

Table of Contents

	Page
PREFACE	V
PART 1. FOUNDATIONS: POLICY AND MEASUREMENT	
CHAPTER 1. THE BASIC ECONOMICS OF ANTITRUST.....	3
§ 1.1 Price Theory: Economic Behavior and Perfect Competition	3
1.1a. The Perfectly Competitive Market	4
1.1b. Behavior of the Competitive Firm	9
§ 1.2 Monopoly	14
1.2a. Price and Output of the Protected Monopolist.....	14
1.2b. Monopsony; Output Effects; Policy Implications	17
1.2c. De Facto Monopolies in Real World Markets.....	20
§ 1.3 Antitrust Policy and the Social Cost of Monopoly	21
1.3a. Monopoly as a Status; Monopolization as a Process.....	21
1.3b. The Deadweight Loss Caused by Monopoly	24
1.3c. The Social Cost of Monopoly: Rent-Seeking	25
1.3d. The Social Cost of Monopoly: Lost Competitor Investment.....	29
§ 1.4 Industrial Organization Theory and Economies of Scale	32
1.4a. The General Case of Economies of Scale	33
1.4b. Persistent Scale Economies, Natural Monopoly, Franchise Bidding and Contestability	38
§ 1.4c. Two-Sided Platforms.....	44
§ 1.5 Less-than-Perfect Competition	46
1.5a. Product Differentiation and Monopolistic Competition	46
1.5b. Price Discrimination.....	47
1.5c. Oligopoly.....	48
1.5d. Less-than-Perfect Competition and “Second Best”	48
§ 1.6 Barriers to Entry	49
§ 1.7 The Structure-Conduct-Performance Paradigm.....	53
§ 1.8 Transaction Cost Economics in Antitrust Analysis	58
CHAPTER 2. HISTORY AND IDEOLOGY IN ANTITRUST POLICY	69
§ 2.1 The Development of American Antitrust Policy.....	69
2.1a. The Goals of the Sherman Act: Efficiency and Interest Group Explanations	69
2.1b. The Common Law and the Federal Antitrust Laws.....	73
2.1c. A Thumbnail History of Federal Antitrust Policy	77
§ 2.2 On the Role of Economics in Antitrust.....	82
2.2a. Antitrust and Economics Before 1960	82
2.2b. The Chicago School and Its Aftermath.....	84
2.2c. Error Cost Analysis; Competitor v. Consumer Suits; Private v. Public Suits	87
2.2d. Politics and Democratic Policy	92

2.2e.	Antitrust Policy in the Wake of the Chicago School	93
§ 2.3	The Necessity and Nature of Antitrust Economics	95
2.3a.	The Domain of Antitrust Economics.....	95
2.3b.	The Substance of Antitrust Economics.....	98
2.3c.	The Meaning of “Consumer Welfare”	99
CHAPTER 3. MARKET POWER AND MARKET DEFINITION		103
§ 3.1	Introduction	103
3.1a.	Market Power Technically Defined	104
3.1b.	Market Share as a Surrogate for Market Power	106
3.1c.	Market Share as More than a Surrogate; Independent Relevance of Market Share	107
3.1d.	The Relevant Antitrust Market	107
§ 3.2	Estimating the Relevant Market; the SSNIP and the “Hypothetical Monopolist”	108
3.2a.	Size of Hypothesized Price Increase	111
3.2b.	The “Profit-Maximizing” Increase; Critical Loss Analysis.....	113
3.2c.	Broader and Narrower Markets; General Irrelevance of Submarkets	114
§ 3.3	The Product Market; General Considerations.....	118
3.3a.	Markets and Brands; “Lock-In”	121
3.3a1.	Single Brand Ordinarily Not a Relevant Market; Kodak; Patented Pharmaceuticals.....	121
3.3a2.	Lower Court Decisions Limiting Kodak	126
3.3a3.	Contract “Lock-In;” Franchisor Brand as Market.....	127
3.3b.	Substitutes v. Complements; Cluster Markets and Two-Sided Platforms	129
3.3b1.	Relevant Market Consists of Substitutes	129
3.3b2.	The Limited Rationale for Finding “Cluster” Markets	130
3.3b3.	Assessing Market Power on Two-Sided Platforms	132
§ 3.4	Product Differentiation and the Cellophane Fallacy	133
3.4a.	Cross-Price Elasticities and Their Meaning	133
3.4b.	Cross-Elasticity of Demand in Differentiated Markets and the <i>du Pont</i> (Cellophane) Case	134
3.4c.	Correcting for the “Cellophane” Fallacy	136
§ 3.5	Supply Elasticities; Foreign Imports.....	138
3.5a.	Foreign Imports and the <i>Alcoa</i> Case	139
3.5b.	Other Decisions Addressing (or Failing to Address) Supply Issues	141
3.5c.	Accounting for Elasticity of Supply: Market Inclusion or Low Barriers to Entry?	143
§ 3.6	The Geographic Market	144
3.6a.	Shipped Goods; Minimum Geographic Market.....	145
3.6b.	Stationary Goods and Services	146
3.6c.	Price Movements and Shipping Patterns.....	149
3.6c1.	Price Movements Generally; Asymmetry	149
3.6c2.	The Elzinga-Hogarty Test	150
3.6d.	Trade Area; Non-Competition Covenants	151
3.6e.	Price Discrimination	153

