

CHAPTER 1

ANTITRUST POLICY: AN INTRODUCTION

§ 1.01 The Focus of Antitrust

Antitrust law is the study of competition. It is a body of law that seeks to assure competitive markets through the interaction of sellers and buyers in the dynamic process of exchange. For example, as a consumer, you are motivated by a desire to purchase products at the highest quality and lowest price. Through purchases you seek to maximize your satisfaction. Sellers of products, in turn, attempt to determine what consumers will buy and how to supply products at the highest quality and best prices. They also attempt to produce those products by expending the least amount of resources.

When buyers and sellers react as these assumptions suggest, the market is competitive. The single most important feature of this competitive interaction is that buyers and sellers act independently, not in concert. For sellers this means that each searches for opportunities to respond to the demands of consumers. The search is intensified by knowledge that, if sellers do not respond to the needs of consumers with the desired product at a fair price, a competitor is likely to fill the void by offering the product and earning a profit by doing so. What this means for you as a consumer is an opportunity to pick and choose among alternatives in order to maximize your satisfaction from each dollar spent.

Contrast this independent action by sellers with a case in which they have agreed to act in concert. For example, suppose the presidents of all the textbook publishing companies gathered in the proverbial “smoke-filled room” and agreed that only one publisher would produce antitrust books or that no textbooks would be sold for less than a set price. This agreement not to compete would mean that each producer would be far less concerned about responding to your needs. As a result, the range of choices available to you would be severely restricted. It is very likely that the satisfaction derived by you per dollar spent would decline.

Antitrust law is centered on certain principles; the primary one is that society is better off if markets behave competitively. Thus to study antitrust is to examine the relationship between buyers and sellers in individual markets, how products and resources are allocated, and how quantities and prices are determined within those markets. Because every student of antitrust is a consumer and, as a lawyer, a seller of services, the study of antitrust should be intrinsically valuable. Each of us is directly affected by the operation of the antitrust laws.

As we study antitrust, we see that it attempts to regulate producers and suppliers of products and services when their conduct does not conform to certain expectations. As a matter of policy, we have decided through Congressional enactment that markets should be competitive. When the market — the interaction of buyers and sellers — deviates from the competitive ideal, antitrust law has a role to play. Private parties or federal or state governments may invoke the antitrust laws in order to regulate or correct the market failure. We must be cautious, however, that the cost of antitrust intervention and regulation of markets does not exceed the cost associated with the identified market failure. If the cost of antitrust enforcement is greater than the costs of the breakdown of the market forces, another kind of failure exists; it too can result in higher prices and injury to consumers. The cost of excessive regulation, as in the case of market failure, is ultimately, borne by each of us as consumers.

The development of antitrust law has been evolutionary, changing over time as we gain new knowledge about how exchanges occur between buyers and sellers. In studying antitrust, we are drawn into a lively debate not only on what the law is but what it ought to be. This implicates ideology and philosophy, as well as history, economics, and public policy. In short, the study of antitrust, as told in this text, is about an evolution of assumptions about production and exchange functions in society and how those activities are ordered and regulated by society when there is a breakdown of market forces. While the reader may be introduced to new terminology in this book, the conduct described here is familiar to all of us. We experience it each day as consumers. This book gives each of us an opportunity to reflect on the dynamics of the marketplace and the kinds of laws that ought to govern it.

Each chapter of this book addresses separate problems that affect competition. Chapter 2 reviews the economic assumptions and implications of antitrust conduct. Chapter 3 introduces the reader to jurisdiction and enforcement requirements under each antitrust law. It also sets forth certain exceptions and defenses to antitrust coverage. Chapter 4 discusses the problems involved when competitors enter into agreements that have the effect of restraining competition. In contrast, Chapter 5 concerns competition issues raised by agreements between firms at different levels in the production or distribution of a product, firms that are not in competition with each other. For example, if a manufacturer of a product attempts to establish the price at which the product is sold by the retailer to the consumer, antitrust law is implicated. Chapter 6 analyzes monopolies and how their conduct can injure consumers. Mergers and acquisitions, which have been frequent topics in the popular press, are discussed in Chapter 7. Finally, Chapter 8 analyzes the law that prohibits sellers from discriminating in price when they sell a product.

