the Matter of McWane, Inc. ... 371

Eastman Kodak Co. v. Image Technical Services, Inc. ... 372

Daniel Francis, Making Sense of Monopolization ... 373

D. Specific Exclusionary Practices ... 375

1. Exclusivity ... 375

Lorain Journal Co. v. United States ... 377

McWane, Inc. v. FTC ... 378

2. Tying ... 381

Findings of Fact, United States v. Microsoft Corp. ... 382

United States v. Microsoft Corp. ... 383

Conditional Dealing or Refusal to Deal? ... 385

3. Pricing Practices: Predation and Price Squeezes ... 386

Steven C. Salop, The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test ... 387

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp. ... 388

Pacific Bell Telephone Co. v. Linkline Communications, Inc. ... 393

4. Bundling ... 396

The Power of Bundling ... 396

LePage's Inc. v. 3M ... 397

Cascade Health Solutions v. PeaceHealth ... 401

5. Torts, Misrepresentations, and Abuse of Process ... 405

Torts and Misrepresentation ... 405

Walker Process Equipment Inc v Food Machinery & Chemical Corp. ... 406

E. Attempt and Conspiracy ... 409

Spectrum Sports, Inc. v. McQuillan ... 409

F. Some Further Reading ... 411

VIII. MERGERS AND ACQUISITIONS 412

A. Overview 412

B. Horizontal Mergers 416

1. The Merger Guidelines and the Structural Presumption 416

United States v. Philadelphia Nat. Bank 417

Horizontal Merger Guidelines § 5 421

"Delta HHIs" 424

United States v. Baker Hughes Inc. 424

The Shape of a Merger Case: The Burden-Shifting Framework 428

2. Competitive Effects Theories in Horizontal Merger Cases 429

a) Unilateral Effects Theories 430

Horizontal Merger Guidelines § 6 430

Analytical Methods for Mergers: Diversions, UPP, and Merger Simulation 433

FTC v. Staples, Inc. ("Staples / Office Depot II") 435

CASENOTE: United States v. H & R Block, Inc. 438

FTC v. H.J. Heinz Co. 440

Stephen Mohr, The closest competitor is not the only competitor 442

United States v. Oracle Corp. 443

b) Coordinated Effects 448

Horizontal Merger Guidelines § 7 449

United States v. H & R Block, Inc. 451

FTC v. Arch Coal, Inc. 454

Unusual Merger Theories: Ovation Pharmaceuticals 461

c) Future Competition: Mergers with Potential and Nascent Competitors 462

CASENOTE: United States v. Marine Bancorporation 463

Yamaha Motor Co., Ltd. v. FTC 464

Complaint, United States v. Visa Inc. and Plaid Inc. 466

CASENOTE: FTC v. Meta Platforms, Inc. ("Meta/Within") 467

d) Entry, Expansion, and Countervailing Power 468

Countervailing Buyer Power 469

Horizontal Merger Guidelines § 9 469

FTC v. Staples, Inc. ("Staples / Office Depot II") 471

United States v. H & R Block, Inc. 473

United States v. Waste Management, Inc. 476

CASENOTE: Google/AdMob 477

C. Vertical Mergers 478

Vertical Merger Guidelines § 4 479

United States v. AT&T, Inc. 482

United States v. UnitedHealth Group, Ltd. 489

D. Procompetitive Benefits and Defenses 493

1. Efficiencies 494

Horizontal Merger Guidelines § 10 497

Vertical Merger Guidelines § 6 498

CASENOTE: United States v. Anthem, Inc. 499

New York v. Deutsche Telekom AG 500

Out-of-Market Benefits and *PNB* 506

2. EDM 506

Vertical Merger Guidelines § 6 507

Statement of Chair Lina M. Khan, Commissioner Rohit Chopra, and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021) 508

Carl Shapiro & Herbert Hovenkamp, How Will the FTC Evaluate Vertical Mergers? 508

3. Failing and Flailing Firms 510

Opinion of the Commission, In the Matter of Otto Bock HealthCare North America, Inc. 510

Ian Conner, On "Failing" Firms—and Miraculous Recoveries, ... 512

United States v. General Dynamics Corp. 513

E. Remedies 515

1. Structural Merger Remedies 515

United States v. E.I. du Pont de Nemours & Co. 516

CASENOTE: Chicago Bridge & Iron Co. N.V. v. FTC 518

FTC, Final Order, In the Matter of Otto Bock HealthCare North America, Inc., ... 519

2. Behavioral Merger Remedies 522

FTC, Analysis of Proposed Agreement Containing Consent Order to Aid Public Comment, In the Matter of Northrop Grumman Corporation and Orbital ATK, Inc. 523

FTC, Decision & Order, In the Matter of Northrop Grumman Corporation and Orbital ATK, Inc. 524

CASENOTE: The Evanston Hospital Remedy 528

3. Negotiated Remedies in Merger Cases 529

"DIY" Merger Remedies and Litigating the Fix 529

FTC, The FTC's Merger Remedies 2006-2012: A Report of the Bureaus of Competition and Economics (January 2017) 530

Deborah L. Feinstein, The Significance of Consent Orders in the Federal Trade Commission's Competition Enforcement Efforts, Remarks of Sept. 17, 2013 531

Jonathan Kanter, Remarks to the New York State Bar Association Antitrust Section (Jan. 24, 2022) 532

F. Some Further Reading 533

IX. IMMUNITIES AND EXEMPTIONS 534

A. Overview 534

B. *"Noerr-Pennington"* Petitioning Immunity 534

Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc. 535

CASENOTE: California Motor Transport Co. v. Trucking Unlimited 537

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc. 539

C. State Action 541

Parker v. Brown 541

CASENOTE: FTC v. Phoebe Putney Health Sys., Inc., and "Clear Articulation" 544

CASENOTE: California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc. 545

North Carolina State Bd. of Dental Examiners v. FTC 545

Foreign Governments and U.S. Antitrust Law 548

D. Labor 549

15 U.S.C. § 17 550

29 U.S.C. § 52 550

29 U.S.C. § 102 550

29 U.S.C. § 104 551
29 U.S.C. § 105 551
29 U.S.C. § 113 552
CASENOTE: United States v. Hutcheson 552
USS-POSCO Indus. v. Contra Costa Cnty. Bldg. & Const. Trades Council, AFL-CIO 553
Brown v. Pro Football, Inc. 556
CASENOTE: William Morris Endeavor Entertainment, LLC v. Writers Guild of America 558
CASENOTE: Columbia River Packers Ass'n v. Hinton 559
Sanjukta M. Paul, The Enduring Ambiguities of Antitrust Liability for Worker Collective Action 560
Brief of the United States Department of Justice as Amicus Curiae in Support of Neither Party, The Atlanta Opera, Inc. 561
Confederación Hípica de Puerto Rico, Inc. v. Confederación de Jinetes Puertorriqueños, Inc. 563

E. Other Exemptions 566

1. Implied Repeal 566
Credit Suisse Securities (USA) LLC v. Billing 566
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP 568

2. Agricultural Cooperatives 570
17 U.S.C. § 291 570
17 U.S.C. § 292 570
National Broiler Marketing Ass'n v. United States 570
Laura M. Alexander, Countervailing Power: A Comprehensive Assessment of a Persistent but Troubling Idea (Oct. 15, 2020) 572

3. Insurance 572
15 U.S.C. § 1012(b) 573
15 U.S.C. § 1013(b) 573
Grp. Life & Health Ins. Co. v. Royal Drug Co. 573
15 U.S.C. § 1013(c) 574

4. Baseball 575
Fed. Baseball Club of Baltimore v. Nat'l League of Pro. Base Ball Clubs 575
Statement of Interest of the United States, Nostalgic Partners LLC v. Office of the Commissioner of Baseball, ... 577

F. Some Further Reading 578

X. ANTITRUST AND INTELLECTUAL PROPERTY 579

A. Overview 579

1. Are IP and Antitrust in Conflict? 580

2. IP and Market Power 581
Illinois Tool Works Inc. v. Independent Ink, Inc. 581

3. IP and Specific Practices 584
Makan Delrahim, The "New Madison" Approach to Antitrust and Intellectual Property Law (remarks of Mar. 16, 2018) 585
Herbert Hovenkamp, *The Antitrust-Intellectual Property Interface* 587

B. Acquisition and Assertion of Intellectual Property 588

1. IP Issues in Merger Review 589
The Hatch-Waxman Act 589
Statement of the FTC, In the Matter of Teva Pharmaceuticals Industries Ltd. and Allergan plc 591

Analysis Of Agreement Containing Consent Orders to Aid Public Comment, In the Matter of Bristol-Myers Squibb Company and Celgene Corporation 593

Dissenting Statement of Commissioner Rohit Chopra, In the Matter of Bristol-Myers Squibb Company and Celgene Corporation 594

Dissenting Statement of Commissioner Rebecca Kelly Slaughter, In the Matter of Bristol-Myers Squibb Company and Celgene Corporation 595

Statement of Commissioner Noah Joshua Phillips, In the Matter of Bristol-Myers Squibb Company and Celgene Corporation 595

CASENOTE: United States v. Bayer AG and Agricultural Patents 597

2. Refusal to License 598

CSU, L.L.C. v. Xerox Corporation 599

CASENOTE: Image Tech. Servs., Inc. v. Eastman Kodak Co. 602

3. Unilateral "Abuse" of the Patent System: Thicketing, Trolling, and Hopping 604

(a) Patent Thicketing 604

Brief for the United States of America as Amicus Curiae in Support of Appellees, UFCW Local 1500 Welfare Fund v. AbbVie Inc. 604

Mayor and City Council of Baltimore v. AbbVie Inc. 606

(b) Patent Trolling 606

Intellectual Ventures I LLC v. Capital One Financial Corp. 608

(c) Product Hopping 612

Brief For Amicus Curiae Federal Trade Commission Supporting Plaintiff-Appellant, Mylan Pharmaceuticals, Inc. v. Warner-Chilcott PLC 613

Product Hopping in the Courts 614

C. Agreements Involving Intellectual Property 616

1. Licensing Agreements 616

Caldera, Inc. v. Microsoft Corp. 616

FTC v. Qualcomm Inc. 618

2. Infringement Settlements 623

FTC v. Actavis, Inc. 624

CASENOTE: Clorox Co. v. Sterling Winthrop, Inc. 630

D. Standard Setting and Standard-Essential Patents 633

1. IP Concealment 634

Rambus v. FTC 634

Analysis of Proposed Consent Order to Aid Public Comment, In the Matter of Union Oil Company of California, 639

2. Other FRAND Violations 641

Makan Delrahim, Take It to the Limit: Respecting Innovation Incentives in the Application of Antitrust Law (Nov. 10, 2017) 642

Herbert Hovenkamp, FRAND and Antitrust 643

FTC v. Qualcomm Inc. 643

Broadcom Corp. v. Qualcomm Inc. 645

3. SSO Manipulation 647

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. 647

CASENOTE: American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. 648

Allied Tube & Conduit Corp. v. Indian Head, Inc. 649

E. Some Further Reading 652

XI. GOVERNMENT ENFORCEMENT 653

A. Overview 653

B. The Federal Trade Commission 653

1. Structure and Organization 653

Humphrey's Executor v. United States 654

Daniel A. Crane, Debunking *Humphrey's Executor* 656

2. Powers and Functions 658

a) FTC Act Section 5 658

E.I. du Pont de Nemours & Co. v. FTC 659

FTC, Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (2015) 662

FTC, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act (Nov. 10, 2022) 663

b) FTC Act Section 6(b) 665

3. Enforcement Procedure 665

Maureen K. Ohlhausen, Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp? 666

15 U.S.C. § 53(b) 667

FTC v. Shire ViroPharma, Inc. 668

CASENOTE: FTC v. Surescripts, LLC, and The Idea of a "Proper Case" 669

AMG Cap. Mgmt., LLC v. FTC 670

4. Competition Rulemaking Authority 671

Nat'l Petroleum Refiners Ass'n v. FTC 672

The Supreme Court and Administrative Agency Power 675

C. The Department of Justice 677

1. Structure and Organization 677

2. Powers and Functions 678

The Expediting Act 678

Competitive Impact Statement, United States v. Intuit Inc. 679

CASENOTE: Tunney Act in Action: United States v. CVS Health Corp. 680

The DOJ Cartel Leniency Program 683

D. The Two-Agency Model 684

Complaint, Axon Enterprise, Inc. v. FTC 685

E. Merger Review and the Hart-Scott-Rodino ("HSR") Act 687

FTC, Model Second Request (revised October 2021) 689

FTC v. Facebook, Inc. 692

F. The States 693

Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement 695

Statement of Interest of the United States of America, New York v. Deutsche Telekom 696

G. Remedies I: Injunctive Relief 698

A. Douglas Melamed, Afterword: The Purposes of Antitrust Remedies 698

FTC v. National Lead Co. 700

1. Structural remedies 701

United States v. Microsoft Corp. 702

United States v. Microsoft Corp. 704

Noah J. Phillips, We Need to Talk: Toward a Serious Conversation About Breakups (remarks of Apr. 30, 2019) 706

Rory Van Loo, In Defense of Breakups: Administering A "Radical" Remedy ... 707
2. Behavioral remedies ... 708
Decision and Order, In the matter of Board of Dental Examiners of Alabama ... 708
Decision and Order, In the matter of Victrex PLC ... 709
In the matter of Motorola Mobility LLC ... 710
Decision and Order, In the matter of Victrex PLC ... 710
Ian Conner, Fixer Upper: Using the FTC's Remedial Toolbox to Restore Competition (remarks of Feb. 8, 2020) 711
FTC v. Shkreli ... 712
H. Some Further Reading ... 713
XII. PRIVATE ENFORCEMENT ... 715
A. Overview ... 715
Private Injunctive Relief and Government Damages Actions ... 716
Antitrust Modernization Commission, Report and Recommendations (April 2007) ... 719
B. Antitrust Standing ... 722
1. The Elements of Standing ... 722
Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters ... 722
Novell, Inc. v. Microsoft Corp. ... 726
2. Antitrust Injury ... 729
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. ... 730
CASENOTE: Steves and Sons, Inc. v. JELD-WEN, Inc. ... 732
3. The Indirect Purchaser Rule ... 733
Hanover Shoe, Inc. v. United Shoe Machinery Corp. ... 734
Illinois Brick Co. v. Illinois ... 735
CASENOTE: Apple Inc. v. Pepper ... 738
Antitrust Modernization Commission, Report and Recommendations (April 2007) ... 739
4. "Efficient Enforcers" ... 740
CASENOTE: Gelboim v. Bank of Am. Corp. ... 741
C. Remedies II: Proving Antitrust Damages ... 742
Bigelow v. RKO Radio Pictures ... 743
CASENOTE: Conwood Co., L.P. v. U.S. Tobacco Co. ... 744
Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic ... 745
D. Limitations and Laches ... 747
In re Pre-Filled Propane Tank Antitrust Litigation ... 748
CASENOTE: Reveal Chat Holdco, LLC v. Facebook, Inc. ... 749
New York v. Facebook, Inc. ... 750
Steves and Sons, Inc. v. JELD-WEN, Inc. ... 753
Fraudulent Concealment ... 754
E. Interaction of Private and Government Enforcement ... 755
Steves and Sons, Inc. v. JELD-WEN, Inc. ... 756
New York v. Deutsche Telekom AG ... 756
In re Graphics Processing Units Antitrust Litig. ... 757
F. Some Further Reading ... 758

I. THE ANTITRUST PROJECT

A. Overview

Welcome to antitrust! This chapter gives a very short introduction to the U.S. federal antitrust system: its basic purpose; its legal foundations; its main institutions; its historical origin and development; and some of its frontiers and controversies. Much of this material will be explored in detail in the rest of the book: for now, the point is simply to sketch out the shape of what we mean by "antitrust," introduce some of its most important features, and provide some basic context for the journey ahead.

We will start in Section B with some of the basic ideas underpinning antitrust, including its distinctive concern with competition and market power. Section C introduces antitrust's main legal rules, including the three central pillars of the antitrust system—the statutory prohibitions on restraints of trade, monopolization, and anticompetitive acquisitions—as well its basic enforcement architecture. Section D identifies the key federal antitrust statutes in order of enactment. Section E gives a very brief history of the antitrust project, including changing views of its economic and social mission. Finally, Section F highlights some questions and ambiguities within the idea of "competition" that will underpin many of the topics we will explore in the rest of the course.

B. The Idea of Antitrust

The most basic definition of U.S. federal antitrust is probably something like this: it is the project of interpreting, applying, and enforcing a specific set of federal statutes, of which the most important are the Sherman Act of 1890 and the Clayton Act of 1914.

The antitrust statutes confer on courts and enforcement agencies a specific set of functions, of which the most important are: (1) prohibiting and remedying anticompetitive agreements; (2) prohibiting and remedying certain kinds of anticompetitive conduct by businesses with significant market power; and (3) prohibiting and remedying anticompetitive mergers and acquisitions.

What unifies antitrust is its fundamental concern with two organizing ideas: "*competition*," on the one hand, by which we mean something like "the process of rivalry between suppliers, or between purchasers, to be chosen as trading partners" and "*market (or monopoly) power*," on the other, by which we mean something like "the ability of a supplier or purchaser to impose less desirable terms (price, quality, etc.) on trading partners by virtue of a lack of competitive pressure."[1]

Antitrust touches very deep normative questions: that is, questions about what we should do or what it would be best to do. Our instincts about antitrust rules and practices will depend, in part, on what else we think about trading, markets, freedom, power, welfare, and the relationship between law and economics. For example: what roles should agencies and courts play in regulating the exchange of goods, services, and money among persons or businesses? What is a "free" market and in what ways is it "free"? Is it good: and, if so, why and under what circumstances? Whose interests should we protect or promote in shaping rules about markets, and how can we best do so in light of our understanding of how the world really works? When exactly can we say that competition is "fair," "legitimate," or "on the merits," and when and how—if at all—can or should we try to make economic interactions conform to those categories? How good are businesses, agencies, and courts at accurately figuring out the likely effects of particular practices and transactions? How often, and how harmfully, are courts and agencies likely to err, and how should we react to the threat of error? The very broad range of views about answers to these

[1] Despite the name, antitrust has nothing to do with "trust" in the everyday sense. When the first federal antitrust law, the Sherman Act, was enacted in 1890, one means of extending a business organization across state lines, and/or of combining separate corporate actors, involved the use of the legal "trust" device: a vehicle through which legal ownership and beneficial interest are separated. Among other things, this device enabled a business organization to carry on activities in multiple states, despite limitations imposed at the time by state corporations laws. *See, e.g.*, Herbert Hovenkamp, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991), 259–67.

questions—and the changes in the relative ascendancy of particular views over time—creates plenty of room for reasonable disagreement, and makes antitrust a rich and rewarding field.