§ 3.7	Computation and Interpretation of Market Shares	154
3.7a.	Revenue v. Units	155
3.7b.	Output v. Capacity	156
3.7c.	Product Durability and Power	157
3.7d.	Interpreting Market Share Data; Questions of Fact or Law	159
§ 3.8	Market Definition in the Justice Department Merger Guidelines.....	162
3.8a.	Product Market Delineation in the 2010 Guidelines.....	163
3.8b.	Geographic Market Definition Under the 2010 Guidelines	165
3.8c.	Calculation of Market Shares Under the 2010 Merger Guidelines.....	166
3.8d.	The “ <i>Cellophane</i> ” Fallacy and the Difference Between Market Delineation for Mergers and Other Practices	168
3.8e.	Conclusion; the Guidelines as a Policy Statement	169
§ 3.9	Alternative Methods of Establishing Market Power.....	169
3.9a.	Measuring Residual Demand Directly	170
3.9b.	Persistent Price Discrimination.....	172
3.9b1.	Price Discrimination and Intellectual Property	174
3.9b2.	Price Discrimination and Market Definition.....	175
3.9c.	Persistent Monopoly Profits; High Margins; Exclusion Payments	175
3.9c1.	Monopoly Profits v. Accounting Profits.....	175
3.9c2.	Absence of High Accounting Profits	177
3.9c3.	The Problem of “Rents”	177
3.9c4.	Power Inferred from Exclusion Payments: <i>Actavis</i> Decision	179
3.9d.	Market Power and Intellectual Property	179
3.9e.	Assessing Market Power for Vertical Restraints.....	181

PART 2. THE SUBSTANCE OF ANTITRUST

	CHAPTER 4. ANTITRUST POLICY TOWARD COLLUSION AND OLIGOPOLY	185
§ 4.1	Introduction: The Basic Economics of Price Fixing	185
4.1a.	The (Virtual) Universality of Cartel Cheating	188
4.1a1.	Divergence Between Cartel and Single Firm Profit Maximization	189
4.1a2.	Cartel Cheating Strategies	190
4.1a3.	Detecting and Punishing Cheating; Cartel “Amnesty”	192
4.1b.	Competitive Fringe Firms	196
4.1c.	Internal Efficiencies of the Cartel	197
4.1d.	Cartels of Buyers; Labor Anti-Poaching Agreements	199
§ 4.2	Imperfect Competition	201
4.2a.	Non-Cooperative Cournot Oligopoly	202
4.2b.	Oligopoly Strategies	205
§ 4.3	The Social Cost of Collusion	209
§ 4.4	Antitrust Policy Toward Oligopoly and Tacit Collusion	210
4.4a.	Attacking Oligopoly; The Turner-Posner Debate	210
4.4b.	Identifying Tacit Collusion and Facilitators; Policy Options	213

§ 4.5	Proving a Price or Output “Agreement” from Indirect or Circumstantial Evidence; Hub-and-Spoke Conspiracies.....	217
§ 4.6	Reaching Oligopoly Behavior on Less Explicit Evidence of Agreement	223
4.6a.	Introduction; Incomplete Agreements.....	224
4.6b.	Challenging Facilitators Established by Agreement.....	226
4.6c.	“Unilateral” Facilitators; Basing-Point Pricing Schemes	228
4.6d.	Other Facilitators, Including Algorithms; § 5 of Federal Trade Commission Act.....	232
4.6e.	Motions to Dismiss and Summary Judgment in Conspiracy Cases; Courts’ General Adherence to Traditional Conspiracy Requirements	237
§ 4.7	Intraenterprise Conspiracy.....	239
CHAPTER 5. JOINT VENTURES OF COMPETITORS, CONCERTED REFUSALS, PATENT LICENSING, AND THE RULE OF REASON.....		247
§ 5.1	Introduction: Naked and Ancillary Agreements Among Competitors	247
5.1a.	Distinguishing Naked from Ancillary Restraints; Question of Law	248
5.1b.	Why Multilateral Activity Deserves Closer Antitrust Scrutiny	250
5.1c.	Partial Condemnation; Less Restrictive Alternatives.....	253
§ 5.2	Joint Ventures as Market Facilitators	254
5.2a.	Joint Ventures: An Overview	255
5.2a1.	Potential Harms and Benefits	255
5.2a2.	The Two Sides of the Exclusivity Problem	258
5.2b.	Ventures Facilitating R & D, Advertising and Promotion; Ancillary Market Divisions	260
5.2b1.	Joint Ventures and Free Rider Problems	260
5.2b2.	National Cooperative Research Act	260
5.2b3.	Ancillary and Naked Agreements Pertaining to Advertising	261
5.2b4.	Ancillary Market Divisions and Noncompetition Agreements	263
5.2c.	Transactional Efficiencies Justifying Joint Venture Price Setting	268
5.2d.	The Relation Between Joint Venture Analysis and Merger Analysis	271
§ 5.3	Competitor Exchanges of Price or Output Information; Posting Agreements	274
5.3a.	Industry-Wide Dissemination of Price and Output Information....	275
5.3b.	Direct Competitor Exchange of Price Information	277
5.3c.	Agreements to Post, or to Post and Adhere.....	279
5.3d.	Agreements of Wage and Salary Information; “Anti-Poaching” Agreements.....	279
§ 5.4	Concerted Refusals to Deal, Joint Venture Membership Restrictions, and Standard Setting	280
5.4a.	Harms and Benefits; Appropriate Antitrust Standard	280
5.4a1.	A Rule of Reason, with Exceptions.....	281
5.4a2.	Special Treatment for the Learned Professions?	286
5.4b.	Efficient Joint Ventures and Refusals to Deal.....	288