What you are about to discover is that while antitrust law has a rich, diverse, and interesting history, it has no less a critical role to play in contemporary society. Its rich fabric surrounds all of our lives, whether consumers or producers, and especially as students studying the marketplace, where mergers, monopolies, and contracts that rig public bids and agreements that restrict competition seem pervasive. Knowledge of antitrust is relevant whether we work on Wall Street or on Main Street.

§ 1.02 Legislative History and Antitrust Goals

Because antitrust is the study of competition, the central issue is how that term has been defined by courts. This is the core question which you will focus on as you move through the chapters of this text. As you will quickly discern, the answer is largely a question of policy. It varies depending on one's ideology and views of the legislative history and development of the antitrust laws and their underlying values. Policy choices confront the antitrust student at every turn. This is true whether one seeks a contemporary interpretation of antitrust or whether one starts by reviewing the legislative history of the antitrust laws.

A contemporary application of the antitrust laws has a certain *déjà vu* quality. The central arguments heard today in antitrust are similar to those echoed in the early, formative years of this country. The genesis of the antitrust debate predates the first antitrust statute, the Sherman Act in 1890. The debate is as old as Jefferson's and Hamilton's view of government.¹

¹ See generally A.D. Neale & D.G. Goyder, *The Antitrust Laws of the U.S.A.* 439–43, 470 (3d ed. 1980); *The Political Economy of the Sherman Act: The First One Hundred Years* (E. Thomas Sullivan

Jefferson urged a deconcentrated society and government, one that valued independent decision-making and equality-enhancing opportunities for small, local businesses. Control of economic concentrations of industrial power was central to Jeffersonian populism. Hamilton, on the other hand, feared that decentralization might interfere with the goal of efficiency. He was an exponent of a strong national government, particularly central control over financial and economic issues and institutions.² These two themes were fundamental to the formation and shape of our government. As we will see in this text, they are evident in the study of antitrust today.

Jeffersonianism was evident in the legislative history of the Sherman Act. The Congress that passed the Sherman Act was concerned with business concentration, acquisition of monopoly power, and cartels that might lead to increased prices and overcharges to consumers. Entrepreneurial independence and freedom for independent decision-making and contracting in the market were, in addition, themes expressed in the legislative debates by those favoring the legislation. Dispersing economic power and stimulating access to free markets also were principal goals. Distributional effects and equity concerns were directed toward protecting consumers from a redistribution of wealth from consumers to monopolists and toward protecting competitors from predatory practices.³ Generally speaking, these goals are unrelated to the Hamiltonian goal of efficiency.

Hamiltonianism was also evident in the legislative history of the Sherman Act. Rejecting this politically-centered, distributive-goal analysis, some scholars have concluded that the main, if not the sole, purpose behind the Sherman Act was the promotion of economic efficiency.⁴ Grounded in a more Hamiltonian approach, this theory argues that antitrust policy should sanction business conduct that promotes efficient allocations of resources. For many students of antitrust the ultimate question is whether the challenged practice produces a net gain or loss to the consumer. The resolution of the underlying policy rationale for antitrust is crucial to a contemporary study of antitrust.

An objective, balanced reading of the legislative history of the Sherman Act reveals that multiple goals and values were expressed by supporters as the

ed., 1991); Arthur M. Schlesinger, Jr., *The Cycles of American History* 220–23, 242 (1986); Donald I. Baker & William Blumenthal, *Ideological Cycles and Unstable Antitrust Rules*, 31 *Antitrust Bull.* 323, 324–25 (1986).

² *The Federalist* Nos. 9, 11, 16 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

³ S. 1, 51st Cong. (1st Sess. 1889), reprinted in 1 *The Legislative History of the Federal Antitrust Laws and Related Statutes* 89 (Earl W. Kintner ed., 1978); 21 *Cong. Rec.* 2460, 2457, 3146, 3152 (1890); see also Harlan M. Blake & William K. Jones, *In Defense of Antitrust*, 65 *Colum. L. Rev.* 377 (1965); John J. Flynn, *Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy*, 125 *U. Pa. L. Rev.* 1182 (1977); Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 *Cornell L. Rev.* 1140 (1981); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 *Hastings L.J.* 65, 68–70 (1982); Stephen F. Ross, *Principles of Antitrust Law* 6–11 (1993); Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 *U. Pa. L. Rev.* 1076 (1979); E. Thomas Sullivan, *The Economic Jurisprudence of the Burger Court’s Antitrust Policy: The First Thirteen Years*, 58 *Notre Dame L. Rev.* 1 (1982).