But almost everyone who is professionally concerned with the federal antitrust laws agrees that, at the most basic level, our antitrust system can be understood as an effort to protect the process of competition, and to set some guard rails around the ways in which market power can be created or maintained, as part of an effort to promote the public interest. Once we move beyond this very fundamental level, we will encounter plenty of disagreement: including disagreement about what "competition" is and when it is good; what "market power" is and when we should tolerate or prohibit practices that create or maintain it; and what "the public interest," correctly understood, really requires.

The United States was among the earliest adopters of antitrust,[2] but today almost every jurisdiction of significant size around the world pursues some version of the antitrust (or "competition law") project. The European Union, for example, enforces a set of competition-law provisions in the Treaty on the Functioning of the European Union ("TFEU"); China has an Anti-Monopoly Law; India has a Competition Act; and so on. And although there are major differences between these different systems—including the substantive rules they express and the institutional arrangements for enforcing them—they are united by their central concern with the promotion of competition, and with the control of market power and/or the means of obtaining such power.

The core of the U.S. antitrust system—as we will see later in this chapter and throughout the rest of the book—consists of three main prohibitions: a rule against anticompetitive agreements (agreements in "restraint of trade") in Section 1 of the Sherman Act; a rule against the improper creation or maintenance of monopoly power ("monopolization") in Section 2 of the Sherman Act; and a rule against anticompetitive mergers and acquisitions in Section 7 of the Clayton Act. We will call these the three pillars of U.S. antitrust. Most competition-law systems have something like these three functions at their core: in the European Union, for example, they are performed respectively by Article 101 TFEU, Article 102 TFEU, and the EU Merger Regulation; in China, they fall under Articles 3(1), 3(2), and 3(3) of the Anti-Monopoly Law; in India, Sections 3, 4, and 5 of the Competition Act 2002; and so on.

Of course, different jurisdictions define and interpret these core functions in different ways. One prominent difference between the United States and most of the rest of the world is that most other competition-law systems (including those of the European Union, China, and India) prohibit not only unilateral conduct by a monopolist or dominant business that tends to create or maintain monopoly power through exclusion of rivals, but also certain forms of unilateral "exploitation" or abuse of that power, even if the conduct does not contribute to the magnitude or duration of the power.

U.S. antitrust law is also distinctive in that it empowers persons who are injured by an antitrust violation to sue, not just for a compensatory measure of damages, but for *treble* the damages suffered. When combined with the provision under Federal Rule of Civil Procedure 23 for class-action litigation, this rule has contributed to a private antitrust litigation landscape in the United States that is vastly more active than in most other jurisdictions. And this reality, in turn, shapes how courts think about antitrust rules and their consequences.

The core U.S. antitrust project—protecting the competitive process and guarding against the improper acquisition or maintenance of market power—may sound pretty straightforward. But on closer inspection we will soon see that things are more complicated than they may at first appear.

For one thing: we will soon realize that not all "competition" among businesses is the kind of thing we really want to encourage. To pick some extreme examples, we surely do not want to encourage businesses to blow up their rivals' factories, or threaten violence against their rivals' customers, in an effort to maximize their profits. We might also not want to allow an incumbent to extract commitments from critical suppliers or distributors that they will

[2] But not the first! Canada enacted a national antitrust law in May 1889. And at the state level, Kansas moved even earlier, passing an antitrust statute in March 1889. *See*, *e.g.*, Yang Chen, *Sherman's Predecessors: Pioneers in State Antitrust Legislation*, 18 J. Reprints Antitrust L. & Econ. 93 (1988); David Millon, *The First Antitrust Statute*, 29 Washburn L.J. 141 (1990).

never work with any competitor of the incumbent; or to buy up all its competitors; or to coordinate with rivals on prices, terms, or markets.

Defining the *desirable* kind of "competition" (*i.e.*, the kind that we want to encourage, sometimes expressed as "competition on the merits," "legitimate competition," or "fair competition") turns out to be a very complicated matter. In particular, it can be difficult in some cases to tell the difference between behaviors that are—either in some individual case or in general—socially beneficial and those that are socially harmful. We will soon start to disagree with one another about the likely effects of particular practices or particular legal rules, and about the relative importance of various benefits, harms, risks, and possibilities. We may also have different intuitions about the wisdom and consequences of various kinds of state "interference" in the market, or about the values and risks of "unconstrained" competition.[3] For example, we might think that it is best to be very conservative and think of anything that sounds unusual to us—such as, for example, agreements between a buyer and seller that limit their respective freedom in any way—as something presumptively suspect. But we may soon conclude that such a narrow view will lead us to prevent businesses from doing things that make everyone better off in the long run, and that building policy in this very restrictive way will harm people and the economy.

Ultimately, if we want to protect a version of the competitive process that can plausibly be thought appealing, we will soon find that we will need *other* standards to identify the boundaries of desirable competition in the real world, and we may disagree about how to spot those boundaries in concrete cases. "Legitimate competition" or "competition on the merits" turns out to be hard to define! We may also find that we value different outcomes of "competitive" processes: better terms for trading partners and consumers (like lower prices or higher quality); the promotion of innovation and investment; decentralization and rivalry; a resilient, polycentic economy; and so on.

And just as it can be hard to tell what kinds of competition are desirable, it can be hard to tell when market power really reflects a problem we should try to solve. The existence of market power is not always a sign that something bad has happened or is likely to happen. To illustrate, suppose that there are five mousetrap-makers with roughly equal shares of the market, until one day one mousetrap-maker has a brilliant idea and makes a mousetrap that is twice as good but half as expensive to make. The competitors simply can't match it (perhaps because the innovator secures a patent on its new design, or because rivals can't figure out how the innovation was achieved), and the innovating manufacturer becomes effectively the only game in town, with the rivals making only minimal sales.

In this example, the mousetrap manufacturer has acquired a ton of market power on most plausible definitions: it has an overwhelming market share, faces little real constraint from rivals, and can probably charge a price comfortably in excess of its costs. But the changes in the world from our initial five-player situation all seem to be beneficial: a new desirable product has been created; consumers have gained access to a new option at a great price; and they are in a situation that they prefer overall. After all, if they didn't prefer the new mousetrap at the new price, they would just continue to buy old mousetrap designs from the other competitors!

It is true, of course, the other competitors are worse off than they were, but competition is *always* bad for less successful competitors. It is inherent in competitive rivalry that the successful competitor succeeds at the expense of a rival, and that businesses that are less efficient and effective will lose share and may eventually be forced to exit the market. If "competition" is what we want to support and protect, we must be comfortable with that reality.

As the mousetrap example suggests, an increase in market power can be understood as an increase in the strength of trading partners' preference for the products or services of one business, compared to the next best available options. Thus: market power may result from the worsening or elimination of alternative options, or from the improvement of an existing one, compared to the status quo ante. And, in practice, those two phenomena are often interlinked: the very same practices that make the products or services of one business more appealing may simultaneously make rivals' products and services less appealing. Real-world behaviors frequently have both of these effects. This makes designing and applying antitrust rules a complex task.

[3] The scare quotes allude to the fact that, on the one hand, given the foundational role of the state in defining and enforcing the rules underpinning a market, it is not at all obvious when state action affecting markets should be described as "interference," or when competition should be considered "unrestrained." *See generally*, *e.g.*, Bernard Harcourt, THE ILLUSION OF FREE MARKETS: PUNISHMENT AND THE MYTH OF NATURAL ORDER (2012).

So: both "competition" and "market power" turn out to be a bit more complicated than they may initially sound. For now, it is enough to think of antitrust law as an effort to define and protect a desirable version of the process of competition, and to limit the ways in which market power can be created or maintained. But you should keep in mind that both halves of this project raise deep complexities: not everything that can be labeled "competition" is beneficial, and not everything that results in "market power" is clearly bad, nor the product of conduct that is clearly bad. So: in defining the forms of competition that antitrust should protect, and in defining the circumstances under which expanding market power is unlawful, we will need to turn to other values and guideposts.

The Idea of "Consumer Welfare"

In modern law, the most common view about what should guide antitrust law and policy—albeit one that is more controversial than it used to be—is that it should operate to make people better off overall than they otherwise would be, by prohibiting certain kinds of marketplace practices and transactions that tend to cause social harm. As you might expect, reasonable minds disagree about how antitrust should accomplish this goal! At present, the most common (but not universal) view among courts, enforcers, and scholars is that antitrust should be shaped in ways that will ultimately make market participants better off overall with respect to their buying and selling activities, by improving the efficiency of markets.[4] This is sometimes described as the promotion of "consumer welfare." We will talk about some of the analytical foundations of this view in Chapter II.

There is plenty of disagreement even within the consumer-welfare tradition about *whose* welfare really counts in such an assessment, how it counts, how it can be evaluated or measured, and what rules or heuristics we should use to try to reflect the welfare stakes of real cases.[5] Among other things, some commentators suggest that only the welfare of consumers or other buyers should matter in the design and application of antitrust rules, while others argue that the welfare of workers, input producers, and other trading partners should also matter in various ways.[6] Moreover, there is considerable controversy today over whether the pursuit of consumer welfare and/or efficiency

---

[4] *See*, *e.g.*, Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) (noting "the antitrust laws' traditional concern for consumer welfare and price competition"); Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15 (1984) (referring to "the consumer—whose interests the [antitrust] statute was especially intended to serve"); Reiter v. Sonotone Corp., 442 U.S. 330, 343 (1979) (indicating that "Congress designed the Sherman Act as a consumer welfare prescription") (internal quotation marks and citation omitted); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979) ("[When evaluating the possible application of a *per se* rule of illegality, a court should consider whether] the effect and . . . purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less, competitive.") (internal quotation marks and citation omitted); City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389, 408 (1978) (noting "the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender"); Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958) ("[The Sherman Act] rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions."; Siva v. Am. Bd. of Radiology, 38 F.4th 569 (7th Cir. 2022) (noting "antitrust's goal of promoting consumer welfare"); City of Oakland v. Oakland Raiders, 20 F.4th 441, 457 (9th Cir. 2021) ("The principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively[.]") (internal quotation marks, citation, and brackets omitted); United States v. Anthem, Inc., 855 F.3d 345, 366 (D.C. Cir. 2017) ("The principal objective of antitrust policy is to maximize consumer welfare by encouraging firms to behave competitively.") (internal quotation marks and citation omitted); Olympia Equipment Leasing Co. v. Western Union Telegraph Co., 797 F.2d 370, 375 (7th Cir. 1986) (noting shift "from the protection of competition as a process of rivalry to the protection of competition as a means of promoting economic efficiency").

[5] The current head of the Antitrust Division seems to have had this kind of thing in mind when he suggested that "consumer welfare is a catchphrase, not a standard." Jonathan Kanter, *Milton Handler Lecture* (remarks of May 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-new-york-city-bar-association.

[6] *See*, *e.g.*, Laura Alexander & Steven C. Salop, *Antitrust Worker Protections: Rejecting Multi-Market Balancing as a Justification for Anticompetitive Harms to Workers*, 90 U. Chi. L. Rev. 273 (2023) (arguing that harms to workers should not be justifiable in antitrust analysis by benefits to consumers); Elyse Dorsey et al., *Consumer Welfare & the Rule of Law: The Case Against the New Populist Antitrust Movement*, 47 Pepperdine L. Rev. 861 (2020); Christine S. Wilson, *Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get* (remarks of Feb. 15, 2019), 12–18 (outlining a case for a total-welfare standard); Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336 (2010); *see also* Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978) (proposing a total-welfare standard under the label "consumer welfare"); A. Douglas Melamed, *Antitrust Law and its Critics*, 83 Antitrust L.J. 269, 271 (2020) ("[I]ncreased market power means the ability profitably to increase price or otherwise disadvantage trading partners through a reduction in the competitive efficacy of actual and potential rivals.").

is really a fair and accurate characterization of the best version of our antitrust project.[7] Certainly, in earlier decades, as we will see, courts and others had often characterized the goals of the antitrust laws in very different terms, including by reference to concerns with power, freedom, and the protection of small businesses.[8]

It is important to appreciate right from the start that promoting the welfare of society (or, at least, preventing certain things that harm it) might involve tolerating some practices that cause some harm in the short term.

To see this clearly, consider a price increase by a monopolist. Should we ban price increases—or maybe just "unreasonable" price increases—by monopolists? We might approach this question by pointing out that a price increase is obviously harmful to consumers in the short term: after all, they must pay more to get the product or service! But not so fast. That same price increase creates an opportunity and incentive for other competitors to enter the market and provide competition while making a profit. Moreover, imagine what would be necessary for antitrust law to *prohibit* such price increases: on the most natural versions of this exercise, an agency or a court would have to set a "correct" or "best" price for a product or service. And that decision, in turn, would have some consequences. For one thing, such a price cap would tend, by limiting the profits available from the provision of that product or service, to discourage businesses from investing in the first place (and to encourage them to put their capital, instead, into markets where no such price cap existed): so it would have the effect of reducing society's access to the relevant product or service, and stifling innovation that might otherwise take place. For another, it would also be a truly heroic task for government to figure out the "best" price (even if we could reach agreement on what we meant by "best" here) for even a single product or service, and to keep adjusting that price in light of changes in market conditions.

For these reasons among others, most economists agree that government price controls would do much more harm than good under most circumstances—at least when competitive markets are possible[9]—and that allowing businesses to charge whatever price they please for the products and services they supply is probably the general rule that best serves social welfare in the long run. Even John Sherman, the Senator who introduced the first federal antitrust law (which still bears his name), emphasized on the Senate floor during the debates that he did not intend antitrust law to disturb this principle, even for the least popular companies: "I am inclined to think that the Standard Oil Company can sell its product at just such prices as it pleases[.]"[10]

This point—that rushing to condemn or prohibit something that seems harmful or suspicious is not always in the long-run interests of society or consumers—can be generalized, with some caution. Many practices and

---

[7] *See*, *e.g.*, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 Antitrust Bull. 479 (2019); Gregory T. Gundlach & Diana Moss, *The Role of Efficiencies in Antitrust Law: Introduction and Overview*, 60 Antitrust Bull. 91 (2015); Jonathan B. Baker & D. Daniel Sokol, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 Fordham L. Rev. 2175 (2013); Joseph Farrell & Michael L. Katz, *The Economics of Welfare Standards in Antitrust*, 2 Comp. Pol'y Int'l 3 (2006); Richard A. Posner, ANTITRUST LAW (2001); Robert H. Lande, *Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust*, 58 Antitrust L.J. 631 (1989); Eleanor Fox, *The Battle for the Soul of Antitrust*, 75 Calif. L. Rev. 917 (1987); John J. Flynn & James F. Ponsoldt, *Legal Reasoning and the Jurisprudence of Vertical Restraints: The Limitations of Neoclassical Economic Analysis in the Resolution of Antitrust Disputes*, 62 N.Y.U. L. Rev. 1125 (1987); Robert Pitofksy, *The Political Content of Antitrust*, 127 U. Pa. L. Rev. 1051 (1979); Kenneth G. Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?* 125 U. Pa. L. Rev. 1191 (1977).

[8] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) ("Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster."); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) ("It is competition, not competitors, which the Act protects. But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision."); United States v. Alcoa, 148 F.2d 416, 428 (2d Cir. 1945) ("[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before them."); Appalachian Coals v. United States, 288 U.S. 344, 359 (1933) ("charter of freedom").

[9] This is not always the case! In some areas of economic activity, competition may not be sustainable, and in such areas policymakers might consider replacing the competitive market with a regulated monopoly supervised in various ways by the government. This is sometimes called "utility regulation." We will have little to say about regulated monopolies in the rest of this book: for when competition is impossible, antitrust usually has no role to play (at least so long as the regulated monopoly stays in the regulated market!). But the topic is a rich and important one. *See*, *e.g.*, Morgan Ricks, Ganesh Sitaraman, Shelley Welton, & Lev Menand, NETWORKS, PLATFORMS, AND UTILITIES: LAW & POLICY (2023).

[10] 21 Cong. Rec. 4090 (May 1, 1890).

transactions may seem at first to have some adverse impact on other market participants, including competitors. For example, when a large company enters into an exclusivity agreement with a valuable supplier, or when two rivals pool their resources to create a joint product, the downside for competition may be clear. After all, it is easy to just ask "why would they need to do that?" without really listening to the answer. But thorough antitrust analysis generally does not stop there. It asks, for example, whether those practices might be playing an important role in making possible some new or more efficient output that will be beneficial overall, and whether a prohibition on that practice might do more harm than good—including through its deterrent effects.

But caution and skepticism should go both ways. Just as there are dangers in being too quick to condemn a practice, there are dangers in being too willing to accept a flimsy justification from a business. In the real world, the subjects of antitrust scrutiny, and their executives and employees, very seldom throw up their hands and tearfully confess that their behavior is anticompetitive and harmful. Instead, businesses will often be able to point to some plausible "legitimate reason" for conduct, and that reason may even have been a genuine motivation for the practice. But this is usually the beginning, not the end, of antitrust analysis: conduct can nevertheless turn out to be both harmful and illegal even if an appealing label can be applied, or if it was undertaken with perfectly good intentions. Antitrust prohibits more than just the most flagrant and nakedly anticompetitive forms of wrongdoing.

