

CHAPTER 1

The Statutory Framework

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§ 1.01 Overview

The federal antitrust laws reflect both economic and social policy. They are informed by concerns about the potential for abuse inherent in the concentration of economic power. Consequently, antitrust policy focuses on controlling the potentially anticompetitive effect of economic power, by regulating the structure of markets and the conduct of market participants.

The basic goal of antitrust law is the protection of consumers from the deleterious effects of monopolies or conspiracies having similar effects.¹ A complementary objective is the protection of businesses from anticompetitive practices intended to injure or eliminate rivals, or to deter the entry of potential competitors. With the expansion of the global economy, U.S. antitrust law also has been increasingly called upon to address the effects of anticompetitive international business practices on American commerce.

Although each of the antitrust statutes derives from independent congressional authority, the courts tend to treat antitrust law as a seamless web with the overriding objective of permitting competition to flourish by barring practices that are on balance anticompetitive. This approach is heavily influenced by the evolution of economic theory and the changing realities of marketplace practices.

¹ See: *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1976); *Standard Oil Co. v. United States*, 221 U.S. 1, 57-60, 31 S.Ct. 503, 55 L.Ed. 619 (1911).

§ 1.02 The Principal Statutes

The principal antitrust laws of the United States are the Sherman Act,¹ the Clayton Act of 1914,² the Federal Trade Commission Act, also enacted in 1914,³ and the Robinson-Patman Act of 1936.⁴ The objectives of these basic statutes have been further advanced by numerous amendments,⁵ exemptions,⁶ enforcement provisions,⁷ and antitrust-related provisions of other statutes.⁸

The Sherman Act is the cornerstone of U.S. antitrust law,⁹ enacted in 1890 in response to rising public concern over the economic power wielded by industrial and transportation combinations.¹⁰ Prior to its passage, the only statute authorizing federal regulation of commerce was the Interstate Commerce Act.¹¹ The Sherman Act was specifically triggered by a fear of price increases resulting from the activities of combinations.¹² There was also widespread concern about the

¹ 15 U.S.C. §§ 1-7.

² U.S.C. §§ 12-27.

³ U.S.C. §§ 41-77.

⁴ 15 U.S.C. § 13, amending Section 2 of the Clayton Act, N. 2 *supra*. For discussion of early English precedent, see Handler, *Cases and Materials on Trade Regulation*, Chapter I (1951). For the evolution of U.S. antitrust law, see Kintner, ed., *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1982); Thorelli, *The Federal Antitrust Policy* (1955).

⁵ See, e.g., Hart-Scott-Rodino Antitrust Improvements Act, 90 Stat 1390 (1976) (pre-merger notification and other provisions).

⁶ See Chapter 20 *infra*. For a partial listing and discussion of antitrust provisions, see: "Report of the National Commission for the Review of Antitrust Laws and Procedures," Part II (1979), 897 Antitrust & Trade Reg. Rep. (Special Supp. 1979); Note, 58 Columbia L. Rev. 673, 679-681 & n.56 (1958).

⁷ See, e.g., Alaska Pipeline Act, 87 Stat. 592 (1973), enacting 15 U.S.C. § 53(b) to authorize the Federal Trade Commission to seek both preliminary and permanent injunctions for antitrust or other violations of laws enforced by the agency.

⁸ See Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314; *Parents Patriae* Act authorizing state suits on behalf of the economy of the state and residents; 15 U.S.C. § 15c-g; National Cooperative Research Act, 15 U.S.C. §§ 4301-4305. For discussion of the anti-tying provisions of Federal Alcohol Administration Act, see, e.g.:

Supreme Court: Black v. Magnolia Liquor Co., 355 U.S. 24, 78, S.Ct. 106, 2 L.Ed.2d 5 (1957).

Second Court: Packers & Stockyards Ass'n v. Perdue Farms, Inc., 680 F.2d 277 (2d Cir. 1982).

⁹ 15 U.S.C. § 1-7.

¹⁰ See: Kintner, ed., *The Legislative History of the Federal Antitrust Laws and Related Statutes* (1982); Thorelli, *The Federal Antitrust Policy* (1955).