5.4b1.	Closed-Membership and Other Traditional Joint Ventures.....	288
5.4b2.	Open-Membership Ventures; Positive Network Externalities	289
5.4c.	Standard Setting and Rule Enforcement in Private Entrepreneurial and Professional Associations	295
5.4d.	Agreements Involving Non-Competitors	302
5.4e.	Expressive and Noncommercial Boycotts.....	303
§ 5.5	Agreements Governing the Licensing and Use of Patents and Other Intellectual Property	304
5.5a.	Introduction; Basic Issues	304
5.5b.	The Scope of the Patent Misuse Doctrine, Antitrust and Beyond	306
5.5c.	Patent Licensing; the “Scope of the Patent” Rule.....	310
5.5c1.	Price Fixing; Output Restrictions; Royalty Rates; Exclusivity	312
5.5c2.	Horizontal Territorial and Other Market Division Agreements	316
5.5c3.	Pay-for-Delay Settlements of Pharmaceutical Patent Disputes; <i>Actavis</i>	317
5.5c4.	Package Licenses.....	320
5.5c5.	Patent Pools.....	321
5.5c6.	Grantbacks.....	322
5.5c7.	FRAND: Patent Licensing and Standard-Essential Patents	323
5.5d.	Agreements Concerning Non-Patent Intellectual Property.....	326
§ 5.6	Characterization and Evaluation: The Per Se Rule and the Rule of Reason	327
5.6a.	The Supreme Court and the Per Se Rule	327
5.6b.	The Distinction Between Rule of Reason and Per Se Treatment	329
5.6c.	Identifying Anticompetitive Conduct: A Tentative Road Map	334
5.6d.	The Truncated, or “Quick Look,” Rule of Reason	342
5.6e.	Reforming the Rule of Reason.....	345
CHAPTER 6. EXCLUSIONARY PRACTICES AND THE DOMINANT FIRM: THE BASIC DOCTRINE OF MONOPOLIZATION AND ATTEMPT		349
§ 6.1	The Monopolization Offense	349
§ 6.2	Monopoly Power and Illegal Monopolization	352
6.2a.	Monopolization’s Market Power Requirement.....	352
6.2b.	The Relation Between Market Power and Market Share; Entry Barriers.....	354
§ 6.3	Conduct Requirements—Is Bad Conduct Necessary?.....	356
§ 6.4	Identifying Monopolizing Conduct	358
6.4a.	Exclusionary Conduct Defined.....	358
6.4b.	Private and Government Suits Distinguished; Equity Remedies.....	363
6.4c.	Intent	363
§ 6.5	The Offense of Attempt to Monopolize	364

6.5a.	Attempt Law's Specific Intent Requirement	365
6.5b.	"Dangerous Probability of Success"	368
6.5b1.	The "Dangerous Probability" Requirement as a Screening Device	370
6.5b2.	Dangerous Probability and Market Power	371
§ 6.6	Conspiracy to Monopolize	373
CHAPTER 7. EXCLUSIONARY PRACTICES IN MONOPOLIZATION AND ATTEMPT CASES		375
§ 7.1	Introduction	375
§ 7.2	Merger and Monopoly	376
§ 7.3	Output Expansion; Strategic Capacity Construction	378
§ 7.4	Price Discrimination; Leasing Practices	379
§ 7.5	Unilateral Refusals to Deal I: General Doctrine	381
7.5a.	Protecting the Incentive to Invest	382
7.5b.	Scope of Duty to Deal	387
7.5c.	Refusals to Deal in Cooperative Networks	388
§ 7.6	Unilateral Refusal to Deal II: Vertical Integration, Price Squeezes, Tying and Exclusive Dealing	389
7.6a.	Kodak and Its Aftermath	390
7.6a1.	"Lock-In" Requires Initial Purchase and Subsequent Change of Policy	392
7.6a2.	"Average" Customer Must Be Poorly Informed; or Price Discrimination Must Be Possible	392
7.6a3.	§ 2 and Aftermarket Opportunism	393
7.6b.	Vertical Integration and Refusals to Deal; Price or Supply "Squeezes"	393
7.6c.	Quasi-Tying and Exclusive Dealing—Technological Ties	397
7.6d.	Use of Vertical Refusals by Private Antitrust Plaintiffs	399
7.6e.	Legitimate Business Purpose	400
7.6f.	Unilateral Refusal by Nonmonopolist	400
§ 7.7	Refusal to Deal III: The "Essential Facility" Doctrine	401
7.7a.	What Is a Qualifying "Essential Facility"?	402
7.7b.	The Extent of the Duty to Deal	403
7.7c.	Reasonableness of Refusal to Deal	404
7.7d.	Essential Facility Doctrine Inconsistent with General Antitrust Goals	405
7.7d1.	Forced Sharing Requires Price Administration	405
7.7d2.	Forced Sharing Undercuts Incentives to Develop Alternative Sources of Supply; <i>Aspen</i> Contrasted	406
§ 7.8	"Predatory" Product Design and Development; Failure to Predispose; Altered Complementary Products	406
7.8a.	Predatory Product or Process Innovation	407
7.8b.	Failure to Predispose New Technology	410
7.8c.	Microsoft: Unnecessarily Harmful Redesigns and Licensing Requirements	411
7.8d.	Strategic Entry Deterrence; Predatory Advertising, Excessive Product Differentiation	413