The same caution and skepticism should also be applied to complaints and testimony from other market participants. Competitors and trading partners may be valuable witnesses in an investigation or litigation, but they too have their own interests. They may find it strategically helpful to cry foul to an agency or court in order to get one over on a market rival, or to extract some beneficial concession in exchange for support, or to increase pressure on a trading partner with whom they are locked in negotiations. And they may have an interest in opposing a practice or transaction simply because it makes a rival a more effective competitor. Similarly, a market participant might provide supportive testimony regarding the actual or probable effects of a practice because they stand to share in the profits of it, or because they do not fully understand its implications.[11]

All this means that good antitrust analysis requires penetrating through forms and labels, and grappling with the economic reality underneath. This usually requires more than a cursory glance at a practice or transaction (though sometimes this is enough!), and it *always* requires some even-handed skepticism of the viewpoints and labels offered by interested participants on both sides of an issue.

As you read through the cases and other materials in this book, ask yourself how each of the parties would characterize the practice or transaction at issue. It is good to get into the habit of seeing both sides whenever you can, realizing that each side may be in perfectly good faith about their understanding of what is "really" going on, and reflecting on which version you find more persuasive and why. It is also worth remembering that our record of evidence on many important (and even basic) issues of antitrust policy, including the effects of particular practices, or categories of practices, is often very far from complete. We all rely on our own intuitions and personal experiences in forming our views about what antitrust rules would be best—and those intuitions and experiences will differ!

As we have already noted, the dominant view today is that antitrust rules should be shaped to protect the participants in society, including consumers—and probably workers and other intermediate trading partners too—in their capacities as buyers and sellers of products and services. But some commenters and writers have different views. Some people think that the phrase "consumer welfare" has outlived its practical usefulness, and we should instead talk more specifically about whose welfare matters and how we will choose among different interests when they conflict. Other commenters reject the idea that antitrust should be motivated by welfare considerations at all. Some, for example, believe that antitrust law should be shaped and applied in ways that help to protect against political or social risks, like undue business size or power as such, rather than just harm from increased market power. Others believe that antitrust should independently pursue goals like commercial fairness or distributional equity, even when those goals conflict with the promotion of welfare. These debates are important, and it is worth spending some time familiarizing yourself with some of the writings from outside the

[11] One on occasion, Ronald Reagan's chief antitrust enforcer Bill Baxter said that "the most useful thing we can know about a merger is what the competitors think about it," and that when competitors oppose it, "my instinctive reaction is to approve the merger." Federal Antitrust Policy, Hearing Before the Committee on Small Business, U.S. Senate, 97th Cong. 111 (1981).

welfarist tradition. Those perspectives have not played an important role in influencing courts in recent decades, but some critics of the status quo have recently become prominent and influential in areas outside antitrust litigation. Antitrust is undergoing a process of deep examination and criticism, and some change may be in the wind. Only time will tell. In short: you have picked a very exciting time to study and think about antitrust!

C. Antitrust Law in a Nutshell

The phrase "antitrust laws" generally refers to a set of federal statutes and the enormous body of court and agency precedent interpreting and applying them. The most important antitrust statutes are the Sherman Act of 1890 and the Clayton Act of 1914 (as amended by the Celler-Kefauver Act of 1950); other important antitrust statutes, in chronological order, include the Federal Trade Commission Act of 1914; the Robinson-Patman Act of 1936; and the Hart-Scott-Rodino Act of 1976. Still other statutes—such as the Foreign Trade and Antitrust Improvements Act of 1998 and the Antitrust Criminal Penalty Enhancement and Reform Act of 2004—have amended or modified the basic antitrust framework in certain respects without disturbing the rules at the heart of the system.

As you might expect, these statutes contain many different provisions: too many to enumerate or discuss in this short introductory chapter, and more than we will meet in this entire book. Some of these provisions impose substantive obligations; some create institutional rules for government enforcement of the antitrust laws; others structure antitrust litigation among private actors. But three provisions in particular are of utterly central importance to modern antitrust: they effectively constitute the three foundational pillars of the U.S. antitrust system. Each of these three core rules is expressed in broad and general language: their meaning has been elaborated gradually over decades of adjudication, enforcement, and scholarship. Let's meet them in turn.

1. The Three Pillars

a) Sherman Act Section 1: Restraint of Trade

The first pillar of U.S. antitrust law is Section 1 of the Sherman Act (15 U.S.C. § 1), which prohibits agreements (specifically, "contracts," "combinations," and "conspiracies," although nothing turns on any distinction between them) that are "in restraint of trade." In modern law, Section 1 is understood to prohibit agreements that are unreasonably and unjustifiably anticompetitive. Section 1 provides in full:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Agreements are generally divided, for analytical purposes, into those between actual or potential competitors ("horizontal") and those between parties at different levels of a supply chain ("vertical"), with the former category generally attracting closer scrutiny from agencies and courts.

Analysis of an agreement under Section 1 involves the application of one of three main standards of legality. Horizontal agreements that are blatantly (or "nakedly") anticompetitive, with little or no redeeming procompetitive virtue, are usually considered automatically or "*per se*" illegal, regardless of their context, purpose, or effects. Bare agreements among competitors to fix prices or divide markets fall into this category. Agreements that are obviously harmful to competition but don't quite qualify for *per se* treatment are sometimes analyzed under a kind of intermediate standard often called "quick look" review, involving a presumption of illegality which the defendant has an opportunity to displace. Agreements that fall outside this category—representing the vast majority of agreements encountered by antitrust agencies and courts in the real world—are analyzed under a standard called the "rule of reason." Formulations of the rule of reason differ, but the core concept is that a court

must determine whether the competitive harms of the agreement are outweighed or justified by its positive effects on competition.

We will talk at length about Section 1 in Chapters IV, V, and VI.

b) Sherman Act Section 2: Monopolization

The second pillar is Section 2 of the Sherman Act (15 U.S.C. § 2), which prohibits monopolization, attempted monopolization, and conspiracies to monopolize. In modern law, Section 2 is understood to prohibit conduct by a company with monopoly power, or something approaching such power, that impermissibly tends to create, maintain, or extend monopoly power. It provides in full:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Monopolization law is notoriously puzzling. Courts and agencies have not generally done a good job of explaining when exactly the acquisition, maintenance, or increase of monopoly power will constitute "monopolization" rather than lawful "competition on the merits." Cases are brought less often under this pillar by federal enforcers than under either of the other two pillars: in part, this may reflect the complexity and unpredictability of the underlying law; in part, it may reflect the fact that monopoly power is a high bar and monopolists are not common in our economy; and in part, it may also reflect a background reality that courts and agencies are particularly cautious about imposing liability under Section 2, perhaps for fear of punishing big companies for competing too aggressively.

However, despite the general confusion about the unifying principles, if any, animating Section 2, courts have provided somewhat greater clarity regarding the standards of legality that apply to specific kinds of practices, such as the use of exclusivity commitments to lock up suppliers or distributors, or the practice of "predatory pricing" (*i.e.*, charging an unsustainable low price to drive rivals out of the market, with the prospect of enjoying monopoly power thereafter).

We will focus on Section 2 in Chapter VII.

c) Clayton Act Section 7: Mergers and Acquisitions

The third pillar of our antitrust system is Section 7 of the Clayton Act (15 U.S.C. § 18), which prohibits the acquisition of stocks, shares, or assets, where "the effects of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." The most important language provides in relevant part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Mergers, like agreements, are generally divided for analytical purposes into "horizontal" transactions, which unite actual or potential competitors, and "vertical" transactions, which unite companies at different levels of the supply chain (or suppliers of complements[12]), with the former category generally attracting closer scrutiny from agencies and courts. Mergers that are neither horizontal nor vertical virtually never raise concerns today. Mergers may harm competition by creating or maintaining market power, either through the elimination of actual or potential

[12] In very general terms, complements are products or services that are more valuable together. More technically, they are products that exhibit negative cross-elasticity of demand: when the price of one goes up, demand for the other goes down. We will talk about complements below. *See infra* § II.C.2.

head-to-head competition between the parties (so-called "unilateral" competitive effects), or by facilitating tacit coordination, or interdependent parallel conduct, among the participants in the market (so-called "coordinated effects").

Merger law underpins the practice of "merger review," which is a major part of the work of the federal antitrust enforcers. Pursuant to the Hart-Scott-Rodino Act of 1976, proposed mergers and acquisitions that meet or exceed certain size thresholds must be notified to the antitrust agencies before they take effect, to give the agencies a chance to review them for competitive concerns and, if necessary, challenge them in court by seeking an injunction to block the deal. The agencies may also review proposed transactions that are not subject to HSR notification ("unreportable" deals) as well as transactions that have already closed ("consummated" deals), though it is widely recognized that it can be hard to unwind a deal that has already closed. The agencies have issued successive "Merger Guidelines" to explain the analytical framework that they use in analyzing mergers and acquisitions; these are periodically revised to reflect changes in economic learning and in enforcement practice.

We will turn to merger law in Chapter VIII.

2. Enforcement Architecture

The federal antitrust laws are enforced, in various ways, by the federal government, the states, and by private persons (including consumers, trading partners, and competitors).

Federal government enforcement includes both civil and criminal enforcement. Although both Sections 1 and 2 of the Sherman Act create felonies, federal criminal enforcement of the antitrust statutes, handled by the Department of Justice, is sharply limited today. For many decades, only a small subset of violations of Section 1 of the Sherman Act has been prosecuted criminally: namely, conduct that is "*per se* illegal," involving very flagrant violations of the antitrust laws, like outright price-fixing agreements. Penalties in criminal prosecutions can include imprisonment and criminal fines. DOJ extradites and prosecutes people who participate in cartels overseas that harm U.S. markets. In recent decades, the Department of Justice has not attempted to criminally prosecute conduct that is plausibly related to a procompetitive purpose, even if that conduct might constitute a civil violation of the law. In 2022, DOJ obtained a guilty plea to a criminal violation of Section 2 (*i.e.*, monopolization) for the first time in decades, launching an effort to revive criminal enforcement of monopolization law.[13]

Federal civil enforcement of the antitrust laws is handled by two agencies with overlapping jurisdiction: the Antitrust Division of the Department of Justice, on the one hand, and the Bureau of Competition of the Federal Trade Commission, on the other. DOJ enforces the antitrust laws directly; the FTC does so through the prohibition on "unfair methods of competition" in Section 5 of the FTC Act, on the basis that that phrase includes at least everything that is prohibited by the antitrust laws.[14] The two agencies have developed complementary bodies of experience and expertise over many years, and they allocate antitrust investigations between themselves through an informal (and largely nonpublic) process known as "clearance." There are some important differences between the agencies, including their structure, legal powers, and procedural options for investigating and challenging practices and transactions.[15] Federal civil enforcement generally results in injunctive relief to terminate and remedy unlawful conduct. Violations of an FTC cease-and-desist order may also result in the imposition of civil penalties.

States are empowered under the Sherman Act to bring claims under the antitrust laws for damages (whether suffered by the state directly or, in what is sometimes called a *parens patriae* claim, suffered by the state's residents) or injunctive relief. State enforcement is handled by the Offices of the Attorney General in each state or territory of the United States. Not every state AG office employs lawyers with antitrust expertise, but some (such as California, Texas, and New York) have large and experienced teams of antitrust enforcers. State Attorneys-General have played a leading role in some prominent recent antitrust matters, including the (unsuccessful) challenges to the Sprint / T-Mobile merger and certain "anti-steering" practices of American Express, and a range

[13] *See infra* § XI.C.2. (describing DOJ's criminal antitrust enforcement program).

[14] *See infra* § XI.B.2. (describing the FTC's powers).

[15] *See infra* § XI.D. (describing the two-agency model, its implications, and its complications).

of hospital merger challenges, as well as a number of lawsuits against large tech platforms. State civil enforcement may result in injunctive relief to terminate and remedy unlawful conduct, as well as an award of treble damages. Separately, most states also have their own state antitrust statutes, which are generally close to federal law but may differ in material respects. We will not discuss state antitrust statutes much in the rest of this book, but you should know that they exist and can be important.[16]

Most antitrust enforcement in the United States is private. Persons injured by antitrust violations—including customers, suppliers, competitors, and consumers—often have a right to sue the wrongdoer in federal court. Such suits may be brought individually or, in appropriate cases, pursuant to the class action mechanism in Federal Rule of Civil Procedure 23. Remedies may include injunctive relief to terminate and remedy unlawful conduct, and treble damages.

We will discuss government antitrust enforcement (including the FTC and DOJ, as well as the states) in some detail in Chapter XI, and private enforcement in Chapter XII.

3. Some Illustrative Easy and Hard Cases

To complete our nutshell tour, and to make concrete some of the general discussion above, it may be helpful to consider some concrete hypotheticals that would constitute "easy cases" under the antitrust laws, with a reasonably clear answer, and some that would constitute "hard cases," turning on a close assessment of the evidence.

Some easy cases include the following:

- **A price-fixing cartel.** Suppose that a group of competing hotel chains meet on video-conferencing software and agree that, rather than competing to offer the best room at the lowest price, they should simply set (or "fix") a uniform, higher price for hotel rooms.
    - This is almost certainly an automatic (or "per se") violation of Section 1 of the Sherman Act, and could be prosecuted criminally by the Department of Justice. In addition, if the agreement took effect and consumers ended up paying higher prices as a result, those consumers could sue (probably as a class under Rule 23) to recover treble damages for their injury and to obtain injunctive relief to bring the cartel agreement to an end.

- **Unjustified use of highly exclusionary exclusivity.** Suppose that, for almost all uses, there is only one commercially viable supplier of touchscreens in the entire world. Upon learning that another firm is thinking about getting into the touchscreen-making business, the lone incumbent convinces all the world's major device manufacturers—who buy the touchscreens—to each commit that, for a period of twenty years, they will not purchase touchscreens from any other supplier. The commitment does not help to improve the efficiency of anyone's business operation: its only purpose, and only effect, is to lock up the key customers and kill the threat of competition from the potential entrant. Upon learning about these deals, the would-be rival abandons its plans and leaves the incumbent undisturbed in possession of the touchscreen market.
    - This is almost certainly a violation of Section 1 of the Sherman Act, as an agreement in restraint of trade, and also a violation of Section 2 of the Sherman Act, as an act of monopolization (specifically "monopoly maintenance," as it involves protecting an already-acquired monopoly). DOJ or the FTC could sue for injunctive relief to eliminate the restriction on manufacturer freedom to buy from rivals. Injured parties (including trading partners and excluded rivals) could sue for treble damages and injunctive relief.

- **A plainly anticompetitive merger.** Suppose that there are only three book publishers in the United States, and that they have been locked in bitter competition for years, as each struggles to offer lower prices and better books to consumers, and to offer higher advance fees to authors. One day, two of the

[16] *See, e.g.*, ABA Section of Antitrust Law, STATE ANTITRUST PRACTICE AND STATUTES (2014).

publishers announce that they have reached an agreement to merge with one another, having calculated that this would significantly reduce the intensity of competition and significantly increase their profits.
  - This is almost certainly a violation of Section 7 of the Clayton Act, as a transaction that may have the effect of substantially lessening competition, or the tendency to create a monopoly. DOJ or the FTC, and/or consumers or trading partners, could sue for injunctive relief to block the transaction before the deal closes.

On the other hand, some hard cases might include the following:

- **A joint venture in a somewhat concentrated market with serious procompetitive benefits.** Suppose that there are four or five reasonably competitive suppliers able to meet the federal government's need for an important defense product: say, a particular kind of radar system. Two of the leading suppliers propose to enter a joint bid rather than separate competing bids. They predict that the resulting team would be able to offer a product of higher quality than either competitor would manage alone; however, the elimination of one competitor seems likely to result in some lost competitive pressure.
  - This would raise concerns under Section 1 of the Sherman Act, as an agreement among competitors that could result in overall harm to competition. But the promise of serious competitive benefits from the collaboration—and perhaps other factors, such as the presence of a sophisticated and powerful buyer, the existence of multiple credible alternatives, and perhaps the nature and structure of the procurement process—could ultimately allay the concerns presented by the deal. Careful analysis would be needed to determine the harmful and beneficial tendencies of the transaction, and the extent to which cooperation was genuinely necessary to obtain any relevant benefits.

- **An exclusive deal with a monopolist device manufacturer regarding a valuable input.** Suppose that an incumbent device monopolist enters into an exclusive partnership with an important component supplier, which will support the development of new and valuable components, but which will deny rivals the opportunity to buy those components from the supplier for a period of five years. There is evidence that that supplier could achieve some of the research benefits independently; but the evidence also shows that the partnership will significantly increase the scope of what is technically possible, including by allowing the parties to share information and know-how more extensively than they would otherwise be able and willing to do.
  - This could raise concerns under Sections 1 of the Sherman Act, as an agreement that may have eliminated or restricted competition, and under Section 2 of the Sherman Act as conduct that may improperly increase or maintain the incumbent's monopoly power. But the significant benefits for competition, including the prospect of additional innovation that could not otherwise be achieved, and the fact that rivals have access to some plausible alternatives, will complicate matters. Ultimately, a court would have to determine whether the agreement will "substantially foreclose" rivals' access to inputs in ways that would threaten competition, and if so whether its benefits are sufficiently significant and likely to outweigh the harms.

- **A merger with ambiguous competitive effects.** Suppose that a major metropolitan center, with a river running through the center, was served by five hospitals, of which three were located on the west side of the river and two on the east side. Evidence suggests that travel around the city is generally fairly easy for most residents, although some residents prefer not to cross the river. Two of the three hospitals on the west side—the two smallest hospitals in the city—propose to merge, in order to access some significant complementarities and efficiencies that would not otherwise be available.
  - This would raise concerns under Section 7 of the Clayton Act, as a merger that may lead to a substantial lessening of competition by eliminating an important competitive constraint on the merged firm (particularly for the business of west-side residents that are unable or unwilling to cross the river), or by contributing to an environment of less vigorous price competition by facilitating strategic coordination ("tacit collusion") among the remaining hospitals. But the existence of other competitive alternatives, and the fact that the merged firm might be a more

aggressive competitor overall, could ultimately dispel competitive concerns. Careful analysis would be needed to determine the overall competitive consequences of the transaction.