¹¹ Interstate Commerce Act of 1887, codified as amended at 47 U.S.C. §§ 10101 *et seq.*

¹² *Standard Oil Co. v. United States*, 221 U.S. 1, 59-60, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Compare, *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

deleterious social and political consequences of such aggregation of economic power for American democracy.¹³

Sections 1 and 2 of the Sherman Act, the core of the statute, prohibit agreements in restraint of trade and illegal monopolies, respectively:

“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;¹⁴

* * *

“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 misdemeanor. . . .”¹⁵

While Section 2 proscribes both concerted and unilateral actions that further monopoly, the prohibition on restraints of trade in Section 1 applies only to “concerted action” between at least “two legally distinct persons or entities.”¹⁶ Concerted activity is of special concern because it “inherently is fraught with anticompetitive risk” and “deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands.”^{16.1}

To establish a conspiracy in violation of Section 1, therefore, plaintiffs must provide proof of joint or concerted action,^{16.2} through direct or circumstantial evidence that “reveal[s] a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful

¹³ See: Thorelli, *The Federal Antitrust Policy* 180 (1955); Fox, “Monopoly and Competition: Tilting the Law Towards a More Competitive Economy,” 37 *Wash. & Lee L. Rev.* 49, 56 (1980). *Compare*:

Supreme Court: *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580, 53 S.Ct. 481, 77 L.Ed. 929 (1933) (Brandeis, J. dissenting).

Second Circuit: *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945).

Compare also: Johnson, *American Heroes and Hero Worship*, p. 234-238 (1941); Cary, “Legal Problems of Economic Power,” 60 *Columbia L. Rev.* 4, 11 (1960).

¹⁴ U.S.C. § 1.

¹⁵ 15 U.S.C. § 2.

¹⁶ *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984). See also, *Oksanen v. Page Memorial Hospital*, 945 F.2d 696, 702 (4th Cir.1991) (*en banc*).

^{16.1} *Copperweld Corp. v. Independence Tube Corp.*, N. 16 *supra*, 467 U.S. at 768-769.

^{16.2} *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

arrangement.”^{16.3} This provision reaches only agreements, not independent decisions. Consequently, Section 1 does not bar conduct by competitors stemming from “independent responses to common stimuli,” and “interdependence unaided by an advance understanding among the parties,”^{16.4} even if such independent decisions “lead to the same anti-competitive result as an actual agreement among market actors.”^{16.5}

The distinction between “concerted” and “independent” action is intended “to deter anticompetitive conduct and compensate its victims, without chilling vigorous competition through ordinary business operations.”^{16.6} More particularly, concerted activity is prohibited by Section 1 when distinct entities “join their resources, rights, and economic power together in order to achieve an outcome that, but for concert, would naturally be frustrated by their competing interests.”^{16.7} Thus, Section 1 does not encroach upon “the entire body of private contract,” and a business generally has “the right to deal or not deal with whomever it likes, as long as it does so independently.”^{16.8}

Furthermore, “[n]ot every instance of cooperation between two people is a potential ‘contract, combination . . . or conspiracy, in restraint of trade.’”^{16.9} It is well-settled that Section 1 of the Sherman Act prohibits only combinations in “unreasonable” restraint of trade. Under the rule established by the 1911 Supreme Court decision *Standard Oil Co. v. United States*,^{16.10} unreasonableness is determined according to whether the restraint’s history, purpose and effect, on balance, produced the evils associated with monopoly.^{16.11}

The majority of concerted actions challenged under Section 1 of the Sherman Act. are analyzed under the rule of reason,^{16.12} a flexible, case-by-case standard that requires a court to weigh “the relevant circumstances of a case to decide whether a restrictive practice constitutes an unreasonable restraint on competition.”^{16.13} Rule of reason

^{16.3} *Id.* at 764 (Citation omitted.).

^{16.4} *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 n. 4, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (Citation omitted.).

^{16.5} *White v. R.M. Packer Co.*, 635 F.3d 571, 575 (1st Cir. 2011) (citing 15 U.S.C. § 1).

^{16.6} *Robertson v. Sea Pines Real Estate Companies, Inc.*, 679 F.3d 278, 284 (4th Cir. 2012).

