
Preface to the Eighth Edition

The most important development in antitrust doctrine over the past fifty years is the increasingly central role of economic analysis. Modern precedent is permeated with economic reasoning, including the proved, possible, or assumed competitive effects of particular practices. Equally important, the day-to-day work of antitrust lawyers in private practice and at government agencies is steeped in economics, as are trials and judicial opinions that must wrestle with complex and conflicting testimony of economic experts. Although policy makers and commentators continue to debate the proper role and utility of economic analysis in applying the antitrust laws, it seems likely that economics will have a substantial role for the foreseeable future.

A student therefore must understand both the teachings of economic theory and how actual markets work. Our goal is to enable students without previous training in economics to apply and critique this body of law and to build the skills needed to function in a domain in which economic analysis looms large, whether as an antitrust practitioner or lawyer in related fields. Great care has been taken to convey economic learning to students in plain language with a minimum of technical apparatus.

To that end, this edition adds a third author, who (like L.K. and A.E.) holds a law degree and a doctorate in economics, and who also has substantial experience as an antitrust enforcer. At the same time, this edition continues along the path set by Phillip Areeda in 1967. (The preface to the first edition, which states what continue to be the pedagogical premises underlying this book, follows.) Our basic approach is agnostic on controversial questions, and as in previous editions, we present contrasting perspectives to the problems at hand.

Since the last edition, antitrust enforcers and courts have struggled to grapple with the rising importance of platforms in our increasingly digital economy. This effort is reflected, among other places, in the Supreme Court's decision in *Ohio v. American Express*, new Vertical Merger Guidelines, and major enforcement actions against Apple, Facebook, and Google. This eighth edition incorporates these and other recent developments. In addition, much of the introductory material in Chapter 1 has been rewritten or streamlined. As in previous editions, the book pays special attention to the intersection of antitrust and intellectual property law.

We are grateful to our many colleagues around the world who have contributed to our understanding of industrial organization and antitrust. We also thank research assistants who made significant contributions to the current edition: Yuqing Cui, Jack Derewicz, Isaac Kirschner, Matt Rosenthal, Catalina Villalobos, Jeffrey Waldron, Elan Weinberger, and Linda Yao. Finally, and most of all, we wish to thank our wives,

Jody, Jenn, and Laura; our children Leah, Irene, Cole, Adam, Mia, and Thomas; and the rest of our families for all their love.

L.K., A.E., and C.S.H.

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Disclaimers: The authors occasionally consult on antitrust matters for government agencies and private parties. Louis Kaplow's wife is in the legal department of a financial services firm.

Preface to the First Edition*

Although this book may have some usefulness elsewhere, it was prepared to meet the threefold needs of antitrust classes for problems, text, and cases. The cases have been edited and organized for maximum ease of comprehension. But an improved casebook was never the primary object. The distinguishing features of this book lie in its text and in its extensive questions and problems.

Text. I am convinced that a contemporary antitrust course requires a judicious use of text to meet several clear needs. The relevance of economics to antitrust law is unquestioned. Although students need study economic theory and behavior only as useful to the law, they must know about market power, justifications for cartelization, price behavior in markets with few firms, basing point pricing, the economic rationale of the patent system, manufacturer interests in resale prices, the objects of tying and exclusive dealing arrangements, the competitive significance of large firms and of mergers, and various aspects of price discrimination. These are all subjects of textual discussion in this book, and in addition there is a summary exposition of the competitive system in Chapter 1A. The utility of such material is quite clear. As one example, consider the economics of vertical restraints. The cases are hardly illuminating, and, in prior years, neither lecture nor class discussion produced anything beyond confusion for most students. By contrast, my class has understood the essentials presented in text. The greater efficiency and effectiveness of economics text is manifest in two respects. First, limited class time is not used for conveying information that is more easily grasped when read and studied. Second, discussion may give the appearance that some members of the class comprehend the economics at hand, but the instructor may be quite uncertain as to how many of the class have mastered the economic argument. To reap these advantages fully, the text is sometimes made more elaborate than would on first consideration seem necessary for law students in order to meet complications or confusions that in fact have developed in the classroom when a simpler treatment has been used.