NOTES

1) The United States has, by global standards, an unusually active antitrust private-litigation scene. How, if at all, do you think the availability of private treble-damages antitrust litigation should affect the content or interpretation of antitrust rules? How, if at all, do you think it should affect the antitrust agencies' choice of cases to investigate and prosecute?
2) What do you see as the principal advantages and disadvantages of a welfare-focused antitrust law? What do you think is the most attractive alternative and why?
3) Should antitrust law and enforcement be designed wholly with respect to the desirability of particular outcomes (what a philosopher might call "consequentialist" logic)? Are there particular rights, liberties, duties, or interests at stake here that antitrust should take seriously as well or instead?
4) What are your intuitions about the wisdom and utility of a rule against the mere exploitation of monopoly power, like the charging of high "monopoly" prices? If Congress wanted to introduce such a rule, how would you design its content and enforcement architecture?
5) Looking at the groups of "easy" and "hard" hypotheticals, are there any that you think antitrust law should or might better classify in the other group (in other words, should any of the easy cases be hard, or vice versa)?
6) What are the advantages and disadvantages of subjective intention as a measure of legality in antitrust cases?
7) Private plaintiffs lose the majority of antitrust cases that they file. How could we tell if they are losing "too many" in an overall sense: that is, if courts are systematically too pro-defendant? (And what values or objectives are you drawing on?) Outline an empirical study that would help us investigate this question.

D. The Federal Antitrust Statutes

1. The Sherman Act of 1890

The first federal antitrust statute was the Sherman Act of 1890. Enacted following popular discontent with large business consolidations in the United States—and particularly the conduct of certain large business consolidations toward agricultural and consumer interests—the Sherman Act introduced, in its first two sections, two of the three pillars of the U.S. antitrust system, in language that has remained essentially unchanged since then. As we have already seen, Section 1 established the prohibition on contracts, combinations, and conspiracies in restraint of trade, and Section 2 established the prohibition on monopolization, attempted monopolization, and conspiracy to monopolize, as described above.[17] As we will see later in this chapter, some of the Sherman Act legislators appear to have thought (or, at least, stated) that, at least to some extent, they were incorporating and codifying ideas that already existed at common law. But the Sherman Act turned out to mark a significant break with the common law, and a fresh start for what would become known as antitrust.

The Sherman Act gave federal courts jurisdiction over antitrust claims, gave injured persons the right to sue for treble damages, and empowered the United States to bring actions for injunctive relief "to prevent and restrain" violations of the new law.

2. The Federal Trade Commission Act of 1914

The Federal Trade Commission Act of 1914 was driven by dissatisfaction with the first generation of antitrust enforcement, which had generally been weak, inconsistent, and not always aimed at its original targets. This dissatisfaction led to calls for a new agency with a special focus on economic policy and competition enforcement. With support from President Woodrow Wilson and his economic adviser Louis Brandeis, the FTC was intended to offer unique expertise on the operation of markets and to help guard against anticompetitive practices.

[17] 15 U.S.C. §§ 1, 2.

The new agency was led by a bipartisan Commission of five members, nominated by the President and confirmed by the Senate, led by a Chair chosen by the President from among the five Commissioners. Section 5 of the Act empowered the FTC to prohibit "unfair methods of competition": a phrase designed to include, but reach more broadly than, the existing prohibitions of the Sherman Act.[18] More than two decades later—after the Supreme Court had made clear that Section 5 did not prohibit misconduct that did not distort competition[19]—Section 5 would be amended by the Wheeler-Lea Act of 1938 to introduce a second prohibition on "unfair or deceptive acts or practices." This would create the FTC's parallel consumer protection jurisdiction.

The FTC is not only an additional antitrust enforcer: it was also intended to be a complementary one. Accordingly, it had unique powers that differed from those of DOJ. Unlike DOJ, which enforced the antitrust laws by suing as a plaintiff in federal court, the FTC's original enforcement method was administrative. The FTC would issue a cease and desist order to a wrongdoer; if the wrongdoer subsequently violated that order, civil penalties would be imposed in an order enforcement proceeding.

It was not until 1973—in a provision introduced by the peculiar vehicle of the Trans-Alaska Pipeline Act—that the FTC gained a limited power to litigate in federal court. The new Section 13(b) of the FTC Act entitled the FTC to sue in federal court to obtain injunctive relief against a person who "is violating, or is about to violate" the laws that the FTC enforces.[20] This was a critical means of getting a preliminary injunction to stop proposed mergers: something that had previously been a serious problem for the FTC.[21] But 13(b) did not create a plenary power to litigate in federal court. In 2019, an appellate court held that this language meant that the FTC could not sue in federal court those who *had previously* violated the law but were no longer doing so.[22] And in 2021, the Supreme Court held that Section 13(b) did not authorize the Commission to obtain an injunction requiring the payment of money, such as disgorgement.[23]

3. The Clayton Act of 1914

Passed right on the heels of the FTC Act, the Clayton Act was a broader antitrust reform statute, containing a package of new measures. Perhaps most importantly, Section 7 of the Act introduced a prohibition on anticompetitive mergers and acquisitions: establishing the third pillar of the antitrust framework. Mergers had previously been successfully challenged as Sherman Act violations, but a question mark had hung over the limits of the Sherman Act as a merger-control tool: Section 7 was intended to remove all doubt. In its original form, Section 7 covered only acquisitions of stock (creating a peculiarly obvious loophole for transactions that involved the purchase of assets rather than shares) and was focused by its terms on loss of competition "between" the parties (raising a question of whether it was limited to transactions among actual or potential competitors: that is, what we would today call "horizontal" transactions).

The Clayton Act also contained a package of reforms to existing non-merger antitrust enforcement. Among other things, it introduced a reframed private right of action for victims of antitrust violations, allowing injured persons to sue wrongdoers for treble damages and injunctive relief. It also expressly exempted labor unions from the reach of antitrust condemnation, in an effort to stop the use of antitrust as an anti-union device. (The federal courts did not fully absorb this point until Congress came back to it again in the Norris-LaGuardia Act of 1932 and put the matter beyond reasonable doubt.) The Clayton Act also introduced specific rules prohibiting certain practices, such as: certain kinds of price discrimination; the use of exclusionary conditions in relation to the sale of commodities; and service as director or officer in multiple competing businesses (sometimes generally referred to as the creation of "interlocking directorates"). These rules were intended to complement and reinforce the existing Sherman Act prohibitions.

---

[18] 15 U.S.C. § 45.

[19] *See* FTC v. Raladam Co., 283 U.S. 643, 649 (1931).

[20] 15 U.S.C. § 53(b).

[21] *See* FTC v. Dean Foods Co., 384 U.S. 597, 607 (1966) ("[E]xperience shows that the Commission's inability to unscramble merged assets frequently prevents entry of an effective order of divestiture.").

[22] FTC v. Shire ViroPharma, Inc., 917 F.3d 147 (3d Cir. 2019).

[23] AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

4. The Robinson-Patman Act of 1936

The Robinson-Patman Act was enacted in 1936, largely as a result of pressure from small businesses—especially independent grocery stores—unhappy with the better prices and terms being granted to large national chains.[24] The Robinson-Patman Act prohibits sellers from setting discriminatory prices for commodities where such discrimination may harm competition: (a) among the discriminating seller and its own competitors (so-called "primary line" discrimination); (b) among the buyers and their competitors (so-called "secondary line" discrimination); or (c) among the customers of the buyers (so-called "tertiary line" discrimination).[25] The Act creates defenses to what would otherwise be illegal discrimination, including on grounds that the discrimination was related to differences in the seller's costs, or that the discriminatory treatment was an effort to meet competition.[26] Either private plaintiffs or the federal government can bring suit for violations.[27]

The Robinson-Patman Act has been the subject of intensive criticism for many decades, because it is aimed at a practice—charging different prices to different sellers—that is generally good, not bad, for consumers.[28] (In brief, the point is that it may be profitable to offer a lower price to a more efficient, appealing, or successful buyer, or as part of an effort to induce entry or expansion, and that consumers will lose out, and overall prices will be higher, if that lower price is prohibited on the ground that it hurts other competitors.[29]) The Act's operation is exemplified by cases like *Morton Salt* (penalizing a salt manufacturer for offering volume discounts on salt to sellers who bought in larger quantities, despite the cost savings from doing so, with the result that consumer prices had to be raised in order to benefit smaller retailers)[30] and *Utah Pie* (imposing liability on market entrants for discounting to win share from a local incumbent in a highly competitive market).[31] The Act continues to play a role in private litigation, but the federal government has not brought an enforcement action in many years.[32] In 2022, the FTC signaled renewed interest in Robinson-Patman enforcement.[33]

5. The Celler-Kefauver Act of 1950

The Celler-Kefauver Amendments were a package of statutory amendments enacted in 1950 to amend Section 7 of the Clayton Act—that is, the merger control provision—to correct deficiencies and loopholes that, by that time, had become painfully clear. These amendments had three central purposes: *first*, to extend Section 7 to acquisitions of assets, as well as acquisitions of stock;[34] *second*, to clarify that Section 7 was not limited to what we would today call horizontal deals between competitors (the original version of Section 7 was focused on competition "between" the parties to the transaction[35]); and, *third*, to introduce the concept of a "line of commerce"—*i.e.*, what we would

---

[24] 15 U.S.C. § 13.

[25] Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).

[26] *See generally* Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1145–54 (1983); Gordon F. Hampton, *Defenses Under The Robinson-Patman Act*, 37 Antitrust L.J. 65 (1967).

[27] 15 U.S.C. §§ 15 (damages), 26 (injunction).

[28] *See*, *e.g.*, U.S. Department of Justice, *Department of Justice Report on the Robinson-Patman Act* (1977); Antitrust Modernization Committee, REPORT AND RECOMMENDATIONS (April 2007), 317-18.

[29] *See* Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125 (2000); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064 (2005).

[30] FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[31] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[32] See, e.g., *Brief of* Amicus Curiae *The Federal Trade Commission in Support of Defendants-Appellants and Reversal*, Woodman's Food Market, Inc. v. The Clorox Co., Case No. 15-3001 (7th Cir. filed Nov. 2, 2015) 4 ("The FTC historically played a central role in enforcing the Robinson-Patman Act. . . . But the FTC has not brought an action to enforce Sections 2(d) or 2(e) since 1988."); Decision & Order, *In the matter of McCormick & Co.*, FTC Dkt. No. C-3939 (F.T.C. Apr. 27, 2020) (accepting consent decree). *See generally* Timothy J. Muris, *How History Informs Practice – Understanding the Development of Modern U.S. Competition Policy*, https://www.ftc.gov/sites/default/files/documents/public_statements/how-history-informs-practice-understanding-development-modern-u.s.competition-policy/murisfallaba.pdf (Nov. 19, 2003), 13 ("At the FTC, the decline in RP enforcement began in the 1970s and continued through the subsequent decades.").

[33] *See*, *e.g.*, Alvaro M. Bedoya, *Returning to Fairness* (remarks of Sept. 22, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

[34] This limitation was a serious loophole in practice. *See*, *e.g.*, FTC Annual Report 1928, 18–19 (noting that "the effectiveness of the act has been materially lessened" as a result of decisions confirming that the Clayton Act, as it then stood, did not cover asset transactions).

[35] *See*, *e.g.*, Jason C. Blackford, *Vertical Acquisition and Section 7 of the Clayton Act*, 17 W. Res. L. Rev. 102, 106–10 (1965).

now call a "market"—as a replacement for a "section or community" as a zone in which competition might be harmed.[36] The Celler-Kefauver amendments created Section 7 as it exists today,[37] and they mark the last time Congress amended the core antitrust laws.

6. The Hart-Scott-Rodino Act of 1976

Congress returned to merger law in 1976 with the Hart-Scott-Rodino Act, which established a prior notification system for certain mergers and acquisitions.[38] Pursuant to the Act, proposed transactions must be notified to the federal antitrust agencies before the deal is "closed" or "consummated" if those transactions meet or exceed certain thresholds. The point of the HSR Act was to give the federal government an opportunity to spot and challenge competitively troubling mergers and acquisitions *before* the deal was consummated, to avoid the difficulties of breaking up a company back into separate viable competitors after the fact.

We will discuss the HSR Act in more detail in Chapter XI. In brief, an initial HSR merger notification is a fairly modest package of information and documents; the agencies then have a period of 30 days to conduct an initial review, within which the parties may not close their transaction. If the agencies issue a "Second Request" for further documents and information, the suspension obligation is extended, and another time period of 30 days commences once the parties have substantially complied with the request.[39] (The reviewing agency and the parties can agree to extend this deadline: why do you think parties might agree to do this?) If the agencies do not file a complaint before the expiration of the period, the parties may close their deal.

The HSR notification thresholds are updated every year. In very broad terms, effective February 2023: transactions valued up to $111.4 million are not reportable; transactions valued at more than $445.5 million are reportable; transactions valued at between $111.4 million and $445.5 million are reportable *if* one party has assets or annual sales of at least $22.3 million *and* the other has assets or annual sales of at least $222.7 million.[40]

7. Later Statutory Reforms

Statutory reforms since the 1970s have been relatively few and modest. For example, the Foreign Trade Antitrust Improvements Act ("FTAIA") clarified the application of the Sherman Act to international commerce[41]; the Antitrust Procedures and Penalties Act ("APPA" or "Tunney Act") introduced processes for the review of DOJ consent decrees[42]; the Antitrust Criminal Penalty Enhancement and Reform Act ("ACPERA") shored up DOJ's leniency program[43]; and the Merger Filing Fee Modernization Act of 2022 recalibrated merger filing fees.[44]

E. A Very Brief History of Antitrust

The history of the U.S. antitrust system is a long and rich story, and it is told at length in many excellent books and articles.[45] This section gives just a short sketch of the main arcs of the saga. It may be helpful to have this

---

[36] *See* Stephen Mann & Thomas M. Lewyn, *The Relevant Market under Section 7 of the Clayton Act: Two New Cases. Two Different Views*, 47 Va. L. Rev. 1014 (1961).

[37] For some early assessments of the impact of the Amendments, *see* M.A. Adelman, *The Antimerger Act, 1950–60*, 51 Am. Econ. Rev. 236, 236 (1961); Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 COLUM. L. REV. 629 (1961).

[38] 15 U.S.C. § 18a.

[39] 15 U.S.C. § 18a(e)(2).

[40] *See infra* § XI.E. (describing the HSR system).

[41] 15 U.S.C. § 6a.

[42] 15 U.S.C. § 16(b)–16(e).

[43] 15 U.S.C. § 7a-1–7a-3.

[44] 16 C.F.R. § 803.9.

[45] For a variety of perspectives, *see, e.g.*, Amy Klobuchar, ANTITRUST: TAKING ON MONOPOLY POWER FROM GILDED AGE TO THE DIGITAL AGE (2021); Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST (2020); Herbert Hovenkamp, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991); Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955). Some of this section borrows from Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779 (2022).

sketch in mind as context for the cases, principles, and enforcement practices that we will encounter in the rest of the book.

As you will see below and throughout the course, both doctrine and enforcement policy have undergone dramatic changes over antitrust's 130-year history, reflecting developments in changes in economic beliefs and understandings as well as changes in political and social circumstances. These changes have affected not only the content of doctrinal rules, but also the authoritative force of law from earlier periods. In the middle of the twentieth century, for example, the federal government and the Supreme Court routinely condemned mergers that combined very small players in highly competitive markets, and courts often expressed the view that superior efficiency could be a cause of antitrust concern. Today, many of these cases would not even be investigated, let alone litigated. But many earlier decisions have ceased to be followed in practice without ever having been formally overruled or repudiated. Indeed, some decisions even remain influential in some respects and totally without influence in others.[46] Likewise, the Robinson-Patman Act was enacted in the 1930s to empower the federal government, as well as private parties, to sue companies engaging in certain kinds of price discrimination. But, in light of mounting criticism of the Act's practical impact on consumers and competition, DOJ repudiated enforcement in the 1970s, and the FTC later followed suit.

All this means that it is helpful to have some sense of antitrust history before diving in and reading cases and statutes in detail. It also underscores the value of learning about the practice of courts and enforcement agencies, as well as formal doctrinal architecture. Anyone who tried to get a picture of antitrust law by just reading the text of binding court decisions would be terribly confused.[47]

1. Before 1890: Common Law

The federal antitrust statutes owe some conceptual debts to the Anglo-American common law that existed before 1890, but the magnitude of these debts have often been overstated, including by some of the Sherman Act legislators themselves.[48] Senator Sherman himself, among others, repeatedly described the Act as simply codifying common law into federal statute.[49] In particular, three strands of the common law are generally understood to have been particularly influential: the law of restraint of trade; the law of patent monopolies; and the law of anticompetitive combinations.

But, as we shall see, these strands of common-law doctrine did not really constitute or contain anything like a modern, competition-centric antitrust system. Anticompetitive agreements—even some naked price-fixing cartels—were often lawful. It was not generally illegal to use market practices like exclusivity or tying agreements to create or maintain monopoly power. And there was nothing at all that we would recognize as competition-focused merger control. However, each of these branches of common-law doctrine contained some conceptual material that proved influential and helpful to the framers of U.S. antitrust.

The first conceptual ancestor was the law of restraint of trade. From at least the 15th century, courts sometimes declined to enforce contractual obligations that unreasonably restrained the rights of persons to practice their trade

---

[46] Prominent examples of cases that remain important in some respects while uninfluential in others include *Alcoa* (influential regarding inference of monopoly power, uninfluential on definition of conduct that constitutes monopolization) and *Brown Shoe* (influential regarding market definition, uninfluential regarding thresholds for inferring harm from a change in market structure).