^{16.7} *Virginia Vermiculite, Ltd. v. Historic Green Springs, Inc.*, 307 F.3d 277, 282 (4th Cir. 2002).

^{16.8} *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc.*, 924 F.2d 539, 542 (4th Cir. 1991).

^{16.9} *American Needle, Inc. v. National Football League*, ___ U.S. ___, 130 S.Ct. 2201, 2208, 176 L.Ed.2d 947 (2010).

^{16.10} See *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 503, 55 L.Ed. 619 (1911) (adopting the rule of reason).

^{16.11} *Id.* at 58-60.

^{16.12} *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

analysis generally entails a balancing of the perceived threat of harm to competition from the challenged conduct against the likelihood that it will yield procompetitive efficiencies.

By contrast, a very small class of “naked restraints of trade” are condemned as *per se* violations of § 1 of the Sherman Act,^{16.14} “because of their pernicious effect on competition and lack of any redeeming virtue.”^{16.15} Over the years, the Supreme Court has narrowed the category of *per se* illegality, with regard to both horizontal agreements (among competitors at the same level of the market structure), and vertical restraints (involving entities at different levels of the market structure, such manufacturers and distributors). This handful of *per se* violations includes horizontal price fixing,^{16.16} the geographic division of markets,^{16.17} and certain group boycotts, or concerted refusals to deal.^{16.18}

It is also “axiomatic” that Section 1 regulates only activities that are “commercial in nature.”^{16.19} Although there is no clear line between commercial and noncommercial transactions, the modern definition of commerce includes “almost every activity from which [an] actor anticipates economic gain.”¹⁷ Thus the nonprofit status of certain entities does not, in itself, exempt them from Sherman Act scrutiny.¹⁸

^{16.13} *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). See also, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

^{16.14} *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963).

^{16.15} *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). See also, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L. Ed.2d 1 (2006); *State Oil Co. v. Khan*, 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (U.S. 1997). (1997) (“Some types of restraints . . . have such predictable and pernicious anticompetitive effect, and such limited potential for pro-competitive benefit, that they are deemed unlawful *per se*”); *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L. Ed.2d 202 (1985).

^{16.16} *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982).

^{16.17} *United States v. Topco Associates*, 405 U.S. 596, 609 n. 9, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972) (“remov[ing any] doubt” that “horizontal territorial limitations, unaccompanied by price 183*183 fixing, are *per se* violations of the Sherman Act”). See also, *United States v. Addyston Pipe & Steel Co.*, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899).

^{16.18} *Klor’s, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959).

^{16.19} *United States v. Brown University*, 5 F.3d 658, 665 (3d Cir. 1993). See also, *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 492-493, 60 S.Ct. 982, 84 L.Ed. 1311 (1940).

¹⁷ Areeda & Hovenkamp, *Antitrust Law*, ¶260b, at 250 (2000).

¹⁸ *Supreme Court: National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100, 104 S.Ct. 2948, 82 L.Ed.2d 704 (1984).

It is often a thorny question, however, whether particular activities conducted by a nonprofit are commercial or noncommercial. These difficulties have been exemplified by various challenges to National Collegiate Athletic Association practices.¹⁹ In *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, the seminal case in this area, the Supreme Court suggested that the Sherman Act governs *all* NCAA regulations.²⁰ However, the circuit courts have puzzled over the precise scope of the statute's application. The Third Circuit has held that the NCAA's promulgation of eligibility rules are exempt from antitrust scrutiny,²¹ while the Fifth Circuit applied the Sherman Act to the eligibility rules without explicitly addressing the question.²² Meanwhile, the Seventh Circuit has concluded that the Sherman Act applies generally to the NCAA bylaws.²³

Congress enacted both the Clayton Act²⁴ and the Federal Trade Commission Act²⁵ in 1914, largely in response to the Supreme Court's restrictive interpretation of the Sherman Act in *Standard Oil*. The Clayton Act explicitly prohibited certain forms of price discrimination,²⁶ tying and exclusive dealing arrangements,²⁷ interlocking directorates,²⁸ and mergers achieved through purchases of stock.²⁹

Section 4 of the Clayton Act also creates a private right of action under the Sherman Act for anyone "injured in his business or property by reason of anything forbidden in the antitrust laws."³⁰ Plaintiffs may

Seventh Circuit: Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).