§ 7.9	The Troublesome “Leverage” Theory; Nonmonopolistic Advantage in Second Market	415
§ 7.10	Raising Rivals’ Costs (RRC).....	416
	7.10a. The Pedigree and Judicial Development of RRC	418
	7.10b. Pre-Emption of Markets or Customers as RRC	420
§ 7.11	Unreasonably Exclusionary Practices Involving Patents or Other Intellectual Property Rights	423
	7.11a. <i>Walker Process</i> : Improper Infringement Suits on Unenforceable Patents.....	424
	7.11b. Enforcement of Patent Known to Be Invalid or Unenforceable; <i>Noerr</i> Issues.....	425
	7.11c. Accumulation; Nonuse.....	430
	7.11d. Unilateral Refusal to License, Simple and Conditional	432
	7.11d1. Absolute Refusal to License.....	432
	7.11d2. Conditional Refusals to License	435
	7.11e. Patent “Ambush” and Failure to Disclose, Particularly in Standard Setting.....	436
§ 7.12	Abuse of Government Process	438
§ 7.13	Business Torts as Antitrust Violations	439
§ 7.14	Conduct Requirements in Attempt Cases	441
CHAPTER 8. PREDATORY AND OTHER EXCLUSIONARY PRICING		443
§ 8.1	Introduction	443
§ 8.2	When Is a Price Predatory? The Areeda-Turner Test.....	444
§ 8.3	Predatory Pricing: Application and Criticism of the Areeda-Turner Test.....	446
	8.3a. The Average Variable Cost (AVC) Surrogate.....	446
	8.3b. The Problem of Long-Run, Strategic Behavior; “Predatory” Prices Above Cost; Multiple-Benefit Predation	448
	8.3b1. Limit Pricing and Strategic Entry Deterrence.....	448
	8.3b2. Multiple-Benefit Predation.....	451
	8.3c. AVC Measured as Average Avoidable Cost; Opportunity Cost	452
§ 8.4	Structural Issues: When Is Predatory Pricing Plausible? Recoupment.....	454
	8.4a. The Predator’s Market Position; Predatory Pricing in Oligopoly.....	455
	8.4b. Barriers to Entry.....	457
	8.4c. Excess Capacity.....	458
	8.4d. Disposition of Productive Assets	460
	8.4e. Should Competitor Predatory Pricing Suits Be Abolished?	461
§ 8.5	Judicial Adaption of the Areeda-Turner Test: Price/Cost Relationships and Intent	462
	8.5a. Price/Cost Relationships.....	462
	8.5b. Intent	463
§ 8.6	Judicial Adaption of Areeda-Turner: Identifying Relevant Costs; Multi-Product Firms; Customer-Specific Pricing.....	465
§ 8.7	Judicial Adaption of Areeda-Turner: Structural Issues and Recoupment	467
§ 8.8	Predatory Pricing and the Robinson-Patman Act	469
§ 8.9	More Complex Exclusionary Pricing Strategies, Particularly Discounts	476
	8.9a. Quantity and Loyalty Discounts	476
	8.9b. Package Pricing and Bundled Discounts.....	479

8.9b1.	The Varieties of Bundled Discounts.....	479
8.9b2.	The “Attribution” Test for Bundled Discounts	480
8.9b3.	More Complex Bundles	482
8.9c.	Slotting Allowances and Related Pricing Incentives Paid to Retailers	483
§ 8.10	Predatory Buying and Most Favored Nation Clauses in Purchase Agreements	484
CHAPTER 9. VERTICAL INTEGRATION AND VERTICAL MERGERS		489
§ 9.1	Introduction	489
§ 9.2	The Economics of Vertical Integration.....	491
9.2a.	The Implications of Coase’s Work; Transaction Cost Economics ...	491
9.2b.	Cost Savings, Technological and Transactional	493
9.2c.	Efficient Vertical Integration and Multi-Stage Market Power; Eliminating Double Marginalization; Two-Part Tariffs.....	496
§ 9.3	Plausible Anticompetitive Consequences of Vertical Integration	500
9.3a.	Strategic Control of Inputs.....	500
9.3b.	Price Discrimination.....	501
9.3c.	Foreclosure and Entry Barriers	502
9.3d.	Vertical Integration by Price Regulated Firms.....	503
9.3e.	Vertical Integration and Cartels.....	504
§ 9.4	Vertical Mergers and Antitrust Law.....	505
§ 9.5	Vertical Mergers and the Merger Guidelines	511
CHAPTER 10. TIE-INS, RECIPROCITY, EXCLUSIVE DEALING AND MOST FAVORED NATION AGREEMENTS		517
§ 10.1	Introduction: The Judicial Test for Tie-Ins.....	517
§ 10.2	Tying Arrangements and Consumer Welfare	519
§ 10.3	Market Power and Per Se Unlawful Ties; Sherman v. Clayton Act Tests	520
10.3a.	The Rationale and Development of Tying’s Market Power Requirement.....	520
10.3b.	Tying Arrangements in Imperfectly Competitive Markets; Locked-In Customers	523
10.3c.	Intellectual Property and the Presumption of Market Power	526
10.3d.	“Uniqueness” and Ubiquity as Market Power	527
10.3e.	Separate Sherman and Clayton Act Tests? Federal Trade Commission Act.....	528
10.3f.	The Rationale for Per Se Illegal Tie-Ins	529
§ 10.4	When Are Products Tied Together?.....	531
10.4a.	Coercion by Contract, Condition, or Understanding	531
10.4b.	Proof of a Relevant Tying “Agreement;” Uncommunicated Conditions.....	534
10.4c.	Package Discounts	534
10.4d.	Coercion by Package Design; Technological Ties.....	535
§ 10.5	The Requirement of Separate Tying and Tied Products.....	537
10.5a.	Introduction; Basic Competitive Market Test	537
10.5b.	“New” Products	538
10.5c.	Complete and Partial Substitutes as Separate Products	539
10.5d.	Intellectual Property and Labor as Separate Products	540