[47] *See, e.g.*, Herbert J. Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005) 208 ("While antitrust casebooks continue to print 1960s-vintage merger decisions that have never been overruled, no one, not even federal judges and certainly not government enforcement agencies, pay much attention to them."). As we will see later in this chapter and at points in the rest of the book, this is fractionally less cut-and-dried than it was in 2005, but it still captures a centrally important truth.

[48] *See, e.g.*, William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 355 (1954) ("The congressmen who drafted and passed the Sherman Antitrust Law thought they were merely declaring illegal offenses that the common law had always prohibited."); Donald Dewey, *The Common-Law Background of Antitrust Policy*, 1 Va. L. Rev. 759 (1955) ("During the debates on the Sherman bill, its backers on several occasions assured the floor that their object was to provide for federal enforcement of the common-law prohibitions of combinations contracts, and conspiracies in restraint of trade.")

[49] *See, e.g.*, 21 Cong. Rec. 2,456 (Mar. 21, 1890) ("[The bill] does not announce a new principle of law, but applies old and well-recognized principles of the common law to the complicated jurisdiction of our State and Federal Government."); 21 Cong. Rec. 2,461 (Mar. 21, 1890) ("Now, Mr. President, what is this bill? A remedial statute to enforce by civil process in the courts of the United States the common law against monopolies."); 21 Cong. Rec. 3,152 (Apr. 8, 1890) ("The great thing that this bill does, except affording a remedy, is to extend the common-law principles, which protected fair competition in trade in old times in England, to international and interstate commerce in the United States.").

or profession, similar to what we would call today a non-compete obligation.[50] The most famous early decision is *Dyer's Case* (1415), in which an English court refused to enforce a defendant's contractual obligation to refrain from work as a dyer.[51] The underlying concern in this and similar cases was something like unconscionable exclusion from a trade: courts were (inconsistently) concerned about the substantively unreasonable and oppressive impact of the agreement upon a worker with a valuable trade and a need to support his or her own existence. Subsequent prominent English cases included *Mitchel v. Reynolds* (1711), which articulated what amounts to a reasonableness test for contracts that restrained trade,[52] and later *Nordenfelt v. Maxim Nordenfelt* (1894), in which the highest English court was willing to approve even a worldwide restraint of 25 years' duration.[53] Informed and influenced by the English approach, American cases on restraint of trade in the decades before 1890 followed a similar pattern: intermittent concern about the unconscionability of contractual restraints that unreasonably precluded persons from practicing a trade.[54]

The second conceptual ancestor was the law constraining patent monopolies. For many centuries before 1890, governments had granted exclusive rights to engage in particular kinds of economic activity: to incentivize certain kinds of behavior, investment, or innovation; to reward loyal or influential supporters; or as part of a decision to substitute a regulated monopoly in place of a competitive regime (as in what we might call today utility-style regulation).[55] By the early seventeenth century, the longstanding practice of the British Crown of issuing "patent monopolies"—either for innovation or to reward political supporters—had become a major source of public complaint, as the holders of exclusive rights would often impose higher prices, and offer lower quality, than a competitive market would provide. Partial reform came in 1623 with the Statute of Monopolies, which invalidated some such monopolies and subjected others to a public-interest test; but, beginning with Edward Coke, some commenters began to assert that the common law itself imposed substantive limitations on the validity of patent monopolies, invalidating those that were unduly oppressive.[56] To a limited extent, saying it made it so: the assertions of Coke and others did in fact have some influence on courts and writers. (It helped that Coke became a very senior judge.) The nature and scope of the limits were not clearly articulated, and were inconsistently applied, but in at least some cases courts were willing to invalidate patent monopolies on the basis that they were contrary to the public interest.[57] However, well into the twentieth century one scholar was able to write that the common law of England "contains no special rule on the subject [of monopoly]. There is a principle of common law that 'restraints of trade are bad,' and that is all."[58]

More generally, antipathy to the "spirit of monopoly"—including monopolies created by the government, the already-declined trade guilds, and other tools of exclusion—permeated the political culture of the early United States.[59] Some state constitutions contained antimonopoly clauses limiting the grant of exclusive economic rights, and opposition to monopolies, especially state-created ones, was widespread.[60] By the mid-19th century, "Jacksonian" concerns about the capture of the state by private interests fueled public opposition to state

---

[50] *See*, *e.g.*, William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 373–79 (1954).

[51] Y.B. 2 Hen. V, 5B (1414).

[52] 24 Eng. Rep. 347 (Q.B. 1711).

[53] [1894] A.C. 535.

[54] Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) 36–53.

[55] *See generally*, *e.g.*, Christine MacLeod, INVENTING THE INDUSTRIAL REVOLUTION: THE ENGLISH PATENT SYSTEM 1660–1800 (2002); W.H. Price, THE ENGLISH PATENTS OF MONOPOLY (1906).

[56] *See*, *e.g.*, Edward Coke, 3 INSTITUTES Ch. 85 ("[A]ll grants of monopolies are against the ancient and fundamentall laws of this kingdome . . . it appeareth that a mans trade is accounted his life, because it maintaineth his life; and therefore the monopolist that taketh away a mans trade, taketh away his life, and therefore is so much the more odious, because he is vir sanguinis").

[57] *See generally*, *e.g.*, William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 356–67 (1954); E. F. Churchill, *Monopolies*, 41 L. Q. Rev. 275 (1925).

[58] F. D. Simpson, *How Far Does the Law of England Forbid Monopoly?*, 41 L. Q. Rev. 393, 393 (1925).

[59] *See*, *e.g.* , GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION, 319 (1991). *See also* J.A.C. Grant, *The Gild Returns to America, I*, 4 J. POL. 303, 309 (1942). *See also* Letter from John Adams, Ben Franklin, and Thomas Jefferson, to Baron von Thulemeier (March 14, 1785) (criticizing reservation of exclusive rights "to particular persons or descriptions of persons" as fruit of "a very remote & unenlightened period").

[60] *See*, *e.g.*, Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 HARV. J.L. & PUB. POL'Y 983, 1109 et seq. (2013); J.D. Forrest, *Anti-Monopoly Legislation in the United States*, 1 Am. J. Soc. 411 (1896); *see also* Alexandra K. Howell, *Enforcing a Wall of Separation Between Big Business and State: Protection from Monopolies in State Constitutions*, 96 Notre Dame L. Rev. 859, 866 *et seq.* (2020).

involvement in economic activity, including grants of monopoly as well as other forms of regulation that suppressed competition and commercial freedom.

The third and final line of antitrust's common-law ancestry is the law of what we might call anticompetitive combinations. Today, we are accustomed to thinking of a naked price-fixing cartel as the clearest example of antitrust illegality. And certainly the older common law, particularly in the United States, contained some basis for condemning price-fixing.[61] But this record was very mixed, particularly with respect to combinations of producers.[62] In practice, skepticism was much more likely to be directed at the actions of organized labor than at price-fixing cartels by producers.[63]

The nineteenth century, with the ascendancy of freedom of contract and the rise of modern industrial and labor organization, saw England repeal many previous statutory anti-combination measures, and English and American courts adopt a more ambivalent and ambiguous approach to conspiracies, sustaining many that we would regard today as nakedly anticompetitive.[64] In the famous case of *Mogul Steamship* (1892), the English House of Lords held that, while a cartel agreement would not be enforced, it was not tortious.[65] Overall, the record of American and English courts regarding anticompetitive combinations was an inconsistent mess.[66] The "anticompetitive" character of an agreement or practice was not usually a reason to infer that it was tortious, criminal, or even suspect.

All in all, we can probably say two things about the pre-1890 common law background against which U.S. antitrust law was created. First, it contained some conceptual threads—including scrutiny of agreements that excluded willing traders from the market, and some concern about the control of at least some kinds of monopoly power—that were to be woven into the fabric of the Sherman Act. Second, competition as such was not a specially

---

[61] *See, e.g.*, John C. Peppin, *Price-Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 310–24 (1940) (noting statutory and common-law basis for skepticism and condemnation of price fixing, and stating "down to the start of the nineteenth century agreements which directly fixed prices or wages were regarded as unlawful per se and also criminal at common law, whether or not the parties thereto controlled the market or any part thereof, and that the rule was applied indiscriminately both to price-fixing and wage-fixing agreements").

[62] Donald Dewey, *The Common-Law Background of Antitrust Policy*, 1 Va. L. Rev. 759, 768 (1955) ("So far as merchants were concerned, prosecutions [in England] for conspiracy to monopolize or restrain trade were virtually unknown."); Herbert Hovenkamp, *Labor Conspiracies in American Law, 1880–1930*, 66 Tex. L. Rev. 919, 922 (1988) ("During the first decades of the nineteenth century, American courts toyed with a conspiracy theory of labor organizing that condemned as unlawful two or more employees' coordinated work stoppage for the purpose of securing higher wages. . . . Indeed, a small number of early American courts concluded that combinations were illegal under received common law. Whether American courts ever actually adopted the conspiracy theory of labor activity is doubtful, although some scholars have concluded they did. Few if any American antebellum decisions examined the legality of a mere combination and strike for the purpose of raising wages, with no coercive activity directed at others."); John C. Peppin, *Price-Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 336–49 (1940) (chronicling cases and noting "it certainly cannot be said that [before 1890] American courts held that agreements directly fixing prices or wages were unlawful *per se* at common law" and that "[o]n the contrary, it does not even appear that a presumption of illegality was raised against them"); Arthur M. Allen, *Criminal Conspiracies in Restraint of Trade at Common Law*, 23 Harv. L. Rev. 531 (1910).

[63] *See, e.g.*, Gary Minda, *The Common Law, Labor, and Antitrust*, 11 Indus. Relations L. J. 461, 484–85 (1989) (describing early case law and noting that "even though both sides could claim that the same rules protected their liberty, independence, and free will, the courts were much more inclined to find protection for only one side in the struggle").

[64] John C. Peppin, *Price-Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 325–33 (1940). William L. Letwin, *The English Common Law Concerning Monopolies*, 21 U. Chi. L. Rev. 355, 379–84 (1954) ("The statute law governing combinations became increasingly lenient during the nineteenth century, in response to greater sympathy, abstract as well as sentimental, for the labor unions. The common law, influenced by a feeling that employers should not be denied rights granted to workers, matched the new legal power of the latter with a solicitous concern for employers' combinations; in the end it came to put a higher value on the freedom of entrepreneurs to use any means short of violence to outstrip competitors than on the right of the public to enjoy the advantages of competition.")

[65] Mogul Steamship Co. v. McGregor [1892] A.C. 25.

[66] *See, e.g.*, Donald Dewey, *The Common-Law Background of Antitrust Policy*, 1 Va. L. Rev. 759, 773–86 (1955) (noting inconsistent judicial practice); John C. Peppin, *Price-Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297, 309 (1940) (noting the "frequent assertion" that price fixing was illegal at common law but that this view "cannot be supported" for either English or American law as of 1890); F. D. Simpson, *How Far Does the Law of England Forbid Monopoly?*, 41 L. Q. Rev. 393, 395 (1925) (noting that an anticompetitive combine may successfully defend against suits for harm inflicted on others and sue to enforce its contracts, but that may fail to sue to enforce the terms of the combination itself: "The cases show only one weakness in the legal position of combines. They cannot prevent one of their members leaving them, and they cannot always, even while he remains a member, enforce the contract against him."); *see also* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940) ("Whatever may have been the status of price-fixing agreements at common law . . . the Sherman Act has a broader application to them than the common law prohibitions or sanctions.")

protected value at common law, nor was market or monopoly power in the economic sense, as such, a matter for legal concern or condemnation in virtually any circumstance.

Thus, the Sherman Act was a fresh start for the U.S. antitrust tradition, however much its authors and supporters might have thought or suggested otherwise.

2. 1890–1930s: Early Stirrings

President Benjamin Harrison signed the Sherman Act into life in July 1890, but neither he nor his immediate successors seemed particularly enthusiastic about the new law. Neither Harrison's Attorney General, William Miller, nor Grover Cleveland's first Attorney General, Richard Olney, were much interested in antitrust enforcement.[67] Cleveland's second Attorney General, Judson Harmon, appears to have taken the Act, and his own role in enforcing it, at least somewhat more seriously.[68] But the McKinley Administration presented "a lower water-mark equaled during no other period."[69] They were not alone: indeed, most professional economists of the time were skeptical, rather than supportive, of the new Sherman Act, with many believing "industrial monopoly was both inevitable and socially beneficial" given scale economies and natural-monopoly dynamics.[70] Organized labor, too, was only lukewarm.[71]

But Roosevelt, Taft, and Wilson were somewhat more interested in the antitrust project. Theodore Roosevelt probably does not quite deserve his modern reputation as a trustbuster: as one author writes, "Theodore Roosevelt did not favor busting trusts at any time in his public life, and over the course of his presidency, he became ever less fond of Sherman Act litigation."[72] He favored developing antitrust law in a manner that allowed the benefits of big business, but he supported government administrative regulation of the economy in a manner that would later be associated with the role of the Federal Trade Commission.[73] His administration did, however, bring the landmark *Northern Securities* case challenging the use of a holding company to combine competing railroads, which resulted in a Supreme Court-ordered breakup,[74] as well as the *Swift & Co.* case against the beef trust.[75] Roosevelt appears to have personally instigated the first and at least approved the second.[76]

William Taft, who had made a landmark contribution to antitrust law as a judge on the Sixth Circuit,[77] was a much more energetic antitrust prosecutor as President, and brought a blockbuster challenge to the U.S. Steel colossus (although it would ultimately fail in the Supreme Court).[78] He would go on to write an influential antitrust treatise after leaving the Presidency.[79] In the three-way election of 1912, antitrust played a prominent role.[80] And the victor, Woodrow Wilson, assisted by his advisor Louis Brandeis, would lead an effort for antitrust reform,

---

[67] Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) 373 *et seq.*

[68] *Id.* at 394 et seq.

[69] *Id.* at 405.

[70] Herbert Hovenkamp, ENTERPRISE AND AMERICAN LAW, 1836–1937 (1991) 219–20; Morton J. Horwitz, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY (1992), 80–85 (describing a "stunning reversal"); Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) 311–29.

[71] Richard Franklin Bensel, THE POLITICAL ECONOMY OF AMERICAN INDUSTRIALIZATION, 1877–1900 (2000) 343.

[72] Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST (2020) 87. *See also*, *e.g.*, Leroy G. Dorsey, *Theodore Roosevelt and Corporate America, 1901-1909: A Reexamination*, 25 Pres. Stud. Q. 725 (1995).

[73] Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST (2020) Ch. 9; William Letwin, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965) 195–238.

[74] Northern Securities Co. v. United States, 193 U.S. 197 (1904).

[75] Swift & Co. v. United States, 196 U.S. 375 (1905).

[76] Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION (1955) 424 (noting that "Roosevelt directed [AG] Knox to take action" in the *Northern Securities* matter), 427 (noting that the beef cases did not originate with field DOJ employees and concluding that the matter was at least the subject of "preliminary consultation" between the AG and the President).

[77] United States v. Addyston Pipe & Steel Co., 85 F. 271 (6th Cir. 1898).

[78] United States v. U.S. Steel Corp., 251 U.S. 417 (1920). For some context, *see* Guy B. Maseritz, *"No Inventions, No Innovations": Reassessing the Government's Antitrust Case Against United States Steel Corporation*, 7 J. Bus. & Tech. L. 247 (2012).

[79] W.H. Taft, THE ANTI-TRUST ACT AND THE SUPREME COURT (1914).

[80] Daniel A. Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, 100 Iowa L. Rev. 2025 (2015); William Kolasky, *The Election of 1912: A Pivotal Moment in Antitrust History*, 25 Antitrust 82 (2011).

including the passage of the Clayton Act to augment antitrust enforcement and the creation of the Federal Trade Commission.[81]

The U.S. Supreme Court decisions of these early years show antitrust finding its feet in some fundamental respects. For example, after holding on constitutional grounds that the Sherman Act did not apply to conduct among manufacturers in *E.C. Knight* in 1895—a holding that would have marginalized antitrust right from the get-go—the Court walked this conclusion back in *Addyston Pipe & Steel* (1899) and *Swift & Co.* (1905).[82] After holding in *Trans-Missouri Freight* in 1897 (and the *Joint-Traffic* case the following year) that Section 1 invalidated all contracts that restrain trade, regardless of their reasonableness or effects[83]—a holding that would have made antitrust completely unworkable by prohibiting virtually every commercial agreement—the Court would course-correct in *Standard Oil* (1911) by adopting a more discriminating "rule of reason" approach to the legality of restraints.[84]

Despite President Wilson's enthusiasm for antitrust enforcement, it fell somewhat by the wayside with the advent of the First World War, the skepticism of the Supreme Court (which in 1920 rejected the government's blockbuster lawsuit against U.S. Steel[85]), and increasing public toleration for industrial concentration and cooperation.[86]

3. 1940s–1960s: The Rise of Structuralism

The beginning of the mid-century revival of antitrust enforcement is symbolized by FDR's appointment of Robert Jackson and then (and in particular) Thurman Arnold as successive heads of DOJ's Antitrust Division, which signaled the invigoration of antitrust enforcement as a serious and sustained federal project.[87] In a lengthy message to Congress in April 1938, President Roosevelt called for significant investment in antitrust enforcement and the augmentation of the antitrust statutes.[88] A string of antitrust enforcement actions were filed.[89] After years of effort,[90] the Celler-Kefauver Amendments of 1950 reinforced the merger-control standard in Section 7 of the Clayton Act.[91]

The rise of active antitrust enforcement was accompanied by an emerging view that would become known as structuralism: the idea that market structure (*i.e.*, the number, market share, and characteristics of market participants), and concentration in particular (*i.e.*, the domination of a market by a few large firms), should be the focus of antitrust intervention. The core structuralist idea was that concentrated markets tended to be less

---

[81] *See generally*, *e.g.*, Marc Winerman, *The Origins of the Federal Trade Commission: Concentration, Cooperation, Control, and Competition*, 71 Antitrust L.J. 1 (2003); G.erald Berk, LOUIS D. BRANDEIS AND THE MAKING OF REGULATED COMPETITION, 1900–1932 (2009); William Letwin, LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT (1965) 271–78.