¹⁹ See, e.g., Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328 (7th Cir. 2012).

²⁰ National Collegiate Athletic Association v. Board of Regents, 468 U.S. 85, 117, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984) (holding that NCAA's restrictions on televising football games violated § 1 of the Sherman Act).

²¹ Smith v. National Collegiate Athletic Association, 139 F.3d 180, 185-186 (3d Cir. 1998).

²² McCormack v. National Collegiate Athletic Association, 845 F.2d 1338, 1343-1344 (5th Cir. 1988) (finding that restriction on benefits awarded to student-athletes easily survived rule of reason analysis).

²³ Agnew v. National Collegiate Athletic Ass'n, 683 F.3d 328, 340 (7th Cir. 2012) (noting that "[n]o knowledgeable observer could earnestly assert that big-time college football programs competing for highly sought-after high school football players do not anticipate economic gain from a successful recruiting program").

²⁴ 15 U.S.C. §§ 12-27; 29 U.S.C. §§ 52-53.

²⁵ 15 U.S.C. §§ 41-58.

²⁶ 15 U.S.C. § 13.

²⁷ 15 U.S.C. § 14.

²⁸ 15 U.S.C. § 19.

²⁹ 15 U.S.C. § 18.

³⁰ 15 U.S.C. § 15(a).

recover treble damages plus the cost of the suit, including attorney fees.³¹ The scope of Section 4 is limited by the direct-purchaser rule of *Illinois Brick Co. v. Illinois*,³² which states that only the immediate buyer of a product has standing to maintain a federal antitrust action.

The general prohibition of “unfair methods of competition” in the FTC Act gives the statute a broader mandate than the Sherman Act’s general condemnation of contracts, combinations, and conspiracies in restraint of trade. Section 5 of the FTC Act also embraces unilateral acts by one defendant,³³ unlike Section 1 of the Sherman Act. Thus, the Federal Trade Commission has adopted the position that a mere invitation to collude in fixing prices may violate Section 5,³⁴ conduct that would not be actionable under Section 1 of the Sherman Act.³⁵

However, the Commission only acts in accordance with public interests, as defined in Section 5. This statutory criterion also guides enforcement priorities, respecting the allocation of the agency’s relatively limited resources.³⁶

³¹ *Id.*

³² *Illinois Brick Co. v. State of Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977).

³³ 15 U.S.C. § 45(a)(1). See *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322, 86 S.Ct. 1501, 16 L.Ed.2d 587 (1966).

³⁴ See *In re Valassis Communications, Inc.*, 2006 WL 1367833 (F.T.C. Apr. 19, 2006); *In re Stone Container Corp.*, 125 F.T.C. 853, 854 (1998).

³⁵ One circuit court, however, has treated a failed attempt to conspire in a two-carrier market as an attempt at “shared” monopolization, as prohibited under Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2. *United States v. American Airlines, Inc.*, 743 F.2d 1114 (5th Cir.1984).

³⁶ Judicial review of agency nonenforcement decisions based on resource allocation is normally minimal. See: *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 84 L.Ed.2d 714 (1985); Note, “The Impact of *Heckler v. Chaney* on Judicial Review of Agency Decisions,” 86 *Columbia L. Rev.* 1247 (1986).

§ 1.03 Evolution of Antitrust Policy

The core antitrust provisions¹ and many supplementary acts form an interlocking whole, since each may be utilized to effect the interpretation of any of the others.² The Sherman Act, of the broadest generality and adaptability,³ has been increasingly regarded as the central antitrust provision of greatest significance in interpreting the others.⁴ It establishes a national policy favoring competition in an open marketplace,⁵ except where this is specifically counteracted by particular congressional or other social decisions to the contrary.⁶ State antitrust laws,⁷ related trade regulation laws at both state and federal levels,⁸ and frequently foreign laws,⁹ must also be considered in each factual context.