§ 10.6	10.5e. Efficiency—“Economies of Joint Provision”	541
	Competitive Effects	543
	10.6a. The Leverage Theory: Using Tie-Ins to Turn One Monopoly into Two; Tipping	543
	10.6b. Entry Barriers, Foreclosure, and Collusion	546
	10.6b1. Entry Barriers and Tying Arrangements	546
	10.6b2. Foreclosure; Market Share	547
	10.6b3. Tie-Ins and Collusion	547
	10.6c. Evasion of Rate Regulation	548
	10.6d. Predatory Pricing and Other Attempts to Monopolize	550
	10.6e. Tie-Ins as Price Discrimination and Metering Devices; Franchise Agreements	551
	10.6f. Tying and Double Marginalization; “Reverse Leveraging”	555
§ 10.7	Tie-Ins and Efficiency: Toward a General Rule of Reason	557
	10.7a. Efficiencies and Tying Law’s Idiosyncratic Per Se Rule	557
	10.7b. Nonforeclosing Ties: Full-Line Forcing and Unwanted Tied Products; Lack of Consumer Injury	558
	10.7c. Conclusion: Moving Tying Law Toward a Rule of Reason	559
§ 10.8	Reciprocity.....	561
§ 10.9	Exclusive Dealing	563
	10.9a. Anticompetitive Foreclosure and Its Variations	564
	10.9a1. The Foreclosure Theory of Exclusive Dealing	564
	10.9a2. Raising Rivals’ Costs	565
	10.9a3. Defining Markets to Measure Vertical Foreclosure	566
	10.9b. Exclusive Dealing as a Cartel Facilitator	566
	10.9c. The Difference Between Exclusive Dealing and Tying	567
	10.9d. Efficiency Explanations and Defenses for Exclusive Dealing	568
	10.9e. The Legal Standard for Exclusive Dealing Contracts	571
§ 10.10	Vertical Most-Favored Nation (MFN) and “Anti-Steering” Clauses	575
CHAPTER 11. INTRABRAND RESTRAINTS ON DISTRIBUTION.....		579
§ 11.1	Introduction	579
§ 11.2	Perceived Competitive Threats of Minimum RPM and Vertical Territorial Restraints.....	580
	11.2a. Introduction	580
	11.2b. Vertical Restraints as Collusion Facilitators; Powerful Individual Dealers	581
	11.2b1. Dealer Power; Policy Implications	584
	11.2b2. Manufacturer Collusion and Vertical Restraints	585
	11.2c. Foreclosure Effects	586
	11.2d. Third Degree Price Discrimination	587
	11.2e. Other Theories	588
§ 11.3	Vertical Restraints and Efficiency	588
	11.3a. The Free-Rider Problem	588
	11.3a1. The Economics of Vertical Restraints to Combat Free Riding	590
	11.3a2. The Domain and Efficiency of Vertical Restraints to Combat Free-Riding	591

11.3b.	Variations on the Free-Rider Problem and Alternative Explanations	592
11.3b1.	Purchase of Preferred Distribution Services; Shelf Space; Quality Certification	592
11.3b2.	Facilitating Resale Density	593
11.3b3.	Facilitating Supplier Entry	594
11.3b4.	Protection of Dealer Margins; Enforcement of Distribution Contracts	594
11.3c.	Vertical Restraints and Efficiency Reconsidered.....	595
§ 11.4	The Agreement Requirement in Vertical Restraints Cases	596
11.4a.	Agreements—Horizontal and Vertical, Price and Nonprice	596
11.4b.	The Colgate Doctrine	597
11.4c.	Dealer Terminations.....	598
11.4d.	The Agreement Requirement and Antitrust Policy Respecting Vertical Restraints; Restraints Initiated by Powerful Dealers.....	601
§ 11.5	Resale Price Maintenance in the Courts.....	602
11.5a.	From Dr. Miles to Leegin	602
11.5b.	The Meaning of “Resale”—Consignment Exception	605
11.5c.	Maximum RPM	609
11.5d.	The Difference Between Price and Non-Price Agreements.....	613
§ 11.6	Vertical Nonprice Restraints Under the Rule of Reason	613
11.6a.	Balancing “Intrabrand” and “Interbrand” Competition	615
11.6b.	Sylvania’s Impact in the Lower Courts	618
11.6c.	Boycott Claims	620
11.6d.	Exclusive Dealerships, Sole Outlets, and Refusals to Deal	621
11.6e.	Dual Distribution.....	622
§ 11.7	Conclusion: The Rule of Reason for Distribution Restraints.....	623
11.7a.	General Policy Concerns.....	623
11.7b.	General Efficiency of Vertical Integration Not Decisive	624
11.7c.	Rejected Approaches	625
11.7d.	Rule of Reason Inquiry Summarized.....	625
	CHAPTER 12. MERGERS OF COMPETITORS.....	629
§ 12.1	Introduction: Federal Merger Policy and the Horizontal Merger Guidelines	629
12.1a.	The Relevance of Market Structure to Merger Analysis	632
12.1b.	The Basic Concerns of Merger Policy: Reduced Market Output or Innovation, Higher Prices, and Offsetting Efficiencies.....	633
12.1c.	Mergers and Exclusionary Practices; Predatory Pricing; Private Challenges	636
§ 12.2	Efficiency and Merger Policy	638
12.2a.	The Dubious Legacy of the Warren Era	638
12.2b.	Assessing the Efficiency Effects of Horizontal Mergers	640
12.2b1.	The Welfare “Tradeoff” Model	640
12.2b2.	Must Efficiencies Be “Passed On”?.....	644
12.2b3.	Efficiencies Must Be “Merger-Specific” and “Extraordinary”	645
12.2b4.	Problems of Identification, Measurement, and Proof	646
12.2b5.	Benefit and Threat in Different Markets	649