⁴ Richard A. Posner, *Economic Analysis of Law* 10 (2d ed. 1977); Richard A. Posner, *Antitrust Law: An Economic Perspective* 4, ch. 2 (1976); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 *J.L. & Econ.* 7 (1966); Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 *Geo. Wash. L. Rev.* 1, 1–4 (1982).

legislation was debated.⁵ There is agreement today, however, that the antitrust laws were written foremost to encourage competition.⁶ Although disagreeing as to the primacy or hierarchy of the various goals and policies expressed in the congressional debates, most antitrust commentators agree that, ultimately, Congress was most concerned with monopoly and cartel conduct⁷ that restrict output, increase prices to consumers,⁸ and result in monopoly profits. High output, low prices, and acceptable quality were and are still popular goals. They are the driving sources that define competition in the market.⁹ Competitive pricing is central to the whole of the legislative debate. The continuing debate over whether the goal of promoting competition was rooted in concern over allocative efficiency or distribution of wealth is not likely to be resolved soon.¹⁰ Notwithstanding the academic debate over congressional intent, the promotion of competition through restraints on monopoly and cartel behavior clearly emerges as the first principle of antitrust. Monopoly profits are condemned either because they are achieved through

⁵ Richard Hofstadter, *What Happened to the Antitrust Movement?*, in *The Paranoid Style in American Politics and Other Essays* 199–200, 205, 209 (1965); see also William H. Page, *Ideological Conflict and the Origins of Antitrust Policy*, 66 Tul. L. Rev. 1 (1991).

⁶ Lande, *supra* note 3; see also *Standard Oil Co. v. FTC*, 340 U.S. 231, 248–49 (1951); Walter Adams & James W. Brock, *The Bigness Complex: Industry, Labor and Government in the American Economy* 87–117 (1986).

⁷ See Chapters 4 and 6 for definitions of these terms.

⁸ See, e.g., Hovenkamp, *supra* note 4, at 16–17; Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 Cal. L. Rev. 263, 286–87 (1986).

⁹ See generally Robert H. Bork, *The Antitrust Paradox* 20–21 (1978); Posner, *supra* note 4, at 23; Bork, *supra* note 4, at 16–21; Hovenkamp, *supra* note 4, at 27–31; E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. Pitt. L. Rev. 771 (1984).

¹⁰ The legislative intent regarding the other antitrust statutes discussed in this book is clearer. For example, the dominant underpinning of the Robinson-Patman Act in 1936, 15 U.S.C. § 13, was the protection of small businesses from leveraged buying practices of larger businesses; the legislation plainly was designed to promote small business over larger firms. See *infra* ch. 8. See generally Bork, *supra* note 10, at 383; Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 Wash. L. Rev. 1 (1966); Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113 (1983).

The same is true for the Clayton Act in 1914, particularly with regard to the 1950 Celler-Kefauver Amendments. See Derek C. Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226, 233 (1960); Fox, *supra* note 3, at 1144 n.12; Hovenkamp, *supra* note 4, at 24–26 (“Bork’s description of the legislative history of the Celler-Kefauver amendment is so inconsistent with the legislative history itself that it is difficult to believe Bork had the correct book in his hands when he described its contents.”); Lande, *supra* note 3, at 126–40; *infra* chs. 5 & 7; see also 51 Cong. Rec. 9088 (1914) (statement of Rep. Mitchell); 96 Cong. Rec. 11,506 (1950) (statement of Sen. Kefauver).

The Federal Trade Commission Act in 1914 had efficiency, as well as wealth distribution, concerns. “Monopoly is the evil we wish to control. Competition is the thing we wish to maintain.” 51 Cong. Rec. 8855 (1914) (statement of Rep. Morgan). Most antitrust observers agree that the purpose of the FTC Act was the same as the Sherman Act but that expanded powers were needed. As Congressman Stevens, a sponsor of the bill, observed: the purpose of the FTC Act was to serve as “a method of enforcing [the Sherman Act] and making it more effective and preventing its misuse.” 51 Cong. Rec. 14,934 (1914); see also Neil W. Averitt, *The Meaning of “Unfair Acts or Practices” in Section 5 of the Federal Trade Commission Act*, 70 Geo. L.J. 225 (1981). Here, too, the debate continues whether allocative efficiency or wealth distribution was the primary objective of the statute. See Lande, *supra* note 3, at 106–26; see also Bork, *supra* note 9, at 20–21, 51.

allocative inefficiency¹¹ or because they redistribute income and wealth from consumers to producers.