Because more than one provision is often directly or indirectly relevant to any given type of conduct, the basic presuppositions of antitrust law as they have evolved must also be considered in analyzing any particular provision and how it may bear on actual or proposed

(Text continued on page 1-7)

¹ The Sherman Act, the Clayton Act and the Robinson-Patman Act, See § 1.01 *supra*.

² *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 77 L.Ed.2d 854 (1978).

³ *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933).

“As a charter of freedom, the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions.” 288 U.S. at 359-360.

⁴ See, *United States v. United States Gypsum Co.*, 438 U.S. 422, 98 S.Ct. 2864, 77 L.Ed.2d 854 (1978); *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 99 S.Ct. 925, 59 L.Ed.2d 153 (1979).

⁵ *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980); *California Retail Liquor Dealers Ass’n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692-695, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *Standard Oil Co. v. United States*, 221 U.S. 1, 57-60, 31 S.Ct. 503, 55 L.Ed. 619 (1911).

Compare *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2 (1977).

⁶ An exception may be established by exemption (see Chapter 20 *infra*), by super-session (see Chapter 18 *infra*) or by action due to specific conditions without explicit sanction, see *Blum, V Was For Victory* 132-140 (1976). The policy is implemented rather than displaced where a specific restraint is deemed pro-competitive under certain circumstances, see *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) or irrelevant to commercial competition, see e.g., *Allied International, Inc. v. ILA*, 492 F. Supp. 334 (D. Mass. 1980).

⁷ See, for example, *New York Donnelly Act*, N.Y. Gen. Bus. L. § 340.

⁸ See, *Automobile Dealers Day in Court Act*, 15 U.S.C. §§ 1221 *et seq.*

⁹ See, *Blake & Rahl, Business Regulation in the Common Market Nations* (1969).

conduct.¹⁰ These presuppositions focus upon the concept of the marketplace as the primary regulator of economic activity and the protector of opportunity for diverse participants.¹¹ As described in various contexts below, four major variants within the antitrust tradition can be identified:

(1) What can be called the “better mousetrap” tradition, which seeks to interpret broadly phrased antitrust provisions so as to attempt to prevent conduct that is inconsistent with the classic Adam Smith model of an open economy in which entrepreneurs benefit themselves and the public by “building a better mousetrap.”¹² Under this approach, restrictions on conduct departing from the model can be justified, but only if they promote competition in their net effect.¹³

(2) The tradition exemplified by the views of Justice Holmes that the marketplace can best regulate itself, and do so even without the type of interference manifested in the antitrust laws.¹⁴ A modified version of this approach is represented by modern views which assert that substitutability among products and services is almost always present,¹⁵ and hence monopoly power may be diffi-

¹⁰ *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *United States v. Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941). Compare *Commissioner v. LoBue*, 351 U.S. 243, 249, 76 S.Ct. 800, 100 L.Ed. 1142 (1956); *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 773, 65 S.Ct. 1515, 89 L.Ed. 1915 (1945); *Parker v. Brown*, 317 U.S. 341, 367, 63 S.Ct. 307, 87 L.Ed. 315 (1943); Stone, “The Common Law in the United States,” 50 *Harv. L. Rev.* 4, 12-18 (1936); Note, 82 *Yale L.J.* 258 (1972).

¹¹ See N. 5 *supra*.

¹² *Ibid.* See also, Chapter 2 *infra*.

¹³ See e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 52 L.Ed.2d 568 (1977); *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed. 2d 1 (1979). Compare: *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979); Areeda and Turner, *Antitrust Law: An Analysis of Antitrust Principles and their Application* (1980). Compare also: Gellhorn, *Antitrust Law and Economics* (2d ed. 1981); Bain, *Economic Organization* (2d ed. 1968); Scherer, *Industrial Market Structure and Economic Performance* (1970); Bain, *Barriers to New Competition* (1956); Blair, *Economic Concentration, Structure, Behavior and Public Policy* (1972); Shepard, *Market Power and Economic Welfare* (1970); Caves, *American Industry: Structure Conduct, Performance* (2d ed. 1967).

¹⁴ This is evident in his dissent in *Northern Securities Co. v. United States*, 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), and many other antitrust cases. Compare, 1 *Holmes-Pollock Letters* 178-179 (Howe ed. 1961).