§ 12.3	Estimating Anticompetitive Consequences I: Mergers Facilitating Unilateral Price Increases	649
12.3a.	Introduction.....	649
12.3b.	Merger to Monopoly	649
12.3c.	Dominant Firm's Acquisition of Nascent Rival; Platform Acquisitions	650
12.3d.	Unilateral Effects in Product Differentiated Markets	651
12.3e.	Mergers That Threaten Innovation	657
§ 12.4	Estimating Anticompetitive Consequences II: Mergers Facilitating Coordinated Interaction	659
12.4a.	Measuring Market Concentration: The CR4 and the Herfindahl	660
12.4a1.	The Four-Firm Concentration Ratio (CR4)	661
12.4a2.	The Herfindahl-Hirschman Index (HHI).....	662
12.4b.	Market Share Thresholds Under the Horizontal Merger Guidelines.....	667
12.4c.	The Weight to Be Given to Market Definition and Market Share Measures	668
12.4d.	How Should Concentration Count? The <i>Philadelphia Bank</i> Presumption	670
12.4e.	Mergers of Competing Buyers.....	673
§ 12.5	The Significance of Product Differentiation	674
12.5a.	General Effects.....	674
12.5b.	More Extreme Product Differentiation: When Is a Merger Horizontal?	675
§ 12.6	Barriers to Entry in Merger Cases	677
12.6a.	The Appropriate Definition of Entry Barriers for Merger Policy	677
12.6b.	What Constitutes an Entry Barrier?	681
12.6b1.	Economies of Scale	681
12.6b2.	Risk and Size of Investment; Sunk Costs	682
12.6b3.	Advertising, Promotion, and Customer Loyalty.....	683
12.6b4.	Product Differentiation	684
12.6b5.	Government Entry Restrictions, Including Intellectual Property	685
12.6c.	Evidence Required to Prove Entry Barriers or Their Absence	687
12.6d.	Entry Barrier Analysis Under the 2010 Horizontal Merger Guidelines.....	690
§ 12.7	Other Factors Affecting the Competitive Consequences of Mergers.....	691
12.7a.	Sophistication and Power of Trading Partners.....	692
12.7b.	Adequacy of Irreplaceable Inputs	694
12.7c.	Excess Capacity.....	695
12.7d.	Marketing and Sales Methods	696
12.7e.	History of Collusion or Facilitating Practices	696
12.7f.	"Trends" Towards Concentration.....	697
12.7g.	Aggressiveness of Acquired Firm.....	698
§ 12.8	Observed Anticompetitive Behavior; Post-Acquisition Review	698
§ 12.9	The "Failing Company" Defense and Related Factors Affecting Firm Viability.....	700

§ 12.10	Partial Acquisitions and Acquisitions “Solely for Investment”; Horizontal Shareholding	703
§ 12.11	Interlocking Corporate Directors or Officers	706
CHAPTER 13. CONGLOMERATE MERGERS.....		709
§ 13.1	Introduction: Competition and Conglomerate Mergers	709
§ 13.2	Conglomerate Mergers and Efficiency	710
§ 13.3	Perceived Dangers to Competition	712
	13.3a. Reciprocity	712
	13.3b. Leverage, Tie-Ins, and “Portfolio” Effects	715
	13.3c. Strategic Pricing and Entry Deterrence.....	716
§ 13.4	Mergers of Potential Competitors	717
	13.4a. The Perceived Potential Entrant Doctrine.....	718
	13.4b. “Actual” Potential Entrant Doctrine.....	721
§ 13.5	Conglomerate Mergers and the Antitrust Division Guidelines.....	722
CHAPTER 14. PRICE DISCRIMINATION AND THE ROBINSON-PATMAN ACT.....		725
§ 14.1	Introduction: Price Discrimination.....	725
§ 14.2	Price Discrimination and Competition.....	726
§ 14.3	Price Discrimination and Market Power	727
§ 14.4	Three Degrees of Price Discrimination; Arbitrage	729
§ 14.5	Price Discrimination and Antitrust Policy	732
	14.5a. The Social Cost of Price Discrimination	732
	14.5b. The Social Cost of Preventing Price Discrimination in Concentrated Markets	733
§ 14.6	The Robinson-Patman Act and Price Discrimination	734
	14.6a. General Interpretation	734
	14.6a1. Legislative History and Effectiveness in Achieving Goals.....	734
	14.6a2. The Robinson-Patman Act’s Theory of Competitive Injury.....	735
	14.6b. The Meaning of Price “Discrimination” Under the Act	737
	14.6c. Primary- and Secondary-Line Violations	737
	14.6d. Technical Requirements	739
	14.6e. Violations by Buyers	743
	14.6f. Affirmative Defenses	743
	14.6f1. “Cost Justification” Defense	744
	14.6f2. “Meeting Competition” Defense	745
PART 3. ANTITRUST AS A REGULATORY INSTITUTION		
CHAPTER 15. PUBLIC ENFORCEMENT OF THE FEDERAL ANTITRUST LAWS.....		749
§ 15.1	Public Enforcement Generally; the Antitrust Division.....	749
	15.1a. Criminal Enforcement	750
	15.1b. Civil Enforcement	752
§ 15.2	The Federal Trade Commission.....	754
§ 15.3	The Process of Premerger Notification.....	757

