

CASES AND MATERIALS ON
MODERN ANTITRUST LAW
AND ITS ORIGINS

Third Edition

Thomas D. Morgan

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**CASES AND MATERIALS ON
MODERN ANTITRUST LAW
AND ITS ORIGINS**

Third Edition

By

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AMERICAN CASEBOOK SERIES®



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Preface

The Justice Department's suit against Microsoft Corporation put antitrust law in the forefront of public consciousness in a way few can remember. It was a story that couldn't miss: The full might of the Government was arrayed against one of the leading firms in the "new economy," a company whose president is probably the richest man in the world.

Yet Microsoft was far from the first large defendant in the public dock. Standard Oil and its founder John D. Rockefeller were there. So were J.P. Morgan and the leaders of United States Steel, IBM, and AT&T. The drama of creative business dreams clashing with perceived insensitivity to the public interest runs throughout the history of antitrust enforcement.

Antitrust law at its best represents a national commitment to the free market's ability to stimulate economic growth and direct economic activity. The development of antitrust thinking thus provides a unique window on what succeeding generations have thought constituted market imperfections requiring correction. Antitrust law also illustrates the formation, development and rejection of a number of important economic hypotheses. In these pages, you will see them debated in the justices' opinions, tested in the world of experience, and modified or abandoned as better (or simply newer) ideas replaced them.

To try to convey the intellectual richness of this field, this book departs from the usual practice of examining discrete lines of antitrust doctrine from the adoption of the Sherman Act in 1890 to the present. Instead, it takes up the material in successive chronological periods during which the courts employed important contrasting approaches to antitrust issues.

We begin in the Introduction by looking at the adoption of the Sherman Act in the context of the law that preceded it and the economic theory that supported it.

Chapter I examines the period 1890 to 1914 and introduces the judicial debates over what it was that Congress had wrought. We look at that period in its own right, but also to get perspective on matters that are important today.¹ We see the *Standard Oil* case in 1911 as a turning point in judicial interpretation of the Sherman Act, soon followed by adoption of both the Clayton and Federal Trade Commission Acts in 1914.

1. Robert Bork has observed that the first 25 years of the Sherman Act "witnessed the origin of every major theory that drives and

directs the evolution of antitrust doctrine to this day." Robert H. Bork, *The Antitrust Paradox* 15 (1978).

Chapter II, the second 25 years of antitrust law, 1915-1939, illustrates a period in which the Court sought to apply what it called a “rule of reason” to antitrust questions. The cases we consider from the period are good illustrations of the rule of reason in action and of ideas that continue to influence the law’s development.

Chapter III, the third period in our antitrust history, ran for about 35 years, beginning with the decision in *United States v. Socony-Vacuum* in 1940 and ending in the mid-1970s. It was a time of aggressive expansion of antitrust doctrine, much of it born of depression-era economics and premised on the idea that American business had become too powerful and American industries too concentrated.

Chapter IV examines the present era of antitrust thinking. In contrast to the third period, some see current cases as a retreat from sound antitrust doctrine. We will suggest, however, that the current period represents an appropriate response to genuine concerns that prior antitrust doctrine had inhibited efficient business practices and penalized legitimate success.

Antitrust is a course about cases; indeed, the study of it tends to be more case-oriented than almost any advanced field other than Constitutional Law. These materials make a serious attempt to communicate the full richness of the main cases. The procedural context of each case has been left in the opinions, the facts are fully developed, and the justices’ individual efforts to wrestle with unsettled points are retained. Dissents are given almost as much prominence as majority opinions in an effort to help you see the full clash of ideas. Notes and questions that follow each case draw out its historical context, the ongoing debates within the Court, and conflicting economic visions the justices’ positions may reflect. Longer notes provide descriptions of other important cases and economic principles not developed in the opinions.

Citations to cases discussed elsewhere in the materials have been retained in opinions, but many footnotes and citations to articles or other cases have been deleted without notice.

Special thanks go to Professors William Kovacic, Richard Pierce, George Priest, Roy Simon, and others who used and commented on the first two editions of these materials, and to Henry Manne who made law and economics come alive for so many of us now in law teaching.

THOMAS D. MORGAN

October, 2005

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