Preface to the First Edition

The conviction driving this book is that two challenges usually cause antitrust students the most difficulty, but that neither actually has to be that challenging at all. They are (1) the learning of economic theory and (2) the interrelatedness of antitrust issues. This book approaches both problems strategically, and it combines its strategy with the tried and proved question-and-answer pedagogy of the *Examples & Explanations* series.

As for economics, the good news is that the bare minimum economic theory one needs to understand the antitrust case law is not really that hard at all, even for students without prior economics training. There may be plenty more to say about the economics of antitrust issues in policy debates and academic seminars, and antitrust practitioners tend to be economically sophisticated. But none of that advanced material is needed to learn the basic law as the courts apply it. This book approaches the teaching of the minimum core of economics with a two-part strategy, set out in Chapters 2 and 3. As the first part, §2.2 introduces all the economic theory a student really needs to understand the cases and presents it in a purely intuitive way, without any mathematics. (For those students who want or need to learn this material with more rigor, §2.3 supplements the introduction by re-explaining the same material in the more traditional, quantitative manner. My hope is that §2.3 presents it in a way that is still accessible to any student who wants to learn it.) As the second part of the two-part strategy, Chapter 3 takes the economic basics a step further by introducing a set of economic generalizations that run throughout antitrust and help explain much of the law as it now stands. The book also includes more economic material for students who want it and for students whose teachers take a more in-depth approach.

As for interrelatedness, the problem is that, in antitrust, everything seems to relate to everything else, and so it can be hard to know where to start. Especially early in the semester of an antirust course, it can be difficult for an instructor to explain anything because learning any one thing seems to call for an understanding of so many other things. Often this leaves the student at sea for much of the semester. But this doesn't have to be the case, because there are some very general concepts in antitrust that can be explained first, without reference to anything else, and so it is possible to teach antitrust concepts by moving from the most general to the more specific.

We can begin with a basic generalization about what antitrust *is*. To borrow from Chapter 1:

> *Under federal antitrust law, it is the policy of the United States that private persons may not take actions to interfere improperly in the functioning of competitive markets.*

Furthermore, almost all of the law that now gives life to this most general policy can be boiled down to the law surrounding three causes of action — challenges to conspiracies under §1 of the Sherman Act, challenges to monopolies under §2 of the Sherman Act, and challenges to mergers and acquisitions under §7 of the Clayton Act. What's more, these three causes of action turn out to have a great deal in common. Because they share so much, we can identify what is most general about them and move from that most general basis to the more specific details. What they share most generally is that each of them is meant to prohibit only those interferences with competition that are *unreasonable*. Antitrust has come to define unreasonable interference as private conduct that causes more harm to a market than benefit for it. And as it now exists, antitrust looks for both harm and benefit by using the tools of economic theory. In other words, the single most basic idea in current antitrust law is the simple economic theory that will be laid out using the two-part strategy in Chapters 2 and 3.

Next, a basic insight of this economic theory is that private interferences in markets are likely to be net harmful — that is, they are likely to be unreasonable — where some feature or weakness in the market prevents that market from correcting itself. Most economists believe that when a firm tries to raise its prices or otherwise abuse consumers, the market will usually self-correct by causing that firm to lose sales. But sometimes markets do not do that, and where a market's self-corrective power is hindered, a firm within it might have some power to raise prices or otherwise misbehave. Such a firm is said to have *market power*, and the concept of market power has come to have truly fundamental significance in antitrust. Each of the three causes of action that make up antitrust will in most cases require a plaintiff to prove that a defendant holds market power, because without it, a defendant that tries to engage in abuses of a market should just suffer lost sales. Because plaintiffs must prove market power according to the same doctrinal test no matter what cause of action at issue, proof of market power is the next most general concept in antitrust law. It is explained in Chapter 4.