¹⁵ See *United States v. General Dynamics Corp.*, 341 F. Supp. 534, 556-557 (N.D. Ill. 1972), *aff'd on other grounds*, 415 U.S. 486, 491-492 & n. 4, 94 S.Ct. 1186, 39 L.Ed.2d 530 (1974).

cult to find.¹⁶ Horizontal collusion and market division are, however, usually recognized as appropriate to be prohibited by adherents of this viewpoint.¹⁷

(3) The approach best identified with Justice Brandeis¹⁸ that smallness has independent political¹⁹ as well as economic²⁰ value, and should be preserved by the antitrust laws against the evils of bigness.²¹

(4) The approach identified with Theodore Roosevelt who, despite his reputation as a trust buster, believed that bigness was inevitable and should be dealt with by strong federal regulation of corporate conduct²² coupled with publicity concerning business practices.²³

Behind these variants in antitrust tradition is the further notion that the existence of a private economic system depends on controls against the abuse of power in the marketplace, if controls in the form of governmental supervision or even ownership are not ultimately to be substituted.²⁴ This weighty issue, ultimately decided in the court of public opinion,²⁵ depends upon the view taken of the performance of an industry or indeed an economy. The steps that can be taken to

¹⁶ Compare *United States v. E. I. du Pont de Nemours & Co. (Cellophane)*, 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264 (1956).

¹⁷ See, for example: Bork, *The Antitrust Paradox* (1978); Posner, *Antitrust Law: An Economic Perspective* (1976).

¹⁸ See Brandeis, J. dissenting in *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 580, 53 S.Ct. 481, 77 L.Ed. 929 (1933). See also, volumes 2 and 3 *Letters of Louis D. Brandeis* (Urofsky & Levy, eds. 1972).

¹⁹ See Fox, "A Clarion Universe of Microeconomic Policy," 54 N.Y.U.L. Rev. 445 (1979); Fox, "The Modernization of Antitrust: A New Equilibrium," 66 Cornell L.Q. 1140 (1981); Spivack, "The Chicago School Approach to Single Firm Exercise of Monopoly Power: A Response," 52 A.B.A. Antitrust L.J. 651, 653 n. 1 (1983).

²⁰ See: Sullivan, *Antitrust*, Ch. 2(A) (1977); Jacobs, *The Economy of Cities* (1969); "Future of Small Business in America," House Report 95-1810 by the Subcommittee on Antitrust, Consumers and Employment, House Committee on Small Business, 95th Cong., 2d Sess. (1978).

²¹ Sullivan, *Antitrust*, Ch. 4 (1977).

²² See Theodore Roosevelt, 6th Annual Message (Dec. 3, 1906, 3 *State of the Union of the Presidents* 2210 (Chelsea House 1966) ("Our effort should be not so much to prevent consolidation as such, but so to supervise and control it as to see that it results in no harm to the people.").

²³ See Hall, "The History of Section 6 of the Federal Trade Commission Act," 27 *Record of the Ass'n of the Bar of the City of New York* 221 (1972).

²⁴ See, Myers & Newton, *The Hoover Administration* 488-89 (1936) (reason for opposing suspension of antitrust laws in 1932); Schumpeter, *Capitalism, Socialism and Democracy* 140-42 (3d ed. 1950).

²⁵ See Lippmann, *Public Opinion* (1922).

expand the pool within which varying fish can swim may reduce the urgency of dilemmas concerning abuse of power by creating more alternatives.²⁶

Even more than generalized approaches, however, the decision-makers' perception of the facts are often decisive; facts as perceived, indeed, influence the development of rules as well as their application.²⁷

Innovation, price competition,²⁸ decentralization of active decision-making,²⁹ involvement of those performing work in their part of the productive process, satisfaction of customer grievances,³⁰ and many other matters, enter into the totality of the way a particular firm or industry is seen which in turn necessarily influences the interpretation of facts and principles in antitrust contests.³¹

During the 1970s and 1980s, the cutting edge of antitrust thinking was focused upon, if not monopolized by, the Chicago School of economics. This approach called attention to several aspects of the interaction between the legal system and the economy that had been largely ignored during the immediately preceding period. These aspects included:

- (1) The primary objective of antitrust of protecting consumers from price enhancement or output restriction.³²

²⁶ See: Berle, "Legal Problems of Economic Power," 60 Colum. L. Rev. 4 (1960); Berle, *Power Without Property* (1959); Berle, *The American Economic Republic* (1965).