[82] United States v. E. C. Knight Co., 156 U.S. 1 (1895); Addyston Pipe & Steel Co. v. U. S., 175 U.S. 211 (1899); Swift & Co. v. United States, 196 U.S. 375 (1905).

[83] United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290 (1897); United States v. Joint-Traffic Ass'n, 171 U.S. 505 (1898).

[84] Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911).

[85] United States v. U.S. Steel Corp., 251 U.S. 417 (1920).

[86] *See*, *e.g.,* Harold J. Adam, *Anti-Trust (Anti-Monopoly) Policy and Application 1920-1929*, 4 Am. Econ. 9 (1960); Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 St. John's L. Rev. 569, 577 (2004) ("Throughout the 1920s, the antitrust laws were barely enforced, if at all").

[87] *See generally* Spencer Weber Waller, *The Antitrust Legacy of Thurman Arnold*, 78 St. John's L. Rev. 569 (2004). See also Thurman W. Arnold, *Prosecution Policy under the Sherman Act*, 24 A.B.A. J. 417 (1938); Thurman W. Arnold, *Antitrust Activities of the Department of Justice*, 19 Or. L. Rev. 22, 22 (1939) ("The Antitrust Division of the Department of Justice interprets the war as a new challenge which intensifies the need for its activity. War has added to the task before us rather than subtracted from it because it has increased the opportunities for aggressive combinations to use war conditions as an excuse for the destruction of that industrial democracy on which political democracy depends."); *see also* John C. Peppin, *Price-Fixing Agreements under the Sherman Anti-Trust Law*, 28 Calif. L. Rev. 297 (1940) (noting "the current drive for vigorous enforcement of the antitrust laws"); Ellis W. Hawley, THE NEW DEAL AND THE PROBLEM OF MONOPOLY (1966) Chs. 22 & 23.

[88] Franklin D. Roosevelt, *Message to Congress on Curbing Monopolies* (Apr. 29, 1938), https://www.presidency.ucsb.edu/documents/message-congress-curbing-monopolies.

[89] For some highlight decisions of the 1940s, *see*, *e.g.*, United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v Columbia Steel Co, 334 US 495 (1948); United States v. Paramount Pictures, 334 U.S. 131 (1948); Standard Oil Co. of California v. United States, 337 U.S. 293 (1949).

[90] See, e.g., Comment, *Corporate Consolidations and the Concentration of Economic Power: Proposals for Revitalization of Section 7 of the Clayton Act*, 57 Yale L.J. 613, 621–27 (1948) (chronicling a variety of proposals).

[91] Milton Handler & Stanley D. Robinson, *A Decade of Administration of the Celler-Kefauver Antimerger Act*, 61 Colum. L. Rev. 629 (1961).

competitive, with higher prices, markups, and profits.[92] Scholars proposed reforms that would tilt antitrust law and enforcement away from the existing conduct-focused paradigm that posed lengthy and difficult problems of proof, and toward a structure-focused approach that would allow intervention based on market structure alone and would favor structural remedies like corporate breakup.[93] A Presidential Task Force on Antitrust Policy proposed, among other things, a "Concentrated Industries Act" to break up oligopolistic markets.[94] However, despite later caricatures, structuralist writers were not necessarily or always hostile to size as such or to efficiency claims.[95]

Throughout the 1960s, the Supreme Court issued a series of decisions generally favoring government enforcement—including in cases that would not have been brought in earlier or later eras—in parallel with a surge in enforcement activity.[96] In the famous *Brown Shoe* decision (1962), for example, the Supreme Court indicated that mergers could be illegal even if they led only to very modest incremental increases in market concentration.[97] In *Continental Can* (1964) the Court prohibited a merger between a metal can manufacturer and a glass bottle manufacturer, relying on some very limited and generalized discussion about substitution between metal and glass containers, rather than a thorough analysis of the scope of competition for particular end-uses.[98] In *Von's Grocery* (1966) the Court prohibited a merger in a highly competitive market without any evidence that economic harm was plausible.[99] In *Pabst Brewing* (1966) the Court condemned a national merger between two brewing companies to a combined 4.5% share of the national market, relying primarily on the existence of somewhat higher—but still unimpressive—combined shares of sales in Wisconsin (24% combined share) and the Wisconsin-Illinois-Michigan "three state area" (11.32% combined share), without ever establishing whether the market in which competition took place was national, state-specific, or something in between.[100] And in *Procter & Gamble* (1968) the Court invalidated the acquisition of a liquid bleach brand by a consumer-products firm that did not sell bleach at all,

---

[92] The core of structuralism has recently been summarized in more technical terms as follows: "This empirical implementation of the paradigm typically involved regression analysis. The dependent variable was a market outcome such as profits, markups, or prices. The key explanatory variable sought to capture the structure of the market with a measure of concentration—usually the Herfindahl–Hirschman index, which is the sum of squared market shares. The regression also included a range of control variables intended to capture other exogenous reasons for variation. Structure is thus related to performance, with (unobservable) conduct captured as the estimated relationship between structure and performance. In this regression, the coefficient on the concentration measure is intended to capture how the toughness of competition changes as market concentration changes." Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. Econ. Persp. 44, 46 (2019).

[93] *See, e.g.*, Joe S. Bain, INDUSTRIAL ORGANIZATION (1968) 651 ("[T]he law might be changed to state that structural situations (involving high concentration and impeded entry) which might be expected to have and demonstrably do have monopolistic performance tendencies are generally illegal, without particular reference to the lines of market conduct through which the undesirable structure has ben created, maintained, and exploited. . . . Furthermore, the law might instruct the courts that the usual remedy for illegal monopoly as defined should be dissolution or dismemberment of the principal firm or firms possessing the monopoly . . . provided that there would be no serious untoward side effects of such a remedy and that lesser remedies would not clearly suffice[.]"); Carl Kaysen & Donald F. Turner, ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS (1965) 46 ("We propose statutory authorization for the reduction of undue market power, whether individually or jointly possessed; this to be done normally by dissolution, divorcement, or divestiture. We would except market power derived from economies of scale, valid patents, or the introduction of new processes, products, or marketing techniques."); Joe S. Bain, BARRIERS TO NEW COMPETITION (1956) 212 ("[I]f it is found that the integration is not required for real economy and does not reduce costs, enforced disintegration of established firms, resulting in the establishment of non-integrated industries at both stages of production, may reduce the importance of scale economies . . . without offsetting disadvantages."); Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 238–49 (1960).

[94] Phil C. Neal et al., *Report of the White House Task Force on Antitrust Policy*, 2 Antitrust L. & Econ. Rev. 11 (1968).

[95] *See, e.g.*, Joe S. Bain, BARRIERS TO NEW COMPETITION (1956) 207 ("[Entry barriers] resting on real economies of large-scale plant and firm (whatever their importance) should not and probably could not be removed, because of the adverse effects on efficiency of such removal."), 208 ("[T]he results of fairly high seller concentration might vary widely according to the condition of entry to the industry, and alteration of the condition of entry might constitute a generally more feasible regulatory technique than dissolution and dismemberment policies aimed just at reducing seller concentration.").

[96] *See, e.g.*, Donald Dewey, *Mergers and Cartels: Some Reservations about Policy*, 51 Am. Econ. Rev. 255, 255 (1961) ("In the last two decades, antitrust has finally been tried with a vengeance").

[97] Brown Shoe Co. v. United States, 370 U.S. 294, 343–44 (1962) ("If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved."); *but see id.* at 343 (noting higher concentration figures in some markets).

[98] United States v. Continental Can Co., 378 U.S. 441 (1964).

[99] United States v. Von's Grocery Co., 384 U.S. 270 (1966).

[100] United States v. Pabst Brewing Co., 384 U.S. 546 (1966).

apparently motivated primarily by a fear that the merged firm would enjoy economies of scope as a result of its presence in the consumer-products space.[101] Dissenting in *Von's Grocery*, Justice Potter Stewart famously griped: "The sole consistency that I can find is that in litigation under [Section] 7, the Government always wins."[102]

4. 1970s–2020s: Chicago and Post-Chicago

Structuralism eventually came under fire from both evolving perspectives in economics and changing political fortunes. In economic scholarship, structuralism was subject to increasing skepticism, including for difficulties in measuring key inputs to structuralist analysis (such as competitive performance) and in interpreting them (for example: do high profits imply desirable efficiencies, or undesirable anticompetitive harms?).[103] Ultimately the structure-conduct-performance paradigm became "discredited" in mainstream industrial organization economics.[104] Politically, too, the conditions favored realignment, with a broad move toward deregulatory economic policy in the United States and the ascendancy of the law and economics movement.[105]

Thus the 1970s proved to be a major turning point for antitrust law and policy, in what is known colloquially today as the "Chicago School Revolution." This multi-dimensional change in climate involved, among other things: (1) the normative orientation of antitrust policy toward maximizing the welfare of persons (with some debate and confusion about which persons counted and in what ways); (2) increased skepticism of the idea that business size and concentration were meaningfully correlated with consumer harm; (3) an increased emphasis on the efficiency-generating characteristics of many business practices that might lead to increased market power; and (4) a general turn—at the antitrust agencies, in the judiciary, and in academia—toward caution in matters of economic regulation, lest antitrust intervention end up suppressing the very competitive process that it was intended to encourage.

These views were most famously expressed by Robert Bork in a highly influential 1978 book called *The Antitrust Paradox*,[106] and by other leading "Chicago School" figures like Richard Posner and Frank Easterbrook.[107] The revolution in antitrust was also fueled by other currents and developments, including Joseph Schumpeter's account of "creative destruction" (which implied that the existence of monopoly was compatible with—and could be an

---

[101] FTC v. Procter & Gamble Co., 386 U.S. 568 (1967).

[102] United States v. Von's Grocery Co., 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

[103] *See*, *e.g.*, Sherril Shaffer, *Structure, conduct, performance, and welfare*, 9 Rev. Indus. Org. 435, 447 (1994) ("[W]elfare is not monotonically related to any of the dimensions of structure, conduct, or performance. . . . The findings emphasize that, apart from special conditions, there is no shortcut around the need to base public policy directly on total welfare. This conclusion has pessimistic implications for the potential usefulness of exercises designed to reduce welfare calculations to simple structural rules of thumb[.]"); Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. Econ. Persp. 44, 46 (2019) ("Measuring concentration is inherently difficult because economic markets are not observed directly in the data. . . . Measuring economic outcomes was another problem for research in the structure-conduct-performance tradition. Most measures of profits use accounting measures, which are not economic profits. Markups are rarely directly observed in firm-level data at all[.] . . . But even if the structure and output variables were measured with precision and the analysis was within a single industry, structure-conduct-performance researchers . . . often grappled with the problem of interpreting their regressions [and particularly distinguishing between anticompetitive and procompetitive explanations.] . . . [T]here is no well-defined 'causal effect of concentration on price,' but rather a set of hypotheses that can explain observed correlations of the joint outcomes of price, measured markups, market share, and concentration."); T.F. Bresnahan, *Industries with Market Power* in 2 Richard Schmalensee & Robert Willig (eds.) HANDBOOK OF INDUSTRIAL ORGANIZATION (1989) 1012–13 (noting "dissatisfactions" regarding hypotheses in the structure-conduct-performance paradigm); Richard Schmalensee, *Inter-Industry Studies of Structure and Performance*, in Richard Schmalensee & Robert Willig (eds.), HANDBOOK OF INDUSTRIAL ORGANIZATION (1989) 974 (noting that many studies find "no statistically significant linear relation between domestic concentration and profitability").

[104] Steven Berry, Martin Gaynor & Fiona Scott Morton, *Do Increasing Markups Matter? Lessons from Empirical Industrial Organization*, 33 J. Econ. Persp. 44, 46 (2019).

[105] *See generally*, *e.g.*, George L. Priest, THE RISE OF LAW AND ECONOMICS: AN INTELLECTUAL HISTORY (2020); Martha Derthick & Paul J. Quirk, THE POLITICS OF DEREGULATION (1985); Stephen Breyer, REGULATION AND ITS REFORM (1985); Robert W. Crandall, *Deregulation: The U.S. Experience*, 139 J. Instit. & Theoret. Econ. 419 (1983); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972); Guido Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). The roots of law and economics extend much further back in time. *See*, *e.g.*, Walton L. Hamilton, *Law and Economics*, 19 Am. Econ. Rev. 56 (1929).

[106] Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J. L. & Econ. 7 (1966).

[107] *See, e.g.,* Richard Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 Tex. L. Rev. 1 (1984); Richard A. Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 U. Chi. L. Rev . 1 (1977); Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. Rev. 281 (1956).

inducement to—intense dynamic competition)[108]; William Baumol's theory of "contestable markets" (which indicated that the threat of new entry from outside markets could discipline competition within them)[109]; and growing calls for efficiencies to be treated as a factor in favor of the legality of a merger or acquisition, rather than a reason for condemning it.[110] The antitrust agencies cut back their enforcement activities during the 1980s as the new view, and its adherents, became increasingly influential in the federal government.[111]

But, right from the start, the accommodation of "Chicago School" antitrust triggered a robust literature of "Post-Chicago" qualification and criticism. Scholars like Eleanor Fox, Steve Salop, Jon Baker, and Robert Pitofsky argued for more active antitrust doctrine and enforcement practices.[112] And the Supreme Court did not rush to embrace "hard Chicago" positions, instead generally favoring a middle position that was influenced by Chicagoan thinking, but less opposed to intervention and more focused on administrability (the "Harvard School").[113] Across a series of areas of antitrust doctrine, the Court cut back from bright-line prohibitions in favor of a case-specific effects-based analysis. Emblematic decisions in this vein included *General Dynamics* (1974) (holding that a structural case of illegality could be rebutted by evidence showing that the market shares presented a misleading picture of competition), *GTE Sylvania* (1977) (holding that it was not *per se* illegal for a seller to distribute its products through exclusive distribution territories), *BMI* (1979) (establishing that a combination among competitors to create a new product was not *per se* illegal even though it involved joint price-setting), *Jefferson Parish* (1984) (holding that tying one product to another could not be unlawful unless the business held market power in the product that provided the leverage to impose the condition), and *Northwest Wholesale Stationers* (1985) (holding that expulsion from a common buying cooperative was not *per se* illegal but required rule-of-reason analysis).[114]

In the age that was dawning, much "mainstream" scholarly debate about antitrust settled into a somewhat technocratic conversation about the economic tendencies of particular phenomena and practices. With antitrust's foundations established as the protection of consumers from economic harms, scholarship and argument often focused on whether and when the economic harms of particular practices (resale price maintenance, exclusive dealing, tying, and so on) might outweigh the benefits of tolerating them. In 2005, a leading antitrust scholar could open his survey of issues in antitrust law and policy by pointing out that, "[a]fter decades of debate, today we enjoy more consensus about the goals of the antitrust laws than at any time in the last half century."[115]

About ten years later, the consensus was sharply challenged. In the second decade of the 21st century, a school of "Neo-Brandeisian" critics—including Tim Wu, Lina Khan, and others—emerged to criticize modern antitrust as outdated, "defanged," and unfit for purpose, arguing in a series of writings that antitrust agencies and federal

---

[108] Joseph Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY (1942).

[109] William J. Baumol, CONTESTABLE MARKETS AND THE THEORY OF INDUSTRIAL STRUCTURE (1982).

[110] *See, e.g.*, Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 Am. Econ. Rev. 18 (1968); FTC v. Procter & Gamble Co., 386 U.S. 568 (1967) (Harlan, J., concurring).

[111] *See, e.g.*, F.M. Scherer, *Merger Policy in the 1970s and 1980s* in Robert J. Larner & James W. Meehan, Jr. (eds.), ECONOMICS AND ANTITRUST POLICY (1989) 90–94 ("Many mergers that almost surely would have drawn a challenge from past administrations were let through; and the number of challenges issued per year by the two enforcement agencies declined by half relative to 1960–1980 averages despite all-time peak levels of merger activity."); William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105 (1989) (1981–88 saw "the smallest number of [Section 2] prosecutions the . . . agencies have initiated in any eight-year period since 1900").

[112] *See, e.g.*, Robert Pitofsky (ed.), HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2008); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 Colum. Bus. L. Rev. 257, 273 (2001); Jonathan B. Baker, *Recent Developments in Economics that Challenge Chicago School Views*, 58 Antitrust L.J. 645, 646 (1989); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 Calif. L. Rev. 917 (1987); Eleanor M. Fox, *Consumer Beware Chicago*, 84 Mich. L. Rev. 1714, 1715 (1986); Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power over Price*, 96 Yale L.J. 209 (1986); Herbert Hovenkamp, *Antitrust After Chicago*, 84 Mich. L. Rev. 213, 225 (1985).

[113] See, e.g., Einer Elhauge, H*arvard, Not Chicago: Which Antitrust School Drives Recent U.S. Supreme Court Decisions?* 3 Comp. Pol'y Int'l 59 (2007); William E. Kovacic, *The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/Harvard Double Helix*, 2007 Colum. Bus. L. Rev. 1, 36-38 (2007).

[114] *See* Continental Television v. GTE Sylvania, 433 U.S. 36 (1977); Broadcast Music, Inc. v. CBS, Inc. :: 441 US 1 (1979); Jefferson Parish Hospital District No. 2 v. Hyde, 466 US 2 (1984); Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985).

[115] Herbert J. Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005), 1.

courts had been weak and ineffective stewards of the antitrust function, and that a radical shakeup was needed.[116] At the core of the emerging Neo-Brandeisian movement was an *antimonopoly* project: it centrally conceived of antitrust as a tool of opposition to monopoly power as such and as a means to pursue broader aims, including economic deconcentration, greater equality of economic opportunity, and equity. Following the Presidential election of 2020, Neo-Brandeisians were appointed to prominent leadership positions in the federal government.[117] This development, too, has elicited criticism, including for this school's emphasis on criticizing established practices rather than providing a workable and appealing alternative, and for its rejection of economic welfare as a guide to policy.[118] At the time of writing, there is no significant evidence that courts have been influenced by distinctively "Neo-Brandeisian" ideas. Changes at the agencies have been relatively limited: notable developments have included the pursuit of competition rulemaking at the FTC and efforts to revive criminal monopolization enforcement at DOJ. But these are early days!