Contemporary disagreement centers on how competition is best achieved and what groups in society should benefit from this goal.¹² It is frequently the case that as the antitrust laws are applied, winners and losers emerge.

The legislative history of the Sherman Act does show that Congress intended to incorporate and federalize the common law antitrust precedents.¹³ A problem of interpretation arose, however, because no unified common law of trade restraints existed. The common law in 1890 included English as well as American judge-made decisions and statutes,¹⁴ espousing the contemporary economic philosophies.¹⁵ As one authority explained:

The congressmen who drafted and passed the Sherman Antitrust Law thought they were merely declaring the illegality of offenses that the common law had always prohibited. [Like others, they have too easily] accepted the mistaken view that the attitude of the common law towards freedom of trade was essentially the same throughout its history.¹⁶

§ 1.03 Early Interpretation

The initial interpretation of the Sherman Act by courts was difficult because, in the words of Senator Sherman, the sponsor of the legislation:

[I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law, as the courts of England and the United States have done for centuries. This bill is only an honest effort to declare a rule of action . . .¹⁷

Congress, therefore, delegated broadly to the courts the role of applying general principles and filling in the large gaps left by the open-ended text of the statute. Common law was to serve as the background for the “meaning of the law.”¹⁸ But,

¹¹ See *infra* ch. 2.

¹² See, e.g., Robert M. Lande, *Consumer Choice as the Ultimate Goal of Antitrust*, 62 U. Pitt. L. Rev. 503, 525 (2001) (suggesting that the focus of antitrust should shift from price to consumer choice).

¹³ 21 Cong. Rec. 2456, 3146, 3151–52 (1890); see Arthur, *supra* note 8, at 277, 279–80, 284.

¹⁴ Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition* 10 (1954); Donald Dewey, *The Common-Law Background of Antitrust Policy*, 41 Va. L. Rev. 759 (1955); see also James May, *Historical Analysis in Antitrust Law*, 35 N.Y.L. Sch. L. Rev. 857 (1990).

¹⁵ William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 18–32 (1965). See generally Herbert Hovenkamp, *The Sherman Act and the Classical Theory of Competition*, 74 Iowa L. Rev. 1019 (1989).

¹⁶ Letwin, *supra* note 15, at 18. See generally James May, *Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880–1918*, 135 U. Pa. L. Rev. 495 (1987).

¹⁷ 21 Cong. Rec. 2460 (1890).

¹⁸ See also James May, *The Role of the States in the First Century of the Sherman Act and the Larger Picture of Antitrust History*, 59 Antitrust L.J. 93 (1990). Compare Arthur, *supra* note 8, at 290–300 with William F. Baxter, *Separation of Powers, Prosecutorial Discretion, and the “Common Law” Nature of Antitrust Law*, 60 Tex. L. Rev. 661 (1982).

as noted above, this was no easy task. The early courts found elusive the operational standards and underpinnings.

Early decisions saw the Supreme Court rapidly change the course of its interpretation, showing a more evolutionary process of decisionmaking. In the first Sherman Act case, *United States v. E.C. Knight Co.*,¹⁹ decided in 1895, the Court held that restraints affecting merely the manufacturing of commodities did not come within the jurisdictional reach of the Act. This narrow definition of commerce, however, did not last. When the Court decided its first Sherman Act case on the merits in *United States v. Trans-Missouri Freight Ass'n*,²⁰ it adopted an over-inclusive interpretation to § 1: every restraint, without exception, was declared illegal.

The next year the Court rejected its reasoning in *Trans-Missouri* by distinguishing common law restraints from those condemned by the Sherman Act. In *United States v. Joint-Traffic Assoc.*,²¹ the Court made clear that market practices that affect competition directly are illegal without inquiry into their reasonableness. Indirect or incidental restraints, under the so-called common law “ancillary restraint” doctrine,²² however, are not condemned under § 1. Thus the *Trans-Missouri* rule that *all* restraints were unlawful under the new Sherman Act was rejected. From *Joint-Traffic* to the present, courts and the antitrust academic community have debated the original intentions of the antitrust laws and this “characterization” process of determining whether the restraint is a direct or indirect interference with commerce.

¹⁹ 156 U.S. 1 (1895).

²⁰ 166 U.S. 290 (1897).

²¹ 171 U.S. 505 (1898).

²² See *infra* § 4.04.