With economic theory and market power under our belt, we can move on to more specific details of the three major causes of action, and that study will take up the next several chapters of the book. Finally, the remaining chapters cover more peripheral matters, such as the intersection of antitrust and intellectual property (Chapter 15), the problem of price discrimination (Chapter 16), antitrust procedural issues (Chapter 19), and the scope of antitrust (Chapters 20-23).

Preface to the First Edition

I thank Lynn Churchill of Wolters Kluwer for the opportunity to write this book. She was an awfully nice person to work with. As for Peter Skagestad, the editor who shepherded the book and who manages the entire Examples and Explanations series, what can one say? As if it were not enough to oversee a series that set a standard in legal education (in a second language no less), he is a polyglot philosopher economist who has interesting things to say about matters from regulatory policy to Charles Sanders Peirce. More important to me, in any event, were his patience and forbearance. I am thankful for feedback from Peter Carstensen and from several anonymous reviewers, who undertook a large and thankless task and gave very effective advice. This book also benefited from the financial support of the Cleveland-Marshall summer scholarship fund and my sabbatical leave from the Cleveland-Marshall College of Law.

The four-year-old boy to whom this book is dedicated wrote the heck out of a book of his own while I was writing this one, and it was darn nice for a dad to have him as a working companion. His book, he tells me, is written entirely in Ant-Chinese, a language that only ants understand, and is called *My Son Is a Peanut*. He is a good egg. My wife, Annie, is beyond the reach of my thanks for her support and the sacrifices she has made for me.

Christopher L. Sagers

May 2011

Preface to the Fourth Edition

Over this book's fifteen-year lifetime, many things have *happened* in antitrust, but it is a different question to know which of them *mattered*.

Since the last edition in particular, there got to be a lot of talk about antitrust. Popular interest in the policy surged, for various reasons it seems, and sometimes it seemed to be everywhere in popular media and retail politics. That was remarkable, because for decades on end it had been basically absent from Americans' daily awareness. There was also some real-world enforcement activity, though less than one might guess from reading the papers. While it all mattered in some sense, reasonable minds differ on what if any of it changed substantive policy or its effect on the world. That must in some part reflect the times, as the daily news-informational tumult in our divided age can be a challenge to interpret. But it also reveals something significant about the real nature of the policy and its relationship to the debate that surrounds it. The two things are not the same.

There was plenty of reason to care about antitrust and, for some, to long for its return. Popular concern was especially driven by the revolution in high technology. The power of a small number of rapidly growing firms raised traditional antitrust concern for many, as for the impacts of e-commerce on small retailers and suppliers. There was a sense that e-tailers had wrecked Main Street, and posed plenty of other epochal, destructive social changes. Big Tech firms stoked broader political fears as well. Some thought that they fostered misinformation that might have thrown a presidential election, while others thought they censored political opinions and impaired free speech.

Meanwhile, a body of empirical evidence began to suggest increasing industrial concentration and market power throughout the economy. The trend arguably began at the time of the conservative antitrust revolution, around 1980. The evidence is very complex and interpreting it remains very controversial, but economists from varying points of view have guardedly begun to acknowledge that systematic harm may have occurred in the economy, and it may have had something to do with relaxed antitrust enforcement.

And so antitrust became ordinary politics again. Among other things it became an issue in presidential election politics for the first time in perhaps seventy years,[1] and its reform was a priority in the messaging and initiatives

1. George Slover, Am. Antitr. Inst., Obama Inauguration Speech Mentions Antitrust: References to the Antitrust Laws in Presidential Inaugural Addresses—Now and Then (Jan. 20, 2013).

of the Biden administration.[2] So far it appears to remain salient and just as political during the second Trump administration, which has announced a number of eye-catching initiatives and made a strongly-worded point of rescinding much of the Biden administration's approach.

But for all the parties' rhetoric and denunciation of their purported difrerences,[3] and for all the promises and fears of change, a surprising fact remains: there is not that much evidence of difference between them. Rhetoric aside, their management of the substantive policy is basically the same, or at least it has been for past few decades.