It is far too soon to assess whether the Neo-Brandeisian intervention in U.S. antitrust discourse will lead to a meaningful and durable change in direction. Neo-Brandeisianism may turn out to be a brief phenomenon, or it may signal an impending generational shift in antitrust. But it has already made one valuable contribution to discussions about antitrust: it has helped to dispel the idea that antitrust is or could possibly be "neutral" or "above politics" in any relevant sense. By underscoring the importance of explicit normative debate about the functions, benefits, and limits of antitrust law, Neo-Brandeisian criticism has encouraged a more honest, searching, and inclusive conversation about what antitrust law is, and what it should be.[119]

Carl Shapiro, Antitrust in a Time of Populism

61 Intl. J. Indus. Org. (2018)

Antitrust is sexy again. Where does this take us?

American politicians are calling on antitrust to solve an array of problems associated with the excessive power of large corporations in the United States. [A recent] plan calls for much tougher merger enforcement and greater government oversight "to stop abusive conduct and the exploitation of market power where it already exists."

Not since 1912, when Teddy Roosevelt ran for President emphasizing the need to control corporate power, have antitrust issues had such political salience. While Roosevelt did not win, Congress passed the Federal Trade Commission Act and the Clayton Act in 1914, significantly strengthening the Sherman Act. Indeed, the Sherman Act itself was passed in 1890 in response to broad concerns about the political and economic power of large corporations in America [.] [. . .]

[T]he role of antitrust in promoting competition could well be undermined if antitrust is called upon or expected to address problems not directly relating to competition. Most notably, antitrust institutions are poorly suited to address problems associated with the excessive political power of large corporations. The courts and the antitrust enforcement agencies know how to assess economic power and the economic effects of mergers or challenged business practices, but there are no reliable methods by which they could assess the political power of large firms. Asking the DOJ, the FTC to evaluate mergers and business conduct based on the political power of the firms

---

[116] *See*, *e.g.*, Sanjukta Paul, *Recovering the Moral Economy Foundations of the Sherman Act*, 131 Yale L.J. 175 (2021); Matt Stoller, GOLIATH: THE 100-YEAR WAR BETWEEN MONOPOLY POWER AND DEMOCRACY (2019); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Comp. L. & Prac. 131 (2018); Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 Antitrust Bull. 479 (2019); Zephyr Teachout, *Antitrust Law, Freedom, and Human Development*, 41 Cardozo L. Rev. 1081, 1104 (2019); Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018); Lina M. Khan, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710 (2017); Lina M. Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol'7 Rev. 235 (2017).

[117] *See* David McCabe & Cecilia Kang, *Biden Names Lina Khan, A Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 17, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html; Cecilia Kang, *A Leading Critic of Big Tech Will Join the White House*, N.Y. TIMES (Mar. 5, 2021), https://www.nytimes.com/2021/03/05/technology/tim-wu-white-house.html.

[118] *See*, *e.g.*, Joshua D. Wright, Elyse Dorsey, Jonathan Klick & Jan M. Rybnicek, *Requiem For A Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 Ariz. St. L.J. 293 (2019); Daniel A. Crane, *How Much Brandeis Do The Neo-Brandeisians Want?* 64 Antitrust Bull. 531 (2019).

[119] That conversation is not just a domestic one: international cooperation is implicated also. *See*, *e.g.*, James Keyte, Frédéric Jenny & Eleanor Fox, *Buckle Up: The Global Future of Antitrust Enforcement and Regulation*, 35 ANTITRUST 32 (2021).

involved would invite corruption by allowing the executive branch to punish its enemies and reward its allies through the antitrust cases brought, or not brought, by antitrust enforcers. On top of that, asking the courts to approve or block mergers based on the political power of the merging firms would undermine the rule of law while inevitably drawing the judicial branch into deeply political considerations. Let me be clear: the corrupting power of money in politics in the United States is perhaps the gravest threat facing democracy in America. But this profound threat to democracy and to equality of opportunity is far better addressed through campaign finance reform, increased transparency, and anti-corruption rules than by antitrust. [. . .]

Until quite recently, few were claiming that there has been a substantial and widespread decline in competition in the United States since 1980. And even fewer were suggesting that such a decline in competition was a major cause of the increased inequality in the United States in recent decades, or the decline in productivity growth observed over the past 20 years. Yet, somehow, over the past two years, the notion that there has been a substantial and widespread decline in competition throughout the American economy has taken root in the popular press. In some circles, this is now the conventional wisdom, the starting point for policy analysis rather than a bold hypothesis that needs to be tested. [. . .]

Antitrust was born and then fortified during a period of populism in the United States in the late 19th and early 20th centuries. Likewise, today's populist sentiments—by which I mean the widespread and bipartisan concern that the deck is stacked in favor of large powerful firms—represent an opportunity, indeed a plea, to strengthen antitrust enforcement. [. . .]

Today's populist sentiments pose a threat as well as an opportunity for antitrust. The danger to effective antitrust enforcement is that today's populist sentiments are fueling a "big is bad" mentality, leading to policies that will slow economic growth and harm consumers. The rest of this article is devoted to identifying this threat and discussing how such an error can be avoided.

I take as my starting point the core principle guiding antitrust enforcement in the United States that has served us well for so many years*: antitrust is about protecting the competitive process so consumers receive the full benefits of vigorous competition*. None of the empirical evidence relating to growing concentration and growing corporate profits, which I have discussed at length in this article, provides a basis for abandoning this core principle. Applying this core principle, we understand quite well how to use antitrust to protect competition and consumers, at least conceptually. This enterprise centers on the economic notion of market power, and relies heavily on industrial organization economics. Of course, there is always room for improvement in practice, and right now that means stricter merger enforcement and vigilance regarding acts of monopolization, as already discussed. The fundamental danger that 21st century populism poses to antitrust is that populism will cause us to abandon this core principle and thereby undermine economic growth and deprive consumers of many of the benefits of vigorous but fair competition. Economic growth will be undermined if firms are discouraged from competing vigorously for fear that they will be found to have violated the antitrust laws, or for fear they will be broken up if they are too successful. [. . .]

My hope is that the intense energy of populism will empower stronger antitrust enforcement policy in the United States with the goal of protecting the competitive process and channeling more of the benefits of economic growth to consumers. To protect and preserve this mission, it is important to recognize that antitrust cannot be expected to solve the larger political and social problems facing the United States today. In particular, while antitrust enforcement does tend to reduce income inequality, antitrust cannot and should not be the primary means of addressing income inequality; tax policies and employment policies need to play that role. Nor can antitrust be the primary policy for dealing with the corruption of our political system and the excessive political power of large corporations; that huge problem is better addressed by campaign finance reform, a better-informed citizenry, stronger protections for voting rights, and far tougher laws to combat corruption. Trying to use antitrust to solve problems outside the sphere of competition will not work and could well backfire.

* * *

Lina M. Khan & Sandeep Vaheesan, Market Power and Inequality: The Antitrust Counterrevolution and Its Discontents

11 Harv. L. & Pol'y Rev. 235 (2017)

Antitrust laws historically sought to protect consumers and small suppliers from noncompetitive pricing, preserve open markets to all comers, and disperse economic and political power. The Reagan administration—with no input from Congress—rewrote antitrust to focus on the concept of neoclassical economic efficiency. In dramatically narrowing the goals of antitrust, executive branch officials and judges held that open-ended standards favorable to businesses with market power, rather than clear rules, should govern most forms of business conduct. This elastic standard has crippled plaintiffs' attempts to challenge illegal behavior and has permitted large corporations to engage in anticompetitive conduct.

The Reagan administration's overturning of antitrust has had sweeping effects. But antitrust laws can be restored to promote competitive markets once again. Doing so would also produce a more equitable distribution of wealth and power in American society. This requires two things: first, an intellectual shift that embraces the original goals of antitrust and second, the appointment of antitrust officials and federal judges committed to this approach. A determined administration should do a number of things to revive Congress's vision as expressed in 1890 and 1914. First, antitrust laws must be reoriented away from the current efficiency focus toward a broader understanding that aims to protect consumers and small suppliers from the market power of large sellers and buyers, maintain the openness of markets, and disperse economic and political power. Second, clear rules and presumptions must govern mergers, dominant firm conduct, and vertical restraints and replace the current rule of reason review and other amorphous standards, which heavily tilt the scales in favor of defendants. Third, by using existing legal powers or seeking additional authority from Congress, the agencies should challenge monopoly and oligopoly power that injures the public on account of duration or magnitude of harm. Fourth, strong structural remedies and blocking of anticompetitive mergers are necessary to ensure that competitive markets are restored and maintained. Fifth and finally, antitrust agencies must be subject to strong transparency duties to allow the public to understand the internal decision-making processes and choices over whether to pursue-or not to pursue-a particular case.

A revived antitrust movement could play an important role in reversing the dramatic rise in economic inequality. With public engagement and political will, the antitrust counterrevolution—which has produced monopolistic and oligopolistic markets and contributed to a captured political system—can be undone. To be clear, our argument is not that antitrust should embrace redistribution as an explicit goal, or that enforcers should harness antitrust in order to promote progressive redistribution. Instead we hold that the failure of antitrust to preserve competitive markets contributes to regressive wealth and income distribution and-similarly-restoring antitrust is likely to have progressive distributive effects.

NOTES

1) In choosing a direction for antitrust law and policy, how much do you think the intention of the Sherman Act legislators should matter? What about the concerns of those who supported the original antitrust legislation?
2) How could we tell whether antitrust enforcement has been too lax since the 1970s, or whether it was too strict before? What evidence or metrics could we look at?
3) What are the advantages and disadvantages of antitrust as a tool to respond to inequality in the United States?
4) In what way, or under what circumstances, do you think the increased use of economic analysis, and a focus on analyzing the effects of particular practices and transactions, might favor one side or other in antitrust cases?
5) How responsive should antitrust be to:
    a. Democratic change?
    b. Change in consensus among professional economists?
    c. Changes in social and economic conditions? (Which ones?)

F. What Is Competition?

As you navigate the rest of this book, it may be helpful to keep asking yourself: "What do we mean by 'competition on the merits'? How should we distinguish between "procompetitive" and "anticompetitive" practices?"

Earlier in this chapter we accepted a very general definition of competition: "the process of rivalry between suppliers, or between purchasers, to be chosen as trading partners." But that definition includes forms of "competitive" rivalry that antitrust law clearly has no truck with: it could include everything from blowing up rivals' factories to buying up all the competition. If we want the idea of "competition" to do some useful work *within* antitrust analysis—*i.e.*, if we want to use it to inform our view of how antitrust should treat particular phenomena or practices—we will need something narrower than "all forms of rivalry between market competitors."[120]

All too often, courts and commentators use the labels "procompetitive" and "anticompetitive" as if they have some obvious, but unstated, meaning. Be alert for this! Consider, for example, this famous formulation of the antitrust "rule of reason" under Section 1 of the Sherman Act in a challenge to a rule adopted by the Chicago Board of Trade:

> [The government, prosecuting this case] made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or if raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to anyone. . . . [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.[121]

This language gets quoted a lot in ways that suggest it is very helpful and insightful, but the truth is that it is strikingly unhelpful for a reader trying to discern what it really means to "promote" rather than "suppress or even destroy" competition. The language at the beginning of the quotation suggests that output, speed of shipping, prices, discrimination, and hardship to "any one" might all be relevant, in some way. But it is not clear how, or why, or what to do if those metrics conflict. (What if output goes up but so do prices? What if there is hardship and discrimination but lower prices?) The Court is telling us what to look *at* (everything?), but not what to look *for*.

Similarly, regarding the monopolization offense in Section 2, the Supreme Court has given the following—equally famous (and perhaps almost equally vague)—guidance in *Trinko:*

> It is settled law that [the monopolization] offense requires, in addition to the possession of monopoly power in the relevant market, "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. 563, 570–71 (1966). The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard

[120] *See, e.g.*, Herbert Hovenkamp & Carl Shapiro, *Horizontal Mergers, Market Structure, and Burdens of Proof*, 127 Yale LJ. 1996, 2020 (2018) ("Does 'lessened competition' refer to lower output and higher price-cost margins, or rather to a market structure with fewer firms? If the former, then a merger creating a larger, more efficient firm that charges lower prices is welcome. If the latter, such a merger is unwelcome, especially if that firm will drive smaller, less-efficient firms out of business. Both of these are more or less consistent with the lay understanding of 'competition.'").

[121] Board of Trade of City of Chicago v. U.S., 246 U.S. 231, 238 (1918).

> the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.[122]

What does this tell us about when conduct is "anticompetitive"? At least the Court is clear here on the point that charging a monopoly price is not anticompetitive in the relevant sense. But the language quoted from *Grinnell* is little help. As one of us has argued elsewhere: "[T]his definition makes no sense: virtually every business seeks to win share from competitors—it willfully seeks monopoly—including through superior products and business acumen. No one thinks that 'willfulness' in chasing monopoly is bad or rare. Every monopolization defendant claims that its conduct facilitates 'superior' operation. And if the use of 'acumen' is exculpatory, then what remains? The first half of the Court's binary is not necessarily bad, the second part is not necessarily good, and they are in no real tension."[123]

The point is that the word "competition" is susceptible of many different definitions and understandings, and labels like "competition on the merits" and "anticompetitive conduct" are not self-applying. The beliefs, values, and assumptions that each of us brings to our work with antitrust will affect our intuitions about how we should understand the kind of "competition" that antitrust does and should protect. As you read the following extracts, and in the rest of the book, keep your eyes on the following questions (and the answers to them that judges and scholars seem to have in mind when they answer antitrust questions!).

When we interpret, apply, develop, and amend antitrust rules:

- **Goals and interests.** What are we trying to achieve or maximize? Whose interests matter and in what ways? Who should make this decision and how?
- **Competition and other values.** Do we want "maximum" competition (however defined), or do we want to balance competition against other desirable things? Who should make this decision and how?
- **Limits of regulators' knowledge.** How good do we think courts are, generally, at telling when a practice or transaction should be prohibited? What about agencies? How do we know?
- **Error costs.** Do we think that the costs of wrongly prohibiting business practices are generally higher or lower than the costs of wrongly permitting them? Are there circumstances under which the balance of costs might tip the other way?
- **Static v. dynamic effects.** How do we weigh static effects (like increased prices) against dynamic ones (like increased innovation)?
- **Probabilities.** How do we weigh high-probability outcomes against low-probability outcomes? And how do we assess these probabilities?
- **Tendencies and effects.** How do we know what effects practices like exclusivity arrangements, bundling pricing, and mergers have? How generalizable is that knowledge from one context to another?
- **Whose perspective?** Who is the "we" in these questions anyway? Do we have in mind judges, enforcement officials, economists, scholars, business executives, consumers, workers, union officials, employees, shareholders, citizens? Would the answers differ if we had different people in mind?

What kind of "competition" do the authors of the following extracts understand antitrust to protect? How do they seem to determine whether or not something is procompetitive or anticompetitive? Don't worry at this stage about the substantive antitrust law: just ask what version of "competition" is being valued and defended. For example: in what sense did the merger in *Von's Grocery* threaten to harm competition, and what facts suggested such harm? Is *Utah Pie* a tale of competitive harm, as the Court suggests—and if so what would "more competition" have looked like? Why didn't the plaintiff get what it wanted in *Cargill*? And what point is Judge Posner making about the intent to inflict harm through competition in *Olympia Equipment*? One very important note: neither *Von's Grocery* nor *Utah Pie* is representative of the current state of the law or the current practice of the courts. They are included here to demonstrate that the idea of "competition" can be (and has been) understood in very different ways, not to teach you anything about substantive antitrust law.

---

[122] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[123] Daniel Francis, *Making Sense of Monopolization*, 84 Antitrust L.J. 779, 780 (2022).

United States v. Von's Grocery Co.

384 U.S. 270 (1966)

Justice Black.

[1] On March 25, 1960, the United States brought this action charging that the acquisition by Von's Grocery Company of its direct competitor Shopping Bag Food Stores, both large retail grocery companies in Los Angeles, California, violated s 7 of the Clayton Act[.] [. . .]

[2] The market involved here is the retail grocery market in the Los Angeles area. In 1958 Von's retail sales ranked third in the area and Shopping Bag's ranked sixth. In 1960 their sales together were 7.5% of the total two and one-half billion dollars of retail groceries sold in the Los Angeles market each year. . . . From 1948 to 1958 the number of Von's stores in the Los Angeles area practically doubled from 14 to 27, while at the same time the number of Shopping Bag's stores jumped from 15 to 34. . . . [T]he findings of the District Court show that the number of owners operating single stores in the Los Angeles retail grocery market decreased from 5,365 in 1950 to 3,818 in 1961. By 1963, three years after the merger, the number of single-store owners had dropped still further to 3,590. During roughly the same period, from 1953 to 1962, the number of chains with two or more grocery stores increased from 96 to 150. [. . .]

[3] Like the Sherman Act in 1890 and the Clayton Act in 1914, the basic purpose of the 1950 Celler-Kefauver Act was to prevent economic concentration in the American economy by keeping a large number of small competitors in business. In stating the purposes of their bill, both of its sponsors, Representative Celler and Senator Kefauver, emphasized their fear, widely shared by other members of Congress, that this concentration was rapidly driving the small businessman out of the market. . . . [In Section 7 of the Clayton Act] Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies. Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever-increasing concentration through mergers.