A second variety of text is more “legal.” Chapter 1 is entirely textual. In addition to the economics material already mentioned, and the historical background of the antitrust statutes, there is exposition of three matters that cannot receive full treatment in an antitrust course of usual length. Chapter 1C discusses procedures for enforcing the antitrust laws, Chapter 1D notes the statutes’ “jurisdiction” over interstate and foreign commerce and the major exemptions from the antitrust laws, with special attention to developing doctrines on state action and preemption, and Chapter 1E describes the premises and operation of the patent system. These sections attempt to steer a delicate course between undue generality and excessive

*There have been slight modifications where appropriate.

detail. Text in other chapters has varying objectives. There is the brief exposition of noteworthy issues that can be efficiently developed in text and that do not warrant class time, the compact presentation of an issue analogous to one analyzed in detail through questions and problems, especially where the related issue lends itself to great compression, and a presentation of necessary technical details.

Third, there are occasional brief paragraphs of introduction, connection, or comment scattered through the book. Finally, there is material that is midway between text and question: Questions are sometimes put in a way that tends to suggest at least one possible line of answers. This device is used where authority is scant, issues are important but difficult, and conventional text might seem prematurely definitive.

Let me add that I fully appreciate the difficulties in preparing text that is clear, concise, accurate, and yet free of unnecessary detail. This book is, I hope, a useful step in that direction.

Questions and problems. The several hundred questions and problems—categories that I do not distinguish sharply—are the heart of this effort for my own classroom. They try to achieve the advantages and avoid the disadvantages of both case and problem approaches. Problems force students to manipulate and apply antitrust ideas to difficult issues extracted from complex facts with uncertain economic and legal implications. That process tests the usefulness of doctrine, often demonstrates its inadequacies, and helps students focus both on private planning and on “legislative” considerations.

Adequate problems, however, are sometimes overly complex for effective classroom use. The difficulties are several. Problem analysis and solution often demand prior mastery of numerous cases and concepts, but few students can or will attain that command of a topic at the outset of its consideration. When analysis and solution require so much preparation, many students will do little more than read the cases. More manageable questions will be more adequately prepared.

To discuss a complex problem, moreover, is necessarily to discuss the meaning and reasoning of the relevant cases. The appropriate questions can, of course, be posed orally in class, but I find several overwhelming advantages in providing questions in the coursebook. First, students can and do think about them before class. Second, printed questions eliminate some of the delay, confusion, or misunderstanding inevitable with oral questions. Third, the greater precision of a written question invites more precise responses. Fourth, the structure of questions approximates an outline of the class discussion and thus enhances student understanding and sometimes lessens the compulsion to take notes. The result is greater confidence and a more relaxed classroom attitude.

There is, of course, no single best way to treat an antitrust topic. The teacher must often choose among several historical and analytical avenues. And student confusion may result from opaque opinions, complex facts, elusive business context, and obscure economic implications. In striving for orderly development and maximum clarity, I have endeavored to present questions and problems that are highly structured. The questions and problems are designed to expose easier or basic ideas before complex ones. Where experience has shown that a complicating issue unduly obstructs progress toward “answering” a problem, the complicating factor has either been excluded from the problem or made the subject of a prior question that clears the way for a later inquiry. Although it is neither possible nor desirable to narrow questions and problems too finely, a conscious effort has been made to build from basic ideas to more elusive ones. Indeed, for this purpose, occasional

elementary questions with clear-cut answers are scattered through the materials to emphasize fundamental points and remind students that some “answers” do exist. Other questions and problems vary in specificity, breadth, object, and student role. The statement of facts or of issues or both may be complete or require the student to supplement them. There may be subordinate questions to aid the analysis, or a complete fact statement may pose a variety of issues without further written guidance. The problem may call on the student to take the viewpoint of business manager, counselor, advocate, judge, or legislator, as well as to identify the legal issues, to use and distinguish cases after careful exegesis, to consider what data are available and how they can be used by either party or the judge, to understand the strengths and limits of the institutions that must decide, to explore the private and social interests at issue, and to resolve the issue within the limits imposed by the relevant institutions, doctrines, and interests.