Surely the most eye-catching action was government lawsuits against Big Tech firms. Those cases have gone rather well for the government, and if they survive appeal, they could generate significant change in the sector.[4] They were litigated during the Biden administration, and superficially they match the political arguments on which that administration made priorities of antitrust and tech. So one might think they distinguish the Biden administration from its predecessor. But two of the most important of them were initially filed in the first Trump administration, and they will all likely conclude during the second. And indeed, despite promises by reform advocates that antitrust would be reinvigorated with iconoclastic new thinking, the cases involve no theoretical innovation. They are thoroughly traditional,[5] and some administration of either party would have brought them sooner or later. The Big Tech revolution was one of a handful

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2. *See, e.g.*, Exec. Order No. 14036 on Promoting Competition in the American Economy, 86 Fed. Reg. 36,987 (July 9, 2021) (establishing a "whole of government" program to encourage more antitrust enforcement and re-prioritize competition values across regulatory programs).

3. *Compare* Jonathan Kanter, Ass't Att'y Gen., U.S. Dep't of Justice, Speech, *Farewell Address* (Dec. 17, 2024) (attacking prior administrations' "deliberate and decades-long effort to dismantle … antitrust enforcement"), *with* FTC, Press Release, *FTC Chairman Applauds Revocation of Biden-Harris Executive Order on Competition* (Aug. 14, 2025) ("applaud[ing]" revocation of "failed policies [and] undue hostility"); U.S. Dep't of Justice, Press Release, Statement on Revocation of Biden-Harris Executive Order on Competition (Aug. 13, 2025) ("salut[ing]" revocation of Biden order's "overly prescriptive and burdensome approach" in order to "unleash[] the new American Golden Age").

4. To date the most significant developments have been the government's success in two separate actions against Google, finding it to have monopolized the markets for internet search and online advertising technology. *United States v. Google LLC*, 778 F. Supp. 3d 797 (2025); *United States v. Google LLC*, 747 F. Supp. 3d 1 (D.D.C. 2024). As of this writing, the courts have yet to enter remedy orders in those cases, but the government has sought structural relief—some breaking up of the Google organization—in both. The other major Big Tech cases are 581 *FTC v. Facebook, Inc.*, 581 F. Supp. 3d 34 (D.D.C. 2022), and *FTC v. Amazon.com, Inc.*, 2:23-cv-01495-JHC (W.D. Wa. Oct. 31, 2024) (second amended complaint), both of which remain in earlier stages of litigation. The cases initially brought in the Trump administration are *Facebook* and the Google internet search case.

5. Their theories of liability depend heavily on the seminal decision in *United States v. Microsoft Corp.*, 254 F.3d 34 (D.C. Cir. 2001), which was itself a symbol of bipartisan consensus. *Microsoft* was decided unanimously by the D.C. Circuit en banc, and happened to be written by a judge who'd been a Republican antitrust enforcement official.

of major technological disruptions in our history, and like several prior episodes it resulted in changes and conduct that would more or less inevitably invite antitrust response.

Likewise, despite criticism of the Biden administration's alleged crack down on mergers—criticism that from some conservatives and business leaders bordered on the apocalyptic—merger enforcement actually fell during the Biden administration, even while merger activity increased. That is thoroughly unsurprising. Solid evidence suggests that real rates of merger enforcement have been quite stable across different administrations for a long time.[6]

So did things happen in the recent years of antitrust enthusiasm, that actually mattered? Certainly. The government overhauled its *Merger Guidelines* in 2023 and adopted a new vertical merger policy for the first time in decades. The courts of appeals decided plenty of cases with important consequences, possibly most important being monopolization decisions that could revive theories of liability thought to have been killed off by the Supreme Court.[7] Any number of similar events will be recounted in this revised edition and their consequences explained.