²⁷ See Stone, *Law and Its Administration* 39, 45 (1915). See also, *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (more judicial experience needed before application of *per se* rule to type of conduct involved).

²⁸ See Chapter 7 *infra*.

²⁹ As stated in a successful *Amicus* brief, at 11, filed by the Department of Justice in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 682 (1944), favoring a defendant in an intra-enterprise conspiracy case (§16.03 *infra*):

"... all combinations among otherwise independent economic entities *reduce to some extent the number of independent decision makers*, thus raising sufficient anticompetitive potential to merit careful scrutiny . . ." (emphasis added).

³⁰ See §16.02 *infra*.

³¹ See generally: Areeda, *Antitrust Analysis* (1974); Handler, Blake, Pitofsky and Goldschmid, *Cases and Materials on Trade Regulation* (1975); Schwartz, *Free Enterprise and Economic Organization* (4th ed. 1972); Oppenheim and Weston, *Federal Antitrust Laws* (3d ed. 1969); Kaysen and Turner, *Antitrust Policy* (1959); Posner, *Antitrust, Cases, Economic Notes and Other Materials* (1974); Sullivan, *Antitrust* (1977); Areeda and Turner, *Antitrust Law* (1978); Von Kalinowski, *Antitrust Law and Trade Regulation* (1987).

³² See: *Standard Oil Co. v. United States*, 221 U.S. 1, 57-60, 31 S.Ct. 503, 55 L.Ed. 619 (1911); N. 5 *supra*; this approach was formally adopted in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

(2) Dangers of use of antitrust itself as an anticompetitive device, especially where lower prices (one of the goals of antitrust) becomes a basis for suits by competitors under the rubric of predatory pricing.³³

(3) Risks of penalizing effort by an aggressive competitor whose technological³⁴ or marketing³⁵ efforts can be appropriated by others by means of so-called free riding, to the detriment of the innovator.

(4) The critical importance of *public sector* barriers to competition including occupational licensing and other entry barriers or cartel-supportive regulations in permitting anticompetitive arrangements to survive the acid environment of private sector rivalry.³⁶

In view of these factors, some drew the conclusion that most vertical restraints³⁷ and most mergers³⁸ were generally benign, and, indeed, most if not all pre-1974 antitrust enforcement concepts were obsolete.

A counteroffensive was launched by scholars and others who pointed out that antitrust had political and social as well as economic implications, involving support of an open society embracing an open economy with room for new options and new entry, not dominated by any combinations or entities so overweening in size or power as to stifle initiative. This approach, however, is vulnerable to counterarguments concerning whether antitrust can effectively promote those objectives if counter to the consumer interest which is the chief definable objective and doubtless the bedrock of antitrust since its origins.³⁹

More recently, attention has been focused on the common battleground shared by so-called Chicago and contrary-minded participants in these debates: what does in fact promote the consumer interest?⁴⁰ Approaching the issue in this vein increasingly suggests that Chicago perceptions are entirely valid as truthful but incomplete and partial

³³ See § 3.04 *infra*.

³⁴ See § 3.05 *infra*.

³⁵ See: Chapters 8, 9 *infra*.

³⁶ See: § 18.03 *infra*.

³⁷ See: §§ 8.02, 8.03 *infra*.

³⁸ See Chapter 4 *infra*.

³⁹ See: *Standard Oil Co. v. United States*, 221 U.S. 1, 57-60, 31 S.Ct. 503, 55 L.Ed. 619 (1911); N. 5 *supra*; this approach was formally adopted in *Reiter v. Sonotone Corp.*, 442 U.S. 330, 99 S.Ct. 2326, 60 L.Ed.2d 931 (1979).

