U.S. CHAMBER OF COMMERCE

The Dangers of Upending Decades of Supreme Court Precedent

Antitrust critics have signaled their interest to radically change existing U.S. antitrust law. Their ideas often seek to overturn decades of Supreme Court precedent (over 50 years in some cases), risking the very harms the Court sought to prevent.

Proposed changes look to abandon the Court's insistence that antitrust law be ground in the rule of reason and adhere to economic evidence, rejecting short cuts used to reach findings of harm. Below are some of the most important Supreme Court determinations that have thoughtfully shaped the enforcement approach to antitrust:

U.S. v. General Dynamics v. U.S. (1974)

The Court affirmed that the merger did not violation Section 7 of the Clayton Act, rejecting the government's reliance on mere statistics concerning market share and concentration alone. The Court reiterated its position in Brown Shoe v. U.S. that evidence on market share and concentration alone is "not conclusive indicators of anticompetitive effects." Proposed changes to antitrust law often suggest banning mergers based on annual revenue or market shares alone, instead of relying on more sophisticated economic analysis.

U.S. v. Citizens & Southern Nat'l Bank (1975)

The Court held that the proposed acquisitions did not violate the antitrust laws, explaining that, in future competition cases, there must be a realistic prospect that denial of the acquisitions would lead the defendant banks to compete against each other. The Court explained that the Clayton Act is concerned with "probable" effects on competition, not with "ephemeral possibilities."

Continental T.V. v. GTE Sylvania (1977)

The Court held that a firm's decision to restrict the locations where retailers can sell its products must be analyzed under a full-blown effects (or rule of reason) analysis. The Court explained that "per se rules of illegality are appropriate only when they relate to conduct that is manifestly anticompetitive," concluding that conduct transgresses the Sherman Act only if it was an unreasonable restraint of trade that would diminish competition and promote inefficiency. Changes to our antitrust laws would have us to return to pre-1977 case law by ignoring economic analysis used today to evaluate conduct.

Matsushita v. Zenith (1986)

The Court established that antitrust claims must make "economic sense," stating: "If the factual context renders [a plaintiff's] claim implausible—if the claim is one that simply makes no economic sense—[plaintiff's] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."

Brooke Group v. Brown & Williamson Tobacco (1993)

The Court held that charging low prices, even if it harms rivals, is not unlawful unless: (1) the prices are below the appropriate measure of appropriate measure of the firm's costs; and (2) the firm had a "dangerous probability" of recouping its investment in low cost pricing "in the form of later monopoly profits, more than the losses suffered." Some would like to entirely do away with the second requirement.

The Court explained that, without recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." The Court went on to say: "That below cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for 'the protection of competition, not competitors.'" "Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition." In other words, the Court rejected a vague and subjective "unfairness" standard.

NYNEX v. Discon (1998)

The Court held that behavior that evades a given regulatory requirement is not necessarily an antitrust violation, if it does not harm the competitive process. The Court importantly recognized the role of regulation as being separate from the role of antitrust and that conduct outside the scope of the regulation is a matter for antitrust only where a plaintiff can "allege and prove harm . . . to the competitive process, i.e., to competition itself." See also Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) ("The purpose of the [Sherman] Act, is not to protect businesses from the working of the market; it is to protect the public from the failure of the market"); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) ("[A]ntitrust laws . . . were enacted for 'the protection of competition, not competitors.'") (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).

Verizon v. Trinko (Supreme Court, 2004)

The Court relied upon its 1919 decision in U.S. v. Colgate to reiterate that, as a general matter, U.S. antitrust law "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." The Court explained the dangers of compulsory dealing. First, compelling firms to share the source of their advantage risks lessening incentives "for the monopolist, the rival, or both to invest in those economically beneficial facilities." Second, "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing role for which they are ill-suited." And third, "compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion."

The Court also reiterated its prior holding that monopoly power (i.e., substantial market power) is a necessary but not sufficient condition for harm to competition. Potential legislative changes want to explicitly do away with this joint requirement in favor of a standard where substantial market power is alone sufficient. And, as the Court explained in Eastman Kodak v. Image Technical Service (1992)[2] (relying upon its 1966 decision in Brown Shoe), the possession of monopoly power is an essential element in all Sherman Act Section 2 cases. The Court defined monopoly power as the "power to control prices or exclude competition," stating that monopoly power "of course" requires something greater than market power.

Leegin v. PSKS (2007)

The Court held that resale price maintenance must be analyzed under a full-blown effects (or "rule of reason") analysis. The Court stated that: "Resort to per se rules is confined to restraints [such as horizontal price fixing] 'that would always or almost always tend to restrict competition and decrease output.' To justify a per se prohibition a restraint must have 'manifestly anticompetitive' effects, and 'lack . . . any redeeming virtue.'" The Court reasoned that, to hold otherwise, would be contrary to economics, which has shown that both vertical price and non-price restraints come with procompetitive benefits such as stimulating inter-brand competition, eliminating free-riding, and creating more options for consumers.

FTC v. Actavis (2013)

The Court reiterated its prior unanimous holding from California Dental v. FTC that "abandonment of the 'rule of reason' [i.e., a full-blown effects-based analysis] in favor of presumptive rules (or a 'quick-look' approach) is appropriate only where 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"

Ohio v. American Express (2017)

The Court relied upon its prior decisions to reiterate that "nearly every" vertical restraint "should be assessed under the rule of reason," i.e., a full-blown effects analysis. The Court explained that, to determine whether a restraint violates the rule of reason, courts use a three-step, burden-shifting framework under which the "plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." The Court again relied upon its prior decisions to instruct that "[t] he rule of reason requires courts to conduct a fact-specific assessment "to assess the [restraint]'s actual effect' on competition."