None of this is meant as a criticism of any administration or either party, except for those activists and political entrepreneurs who've exaggerated facts or stoked popular frustrations for their own gain. It also is no argument that the enforcement status quo or its stability is a good thing. Very much to the contrary. While the entire remainder of this book will remain as neutral as I am able to make it, I'll continue to make an exception here that I first made in the last edition. The state of the law has come to be a serious problem, and the judiciary has caused it for reasons that were always controversial and no longer have even the support they once had. There do now appear to be concrete economic harms associated with concentration and market power, and they may have been caused in part by

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6. Jeffrey T. Macher & John W. Mayo, *The Evolution of Merger Enforcement Intensity: What Do the Data Show?*, 17 J. Comp. L. & Enf. 708 (2021) (econometric measure of real enforcement rates for 1979-2017).

7. No plaintiff has won meaningful success in any price predation case in the thirty years since *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), and until very recently none had done better in any unilateral refusal to deal case since *Verizon Commcns., Inc. v. Law Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). Recent action in the Courts of Appeals may change that. Several courts continued narrowing the death-knell of *Brooke Group* by limiting it to circumstances in which the only challenged conduct is the defendant's pricing. *See, e.g., McWane, Inc. v. FTC*, 783 F.3d 814, 833-835 (11th Cir. 2015). Likewise, in refusal to deal law, the Fourth Circuit's decision in *Duke Energy Carolinas, LLC v. NTE Carolinas II, LLC*, 111 F.4th 337 (4th Cir. 2025) suggested that *Trinko* might be limited to regulated industries. Other courts found illegal exclusion even under *Trinko*'s purportedly impenetrable armor, *see, e.g., Steward Health Care System, LLC v. Blue Cross & Blue Shield of R.I.*, 311 F. Supp. 3d 468 (D.R.I. 2018), and several courts continued to emphasize that it has no relevance to refusals to deal with non-competitors, *Chase Mfg. Co. v. Johns Manville Corp.*, 84 F.4th 1157, 1173 (10th Cir. 2023); *United States v. Google LLC*, 778 F. Supp. 3d 797, 865-867 (E.D. Va. 2025).

judicial antitrust reforms since the 1970s. Reviving a more active antitrust could be of value.

I will end with a story that seems emblematic. In one of the government's two actions against Google, it was discovered that Google and the Apple computer corporation kept up a long-term arrangement concerning internet search. After Google's initial successes in the early 2000s, the companies agreed that Google would pay Apple a share of its search advertising revenues. In exchange Apple would install Google's search engine as standard software on its devices, including on its then-new iPhone. Described that way, the deal may seem pretty harmless—just a garden-variety marketing and distribution arrangement, and frankly kind of a win-win for all involved. But it's come to light that over time Apple also agreed to a number of restrictions on its own products, including what software of its own that it could pre-install on Apple devices. In effect, Apple agreed that it would not include its own search software or products that would compete with the pre-installed Google search engine. In other words, Apple seems to have agreed that it would keep out of the business of search. Meanwhile, the payments that Google would make to Apple grew to be impossibly large—by the end, Google was giving Apple upwards of twenty *billion* dollars per year, amounting in some years to well over 10 percent of Google's entire, company-wide profits. But strikingly, during the years of the agreement Apple did in fact build search capacity, though it never directly sold it to the public. Apple built a general search "index" containing billions of web pages, making it one of the few companies in existence to own such a resource. Creating it likely consumed billions of dollars, but it really could serve no purpose except for Apple to enter as a competing search provider—or perhaps to be a reminder to Google that, if the payments ever stopped, Apple would do so.

This is all quite extraordinary. It should be said that the real facts are surely more complex than can be known from the publicly available record, and we can only infer what may have been the purpose and details of this arrangement. But from what publicly appears, this may have been an agreement that Apple would keep out of search in exchange for a cut of Google's monopoly profits. If so it was the grossest and most obviously illegal of antitrust violations. It is the sort of thing that every sophisticated business leader knows to be illegal, because it is the kind of thing for which people routinely go to prison. And yet these extremely sophisticated businesspeople and their lawyers apparently thought it was permissible, or at least that they would be able to defend it in court. That is quite something, and if antitrust really is so fallow, it may be time for reform.

Chris Sagers

August 2025