§ 15.4	“Quasi-Public” Enforcement: The States’ Attorneys General.....	758
CHAPTER 16. PRIVATE ENFORCEMENT		761
§ 16.1	Introduction: § 4 of the Clayton Act	761
§ 16.2	Permissible Plaintiffs—Who Should Enforce the Antitrust Laws?.....	762
§ 16.3	Antitrust’s Special Requirement of Competitive Injury	763
16.3a.	“Antitrust Injury”; Private Merger Challenges	764
16.3a1.	Mergers Alleged to Facilitate Exclusionary Practices	764
16.3a2.	Takeover Targets as Antitrust Plaintiffs.....	766
16.3a3.	Consumer Plaintiffs	767
16.3b.	“Antitrust Injury” Beyond § 7; Per Se Violations	768
16.3c.	Causation, Injury-in-Fact, Antitrust Injury Distinguished	769
16.3d.	Antitrust Injury and Damages Claims.....	771
16.3e.	Injunctive Relief.....	772
16.3f.	Plaintiffs Unaffected by Injury to Competition	772
§ 16.4	Statutory and Judicial Rules Limiting Antitrust Standing	774
16.4a.	“Business or Property”	774
16.4b.	Market Relationships; “Direct Injury” and “Target Area” Tests	775
16.4b1.	“Direct Injury”	775
16.4b2.	“Target Area”	776
16.4b3.	Supreme Court Attempts at a More Useful Alternative.....	777
16.4c.	The Preferred Position of Consumers and Competitors	779
§ 16.5	Special Problems of Antitrust Standing.....	781
16.5a.	The Unestablished Business as Antitrust Plaintiff	781
16.5b.	Employees.....	782
16.5c.	Derivative Injuries and “Duplicative Recovery”	783
16.5d.	Second Best Plaintiffs.....	785
16.5e.	Pari Delicto; Declaratory Judgment Actions.....	786
§ 16.6	The Indirect Purchaser Rule.....	787
16.6a.	Hanover Shoe, Illinois Brick, & Apple v. Pepper	787
16.6b.	Exceptions to the Illinois Brick Rule	791
16.6b1.	Pre-Existing Contracts.....	791
16.6b2.	Injunction Suits	793
16.6b3.	Cases Involving Vertical Agreements or Control	794
16.6c.	Monopsony; Buyers’ Cartels.....	795
16.6d.	Policy Implications of the Indirect Purchaser Rule; State Indirect Purchaser Statutes	796
16.6e.	The Umbrella Plaintiff	798
§ 16.7	The Antitrust Statute of Limitation.....	800
§ 16.8	Disposition of Issues; Pleadings; Summary Judgment; Expert Testimony; Tagalong Suits	802
16.8a.	Jury Trial.....	802
16.8b.	Antitrust Pleadings and Summary Judgment	803
16.8b1.	Antitrust Motions to Dismiss and the Twombly Case	803
16.8b2.	Matsushita and Summary Judgment in Antitrust Cases	805
16.8c.	Judicial Control of Expert Testimony.....	812
16.8d.	Tagalong Suits; Offensive Collateral Estoppel	816