Antitrust cases offer a particular challenge to orderly development. Some difficulties have already been noted. In addition, litigants have not arranged their affairs nor have judges written with the needs of the classroom in mind. Yet, in an institutional system in which judges and commissioners have such vital roles in developing and applying antitrust policy, cases provide an object of analysis and discussion, show the tribunals struggling with our problems and creating antitrust law, and, it is hoped, illuminate the subject and the process. Before preparing these materials, I sometimes asked students to read all the reproduced cases on, say, boycotts or tying arrangements and then attempted to discuss the subject as a unit. The results were far less successful than when students read one case, pondered a few questions about it, read another case, then considered questions about both cases, and so on. That is often the pattern of these materials. The questions immediately after a case will not necessarily exhaust its implications. It sometimes happens that the case that opens a section may not be fully explored until the end of that section, or even later. The effort is to open a theme and then, in orderly stages, to elaborate on it with richness and variations of reality.

Spontaneity and flexibility. The virtues—if such they be—of this structured approach raise two questions. First, will the orderly development and detailed questions reduce classroom spontaneity? Experience has provided satisfactory answers. Detailed questions have not reduced classroom spontaneity. The channeling of energies has increased the relevance of student observations or challenges without diminishing their originality, variety, or intensity. For all their detail, moreover, many questions remain quite difficult. The questions seemed to aid all students to grasp the subject and yet tax many to dig deeper. In my own classes there has been a more rapid and more subtle response from more students when using these materials.

The other question about structured materials is this: Will other teachers find the structure congenial? The tested sequence of cases, questions, and problems will be useful to those teachers who have not had occasion to develop a different approach to antitrust pedagogy. Other teachers will, I hope, find at least some of the structure suitable for their tastes. But few teachers will use all these materials in the printed sequence. At least on occasion, other teachers will use cases and text without using the questions or will use the questions or problems in a different order. A teacher who wishes to vary the order of topics or their development will find that the book's system of numbered paragraphs will greatly facilitate the task of making up a syllabus or assignment list.

The questions and problems need not, of course, be used in their entirety. Teachers who prefer to concentrate on problems in class may wish to urge students to answer the nonproblem questions for themselves. Teachers who emphasize case-analysis questions may wish to encourage their students to solve the problems for themselves as an aid to study and review. Indeed, no course of conventional length will have time to consider all the questions, problems, or topics in class. Some selection is therefore inevitable in the use of these materials, which are somewhat more extensive than I can cover in a semester-long course of four hours per week.

The organization of topics is by no means inevitable. To emphasize the unity of subject matter, I have used only a few chapter divisions. They need not be treated in the order printed. The content and development of each chapter is not, in the main, dependent on the order of topics. There are standard progressions. Price fixing must precede most of the other horizontal issues. Vertical restraints should precede vertical mergers. But most topics need not be pursued in any particular order. The answers to be expected and the development of the discussion will, of course, vary according to what has gone before, but most questions can be usefully discussed regardless of the order of topics.

The questions within each topic need not always be treated in the order in which they are printed, and some omissions can usually be made. A topic may include several distinct subtopics. But even where the questions are cumulative, a different progression is usually possible. At only a few points is the solution of a question totally dependent on what has directly preceded it. Most questions can be discussed out of the printed order when the instructor considers some other sequence preferable.

Editorial matters. All paragraphs other than statutes or principal cases are numbered to facilitate assignment, cross-reference, and general use of the book. Paragraphs of text or case abstracts are identified by boldfaced headings. Paragraphs without headings are questions or problems. Problems should be regarded as entirely hypothetical, although they are sometimes based on the case, if any, cited to the problem. A citation to a problem may simply identify a fact situation, or it may identify a discussion of some aspect of the problem. More elaborate footnotes to many questions and problems will provide considerable information about the relevant cases.

Some of the principal cases have been edited severely, but omissions are indicated in the conventional way with these exceptions: omitted without further notation are repetitive statutory or code citations to the antitrust laws, repetitive reporter references within an opinion, cross-references within an opinion, citations for a court's references to a lower court decision in the same case, and excessive citations by a court to a case already cited. Where a court refers to important cases presented elsewhere in the book or already considered in the opinion, a short name for that case may be substituted for the full name and citation. Footnotes are frequently omitted from quoted material; reproduced footnotes retain their original numbers. Footnotes within a case are always those of the court unless a notation indicates otherwise. "Inc." has been omitted from case names. Finally, it should be noted that very occasional liberties have been taken with punctuation, capitalization, and paragraphing in the course of editing.

P.A.

January 1967