[4] The facts of this case present exactly the threatening trend toward concentration which Congress wanted to halt. The number of small grocery companies in the Los Angeles retail grocery market had been declining rapidly before the merger and continued to decline rapidly afterwards. This rapid decline in the number of grocery store owners moved hand in hand with a large number of significant absorptions of the small companies by the larger ones. In the midst of this steadfast trend toward concentration, Von's and Shopping Bag, two of the most successful and largest companies in the area, jointly owning 66 grocery stores merged to become the second largest chain in Los Angeles. This merger cannot be defended on the ground that one of the companies was about to fail or that the two had to merge to save themselves from destruction by some larger and more powerful competitor. What we have on the contrary is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate s 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested.

[5] Appellees' primary argument is that the merger between Von's and Shopping Bag is not prohibited by s 7 because the Los Angeles grocery market was competitive before the merger, has been since, and may continue to be in the future. Even so, s 7 requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended s 7 was intended to arrest anti-competitive tendencies in their incipiency. It is enough for us that Congress feared that a market marked at the same time by both a continuous decline in the number of small businesses and a large number of mergers would slowly but inevitably gravitate from a market of many small competitors to one dominated by one or a few giants, and competition would thereby be destroyed. Congress passed the Celler-Kefauver Act to prevent such a destruction of competition. Our cases since the passage of that Act have faithfully endeavored to enforce this congressional command. We adhere to them now.

* * *

Utah Pie Co. v. Continental Baking Co.

386 U.S. 685 (1967)

{*Eds.: In the following extract some paragraphs have been broken up to make them easier to read.*}

Justice White.

[1] This suit for treble damages and injunction . . . was brought by petitioner, Utah Pie Company, against respondents, Continental Baking Company, Carnation Company and Pet Milk Company. The complaint charged a conspiracy under ss 1 and 2 of the Sherman Act, and violations by each respondent of . . . the Robinson-Patman Act. . . . The Court of Appeals [considered] the single issue of whether the evidence against each of the respondents was sufficient to support a finding of probable injury to competition within the meaning of s 2(a) and holding that it was not. We granted certiorari. We reverse.

[2] The product involved is frozen dessert pies—apple, cherry, boysenberry, peach, pumpkin, and mince. The period covered by the suit comprised the years 1958, 1959, and 1960 and the first eight months of 1961. Petitioner is a Utah corporation which for 30 years had been baking pies in its plant in Salt Lake City and selling them in Utah and surrounding States. . . . The frozen pie market was a rapidly expanding one: 57,060 dozen frozen pies were sold in the Salt Lake City market in 1958, 111,729 dozen in 1959, 184,569 dozen in 1960, and 266,908 dozen in 1961. Utah Pie's share of this market in those years was 66.5%[,] 34.3%[,] 45.5%, and 45.3% respectively, its sales volume steadily increasing over the four years. . . .

[3] Each of the respondents is a large company and each of them is a major factor in the frozen pie market in one or more regions of the country. Each entered the Salt Lake City frozen pie market before petitioner began freezing dessert pies. None of them had a plant in Utah. By the end of the period involved in this suit Pet had plants in Michigan, Pennsylvania, and California; Continental in Virginia, Iowa, and California; and Carnation in California. The Salt Lake City market was supplied by respondents chiefly from their California operations. [. . .]

[4] The major competitive weapon in the Utah market was price. The location of petitioner's plant gave it natural advantages in the Salt Lake City marketing area and it entered the market at a price below the then going prices for respondents' comparable pies. For most of the period involved here its prices were the lowest in the Salt Lake City market. It was, however, challenged by each of the respondents at one time or another and for varying periods. There was ample evidence to show that each of the respondents contributed to what proved to be a deteriorating price structure over the period covered by this suit, and each of the respondents in the course of the ongoing price competition sold frozen pies in the Salt Lake market at prices lower than it sold pies of like grade and quality in other markets considerably closer to its plants. [. . .]

[5] We deal first with petitioner's case against the Pet Milk Company. Pet entered the frozen pie business in 1955, acquired plants in Pennsylvania and California and undertook a large advertising campaign to market its 'Pet-Ritz' brand of frozen pies. Pet's initial emphasis was on quality, but in the face of competition from regional and local companies and in an expanding market where price proved to be a crucial factor, Pet was forced to take steps to reduce the price of its pies to the ultimate consumer.

[6] First, Pet successfully concluded an arrangement with Safeway, which is one of the three largest customers for frozen pies in the Salt Lake market, whereby it would sell frozen pies to Safeway under the latter's own "Bel-air" label at a price significantly lower than it was selling its comparable "Pet-Ritz" brand in the same Salt Lake market and elsewhere. The initial price on "Bel-air" pies was slightly lower than Utah's price for its "Utah" brand of pies at the time, and near the end of the period the "Bel-air" price was comparable to the "Utah" price but higher than Utah's "Frost 'N' Flame" brand. Pet's Safeway business amounted to 22.8%, 12.3%, and 6.3% of the entire Salt Lake City market for the years 1959, 1960, and 1961, respectively, and to 64%, 44%, and 22% of Pet's own Salt Lake City sales for those same years.

[7] Second, it introduced a 20-ounce economy pie under the "Swiss Miss" label and began selling the new pie in the Salt Lake market in August 1960 at prices ranging from $3.25 to $3.30 for the remainder of the period. This pie was at times sold at a lower price in the Salt Lake City market than it was sold in other markets.

[8] Third, Pet became more competitive with respect to the prices for its "Pet-Ritz" proprietary label. For 18 of the relevant 44 months its offering price for Pet-Ritz pies was $4 per dozen or lower, and $3.70 or lower for six of these months. According to the Court of Appeals, in seven of the 44 months Pet's prices in Salt Lake were lower than prices charged in the California markets. This was true although selling in Salt Lake involved a 30- to 35-cent freight cost.

[9] The Court of Appeals first concluded that Pet's price differential on sales to Safeway must be put aside in considering injury to competition because in its view of the evidence the differential had been completely cost justified and because Utah would not in any event have been able to enjoy the Safeway custom. Second, it concluded that the remaining discriminations on "Pet-Ritz" and "Swiss Miss" pies were an insufficient predicate on which the jury could have found a reasonably possible injury either to Utah Pie as a competitive force or to competition generally.

[10] We disagree with the Court of Appeals in several respects. First, there was evidence from which the jury could have found considerably more price discrimination by Pet with respect to "Pet-Ritz" and "Swiss Miss" pies than was considered by the Court of Appeals. In addition to the seven months during which Pet's prices in Salt Lake were lower than prices in the California markets, there was evidence from which the jury could reasonably have found that in 10 additional months the Salt Lake City prices for "Pet-Ritz" pies were discriminatory as compared with sales in western markets other than California. Likewise, with respect to "Swiss Miss" pies, there was evidence in the record from which the jury could have found that in five of the 13 months during which the "Swiss Miss" pies were sold prior to the filing of this suit, prices in Salt Lake City were lower than those charged by Pet in either California or some other western market.

[11] Second, with respect to Pet's Safeway business, the burden of proving cost justification was on Pet and, in our view, reasonable [jurors] could have found that Pet's lower priced, "Bel-air" sales to Safeway were not cost justified in their entirety. Pet introduced cost data for 1961 indicating a cost saving on the Safeway business greater than the price advantage extended to that customer. . . .

[12] With respect to whether Utah would have enjoyed Safeway's business absent the Pet contract with Safeway, it seems clear that whatever the fact is in this regard, it is not determinative of the impact of that contract on competitors other than Utah and on competition generally. There were other companies seeking the Safeway business, including Continental and Carnation, whose pies may have been excluded from the Safeway shelves by what the jury could have found to be discriminatory sales to Safeway. . . . .

[13] Third, the Court of Appeals almost entirely ignored other evidence which provides material support for the jury's conclusion that Pet's behavior satisfied the statutory test regarding competitive injury. This evidence bore on the issue of Pet's predatory intent to injure Utah Pie. As an initial matter, the jury could have concluded that Pet's discriminatory pricing was aimed at Utah Pie; Pet's own management, as early as 1959, identified Utah Pie as an "unfavorable factor," one which "dug holes in our operation" and posed a constant "check" on Pet's performance in the Salt Lake City market. Moreover, Pet candidly admitted that during the period when it was establishing its relationship with Safeway, it sent into Utah Pie's plant an industrial spy to seek information that would be of use to Pet in convincing Safeway that Utah Pie was not worthy of its custom. Pet denied that it ever in fact used what it had learned against Utah Pie in competing for Safeway's business. The parties, however, are not the ultimate judges of credibility. But even giving Pet's view of the incident a measure of weight does not mean the jury was foreclosed from considering the predatory intent underlying Pet's mode of competition. Finally, Pet does not deny that the evidence showed it suffered substantial losses on its frozen pie sales during the greater part of the time involved in this suit, and there was evidence from which the jury could have concluded that the losses Pet sustained in Salt Lake City were greater than those incurred elsewhere. It would not have been an irrational step if the jury concluded that there was a relationship between price and the losses.

[14] It seems clear to us that the jury heard adequate evidence from which it could have concluded that Pet had engaged in predatory tactics in waging competitive warfare in the Salt Lake City market. Coupled with the incidence of price discrimination attributable to Pet, the evidence as a whole established, rather than negated, the reasonable possibility that Pet's behavior produced a lessening of competition proscribed by the Act. [. . .]

[15] Petitioner's case against Continental is not complicated. Continental was a substantial factor in the market in 1957. But its sales of frozen 22-ounce dessert pies, sold under the "Morton" brand, amounted to only 1.3% of the market in 1958, 2.9% in 1959, and 1.8% in 1960. . . .

[16] In late 1960 it worked out a co-packing arrangement in California by which fruit would be processed directly from the trees into the finished pie without large intermediate packing, storing, and shipping expenses. Having improved its position, it attempted to increase its share of the Salt Lake City market by utilizing a local broker and offering short-term price concessions in varying amounts. Its efforts for seven months were not spectacularly successful. Then in June 1961, it took the steps which are the heart of petitioner's complaint against it. Effective for the last two weeks of June it offered its 22-ounce frozen apple pies in the Utah area at $2.85 per dozen. It was then selling the same pies at substantially higher prices in other markets. The Salt Lake City price was less than its direct cost plus an allocation for overhead. Utah's going price at the time for its 24-ounce "Frost 'N' Flame" apple pie sold to Associated Grocers was $3.10 per dozen, and for its "Utah" brand $3.40 per dozen. At its new prices, Continental sold pies to American Grocers in Pocatello, Idaho, and to American Food Stores in Ogden, Utah. Safeway, one of the major buyers in Salt Lake City, also purchased 6,250 dozen, its requirements for about five weeks. Another purchaser ordered 1,000 dozen.

[17] Utah's response was immediate. It reduced its price on all of its apple pies to $2.75 per dozen. Continental refused [its customer] Safeway's request to match Utah's price, but renewed its offer at the same prices effective July 31 for another two-week period. Utah filed suit on September 8, 1961. Continental's total sales of frozen pies increased from 3,350 dozen in 1960 to 18,800 dozen in 1961. Its market share increased from 1.8% in 1960 to 8.3% in 1961. The Court of Appeals concluded that Continental's conduct had had only minimal effect, that it had not injured or weakened Utah Pie as a competitor, that it had not substantially lessened competition and that there was no reasonable possibility that it would do so in the future.

[18] We again differ with the Court of Appeals. Its opinion that Utah was not damaged as a competitive force apparently rested on the fact that Utah's sales volume continued to climb in 1961 and on the court's own factual conclusion that Utah was not deprived of any pie business which it otherwise might have had. But this retrospective assessment fails to note that Continental's discriminatory below-cost price caused Utah Pie to reduce its price to $2.75. The jury was entitled to consider the potential impact of Continental's price reduction absent any responsive price cut by Utah Pie. Price was a major factor in the Salt Lake City market. Safeway, which had been buying Utah brand pies, immediately reacted and purchased a five-week supply of frozen pies from Continental, thereby temporarily foreclosing the proprietary brands of Utah and other firms from the Salt Lake City Safeway market. The jury could rationally have concluded that had Utah not lowered its price, Continental, which repeated its offer once, would have continued it, that Safeway would have continued to buy from Continental and that other buyers, large as well as small, would have followed suit. It could also have reasonably concluded that a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.

* * *

Cargill, Inc. v. Monfort of Colorado, Inc.

479 U.S. 104 (1986)

Justice Brennan.

[1] Respondent Monfort of Colorado, Inc. (Monfort), the plaintiff below, owns and operates three integrated beef-packing plants, that is, plants for both the slaughter of cattle and the fabrication of beef. . . .

[2] Monfort is the country's fifth-largest beef packer. Petitioner Excel Corporation (Excel), one of the two defendants below, is the second-largest packer. Excel operates five integrated plants and one fabrication plant. It is a wholly owned subsidiary of Cargill, Inc., the other defendant below, a large privately owned corporation with more than 150 subsidiaries in at least 35 countries.

[3] On June 17, 1983, Excel signed an agreement to acquire the third-largest packer in the market, Spencer Beef . . . . Spencer Beef owned two integrated plants and one slaughtering plant. After the acquisition, Excel would still be the second-largest packer, but would command a market share almost equal to that of the largest packer, IBP, Inc. (IBP).

[4] Monfort brought an action . . . to enjoin the prospective merger. Its complaint alleged that the acquisition would violate Section 7 of the Clayton Act because the effect of the proposed acquisition may be substantially to lessen competition or tend to create a monopoly[.] [. . .]

[5] Monfort alleged that after the merger, Excel would attempt to increase its market share at the expense of smaller rivals, such as Monfort. To that end, Monfort claimed, Excel would bid up the price it would pay for cattle, and reduce the price at which it sold boxed beef. Although such a strategy, which Monfort labeled a "price-cost squeeze," would reduce Excel's profits, Excel's parent corporation had the financial reserves to enable Excel to pursue such a strategy. Eventually, according to Monfort, smaller competitors lacking significant reserves and unable to match Excel's prices would be driven from the market; at this point Excel would raise the price of its boxed beef to supracompetitive levels, and would more than recoup the profits it lost during the initial phase. [. . .]

[6] [Monfort claims] that after the merger, Excel would lower its prices to some level at or slightly above its costs in order to compete with other packers for market share. Excel would be in a position to do this because of the multiplant efficiencies its acquisition of Spencer would provide. To remain competitive, Monfort would have to lower its prices; as a result, Monfort would suffer a loss in profitability, but would not be driven out of business. The question is whether Monfort's loss of profits in such circumstances constitutes antitrust injury. [. . .]

[7] . . . We find respondent's proposed construction of § 7 too broad . . . . [T]he antitrust laws do not require the courts to protect small businesses from the loss of profits due to continued competition, but only against the loss of profits from practices forbidden by the antitrust laws. The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition. The logic of [our prior case law] compels the conclusion that the threat of loss of profits due to possible price competition following a merger does not constitute a threat of antitrust injury.

* * *

Olympia Equipment Leasing Co. v. Western Union Telegraph Co.

797 F.2d 370 (7th Cir. 1986)

{*Eds.: In the following extract some paragraphs have been broken up to make them easier to read.*}

Judge Posner.

[1] The importance of intent in such fields as tort and criminal law makes it natural to suppose that it should play an important role in antitrust law as well, for an antitrust violation is a statutory tort. But there is an insoluble ambiguity about anticompetitive intent that is not encountered in the ordinary tort case. If A strikes B deliberately, we are entitled to infer, first, that A's act was more dangerous than if the blow had been accidental (you are more likely to hurt someone if you are trying to hurt him than if you are trying, however ineptly, to avoid hurting him, as in the typical accident case), and, second, that the cost of avoidance to the injurer would have been less than if the blow had been accidental; indeed, the cost of forbearing to commit an act of deliberate aggression is negative, because the act requires effort. Similar inferences would be possible in antitrust cases if the purpose of antitrust law were to protect the prosperity or solvency (corresponding to the bodily integrity of potential tort victims) of competitors, but it is not. Competition, which is always deliberate, has never been a tort, intentional or otherwise. If firm A through lower prices or a better or more dependable product succeeds in driving competitor B out of business, society is better off, unlike the case where A and B are individuals and A kills B for B's money. In both

cases the "aggressor" seeks to transfer his victim's wealth to himself, but in the first case we applaud the result because society as a whole benefits from the competitive process. . . .

[2] Most businessmen don't like their competitors, or for that matter competition. They want to make as much money as possible and getting a monopoly is one way of making a lot of money. That is fine, however, so long as they do not use methods calculated to make consumers worse off in the long run. Consumers would be worse off if a firm with monopoly power had a duty to extend positive assistance to new entrants, or having extended it voluntarily a duty to continue it indefinitely. The imposition of such a duty would make firms that possessed or might be thought to possess monopoly power, however laudably obtained, timid about relinquishing that power or, having done so, timid about competing with new entrants. The question therefore is not whether [the defendant acted] in order to make money at the expense of [the plaintiff], which of course it did, but whether [the conduct] was an objectively anticompetitive act.

G. Some Further Reading

Jonathan Baker, THE ANTITRUST PARADIGM: RESTORING A COMPETITIVE ECONOMY (2019)

Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF (1978)

Eleanor M. Fox & Daniel A. Crane (eds.), ANTITRUST STORIES (2007)

Eleanor Fox, *The Battle for the Soul of Antitrust*, 75 Cal. L. Rev. 917 (1987)

Herbert J. Hovenkamp, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005)

Lina M. Khan & Sandeep Vaheesan, *Market power and inequality: The antitrust counterrevolution and its discontents*, 11 Harv. L. & Pol'y Rev. 235 (2017)

William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, 14 J. Econ. Persp. 43 (2000)

William E. Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration*, 74 Iowa L. Rev. 1105 (1989)

Marina Lao, *Ideology Matters in the Antitrust Debate*, 79 Antitrust L.J. 649 (2014)

Robert Pitofsky (ed.), HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2008)

Edwin S. Rockefeller, THE ANTITRUST RELIGION (2007)

Hans B. Thorelli, THE FEDERAL ANTITRUST POLICY: THE ORIGINATION OF AN AMERICAN TRADITION (1955)

Gregory J. Werden, THE FOUNDATIONS OF ANTITRUST (2020)

Tim Wu, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018)