⁴⁰ See: First, Fox & Pitofsky, eds., *Revitalizing Antitrust in Its Second Century* (1993); Steuer, "Book Review," 7 *Antitrust* 48 (ABA Summer 1993).

views of the totality of the situations involved. Nonquantifiable economic factors which are very real but escape econometric equation writing or statistical measurement, and sometimes even much direct law enforcement investigation, may often be the most crucial of all.⁴¹ These may suggest that predatory pricing suits be discouraged,⁴² and public sector restraints be given greater attention as a form of pro- or anti-competition policy by other means,⁴³ but also that widespread but informal coordination of pricing and restraints to protect prices indirectly are of great importance.⁴⁴ If these can be reined in, it may be possible to have a hotter economy without inflation, to the benefit of the entire business sector and consumers. Further aspects of antitrust policy by other means, such as affirmative promotion of private sector innovation benefitting others than merely the direct buyers of the goods or services created may be at least as crucial.

Sources of law outside the strict parameters of antitrust provisions can influence antitrust law, just as antitrust can be important in interpreting other provisions.⁴⁵ For example, the commerce clause⁴⁶ is one of the principal guarantees of openness in commerce because of its inhibition of state or local cartel-like restrictions.⁴⁷ Similarly, procedural assurances of fairness, such as the due process clauses of the Fifth and Fourteenth Amendments, and the equal protection clause of the Fourteenth, can inhibit favoritism for some competitors over others.⁴⁸

The context in which antitrust is relevant continues to expand: worldwide markets at the manufacturing level are rapidly developing, held back to some extent by protectionist measures and promoted by efforts to overcome them. Such restrictive efforts, in an effort to bar subsidies or dumping at the behest of specific industries, may be carried to the point of interference with potentially valuable domestic policies or policies which could expand economic activity as a whole with benefits to all.⁴⁹

⁴¹ See Givens, *Advocacy—The Art of Pleading a Cause* Ch. 29 (3rd ed. 1992).

⁴² See § 3.04 *infra*.

⁴³ See: §§ 18.03, 18.06 *infra*.

⁴⁴ See: Chapters 7, 8 *infra*.

⁴⁵ See § 18.03 *infra*.

⁴⁶ U.S. Const., Art I, § 8, cl. 3.

⁴⁷ See discussion in *Tetra Technologies v. Harter*, 823 F. Supp. 1116 (S.D.N.Y. 1993).

⁴⁸ One-to-a-customer patent, tax and other provisions may be vulnerable to equal protection attack where rivals are injured, as discussed in Givens, 3 *Manual of Federal Practice* § 11.6 (3d ed. 1992).

⁴⁹ See § 18.06 *infra*.

Similarly, public sector activity favoring either specific competitors,⁵⁰ or providing an advantage to those with a long enough purse to pursue litigation over bid protests,⁵¹ strongly affects competition. Support for leveraged buyouts by the banking system influenced by central bank decision-making, and tax structures allowing what would previously have been treated as equity to be characterized as debt,⁵² may both enhance concentration in some fields and bleed the competitive ability of the targets of the buyouts.⁵³

These developments are highly relevant to antitrust policy, which, in its broader framework, is sometimes called competition policy. The fundamental objectives of these policies, in changing contexts, remain the same: to permit openness in economic choices free of undue public or private sector restraints, which can lead to the best results for the end users and the economy as a whole, and rein in the tendency of increases in demand to lead to undue increases in prices rather than output.⁵⁴

These issues arise ever more frequently in inter-industry contexts, with transnational causes and effects, and involving multinational corporations; the technical nature of many aspects of this mosaic require intense attention to the validity of technical arguments used to shield or justify anticompetitive activities effectuated through orchestrated public and private sector action.

⁵⁰ See Givens, *Advocacy: The Art of Pleading A Cause* Ch. 30 (3d ed. 1992).

⁵¹ See § 19.03 *infra*.

⁵² See § 4.05 Ns. 25-25.2, 53, 62 *infra*.

⁵³ See § 4.05 *infra*, generally.

⁵⁴ See: Sullivan, *Antitrust* (1977); Stocking & Watkins, *Monopoly and Free Enterprise* (20th Century Fund 1951); Ely, *Monopolies and Trusts* (1912); §§ 31.03, 31.04 *infra*.