§ 16.9	Equitable Relief	818
§ 16.10	Compulsory Arbitration	819
CHAPTER 17. DAMAGES.....		821
§ 17.1	Antitrust Damages Actions and Social Welfare	821
17.1a.	Introduction: The Role of Efficiency in Damages Theory.....	821
17.1b.	Deterrence and Damages	822
17.1c.	Using Damages to Minimize the Social Cost of Antitrust Violations.....	824
§ 17.2	The Optimal Deterrence Model for Antitrust Damages	826
17.2a.	Victim's Losses v. Violator's Gains	826
17.2b.	Optimal Damages for Overcharge Injuries	827
17.2c.	Optimal Damages for Exclusionary Practices	831
17.2d.	The Optimal Deterrence Model in Litigation.....	834
§ 17.3	The Rationale for Treble Damages.....	836
§ 17.4	How Accurately Must Damages Be Measured?.....	838
§ 17.5	Measuring Damages for Overcharge Injuries.....	841
17.5a.	Introduction; Basic Conceptual Problems	841
17.5b.	Methods of Measurement: "Yardstick" and "Before-and-After"	844
17.5b1.	Yardstick Method	844
17.5b2.	Before-and-After Method	845
§ 17.6	Damages for Exclusionary Practices	852
17.6a.	When Are Damages Due?	852
17.6b.	Damages for Lost Sales and Market Share.....	853
17.6b1.	Before-and-After Method	854
17.6b2.	Yardstick Method	857
17.6b3.	Lost Market Share	857
17.6c.	Damages and Disaggregation	860
17.6d.	Terminated Dealers and Firms Driven from Business	861
17.6e.	Damages for Precluded Entry	863
§ 17.7	Contribution; Joint and Several Liability	865
CHAPTER 18. ANTITRUST AND THE PROCESS OF DEMOCRATIC GOVERNMENT.....		869
§ 18.1	Regulation, Rent-Seeking and Antitrust Immunity.....	869
18.1a.	Introduction.....	869
18.1b.	Regulatory Intervention and the Right to Seek It.....	870
18.1c.	The General Irrelevance of Regulatory Capture	871
18.1d.	<i>Noerr</i> Protects the Process, Not the Result	873
§ 18.2	The Scope of Antitrust's Petitioning Immunity.....	873
18.2a.	Petitions for Legislative or Executive Action Generally	873
18.2b.	Petitions to Governments Acting as Market Participants	874
18.2c.	Petitions for Adjudicative Action	878
§ 18.3	The "Sham" Exception in Legislative and Adjudicative Contexts.....	879
18.3a.	Use of Abusive Methods; False Information	881
18.3b.	Baselessness in the Adjudicative Setting; Successful Claims	883
18.3c.	Single or Repetitive Claims.....	888
18.3d.	Threat to Sue; Ex Parte Statements.....	889
18.3e.	Petitions for Invalid Legislation and Administrative Rules	890

§ 18.4	The Relation Between Unprotected Petitioning and the Substantive Offense.....	891
§ 18.5	Corruption of Private Decision Making Bodies	892
CHAPTER 19. ANTITRUST AND FEDERAL REGULATORY POLICY		895
§ 19.1	Antitrust and Regulation in a Federal System	895
§ 19.2	Regulation, Deregulation and Antitrust Policy	896
19.2a.	The Scope of Regulation and the Domain of Antitrust.....	896
19.2b.	The Rationales for Deregulation.....	896
19.2b1.	Expanded Confidence in Competition and Markets	896
19.2b2.	Public Choice: Decreased Confidence in the Regulatory Process	898
§ 19.3	The Role of Antitrust in the Regulated Market	899
19.3a.	Express or Implied Repeal	899
19.3b.	The Relation Between Federal Regulation and Antitrust Jurisdiction: Two Views.....	900
19.3c.	Requisite Regulatory Oversight; “State Action” Compared.....	905
§ 19.4	Procedure in Areas of Divided Authority; Primary Jurisdiction	906
§ 19.5	Market Power Offenses in Regulated Markets.....	908
§ 19.6	Antitrust Damages Actions and Regulated Rates: The <i>Keogh</i> Doctrine.....	911
§ 19.7	Particular Exemptions	913
19.7a.	Miscellaneous Express Exemptions.....	913
19.7b.	Antitrust and Federal Labor Policy	915
19.7c.	The McCarran-Ferguson Act and the Insurance Exemption.....	918
19.7c1.	“Business of Insurance”	919
19.7c2.	“Regulated by State Law”	921
19.7c3.	Acts of Boycott, Coercion or Intimidation.....	922
19.7c4.	Continuing Vitality of McCarran-Ferguson	924
CHAPTER 20. ANTITRUST FEDERALISM AND THE “STATE ACTION” DOCTRINE		927
§ 20.1	Introduction; Preemption	927
§ 20.2	Federalism and the Policy of the “State Action” Doctrine	931
20.2a.	The Historical Basis of the “State Action” Doctrine	931
20.2b.	Conflicts Between Federal Antitrust and State Regulation; Alternative Solutions	933
§ 20.3	Basic Qualifications for Exemption.....	935
§ 20.4	Authorization	937
§ 20.5	Active Supervision	942
20.5a.	When Is Supervision Required?	942
20.5b.	What Kind of Supervision Is Required?	945
20.5c.	Who Must Supervise?	948
§ 20.6	The Special Problem of Municipal Antitrust Liability.....	949
§ 20.7	The Relationship Between Petitions to the Government and the “State Action” Doctrine.....	952
§ 20.8	The Relation Between State and Federal Antitrust Law	954

CHAPTER 21. THE REACH OF THE FEDERAL ANTITRUST LAWS	961
§ 21.1 Local Activities: Federal Antitrust and Interstate Commerce	961
21.1a. The Sherman Act's Jurisdictional Reach	961
21.1b. Jurisdictional Reach of Other Antitrust Provisions	966
21.1c. "Commerce": Antitrust and Noncommercial Activities	967
§ 21.2 Antitrust's Global Reach	968
21.2a. Extraterritoriality: Basic Doctrine and the FTAIA	969
21.2b. Prudential Constraints on Extraterritorial Reach	974
21.2c. The Act of State Doctrine	978
21.2d. Foreign Sovereign Compulsion; Petitions to Foreign Governments	980
21.2e. Foreign Sovereign Immunity	980
§ 21.3 Judicial Jurisdiction and Antitrust.....	981
TABLE OF CASES	985
TABLE OF STATUTES	1007
TABLE OF REGULATIONS.....	1009
TABLE OF RULES.....	1011
INDEX.....	1013