

Washington University Law Review

Volume 1957 | Issue 4

January 1957

Review of “Antitrust in Perspective: The Complementary Roles of Rules and Discretion,” By Milton Handler

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Recommended Citation

David D. Martin, *Review of “Antitrust in Perspective: The Complementary Roles of Rules and Discretion,” By Milton Handler*, 1957 WASH. U. L. Q. 409 (1957).

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ANTITRUST IN PERSPECTIVE: THE COMPLEMENTARY ROLES OF RULES AND DISCRETION. By Milton Handler. New York: Columbia University Press, 1957. Pp. vi, 151. \$3.00.

Columbia University Press has rendered a service to all students of American antitrust policy by the publication of this little book which records three lectures delivered by Professor Handler in 1956 in the University of Buffalo School of Law under the auspices of The James McCormick Mitchell Fund. The author has revised the lectures to take into account the recent decision of the Supreme Court in the *du Pont—General Motors* case.¹

In the first of the three lectures, Professor Handler attempts to illuminate the basic contours of modern antitrust law by comparing and contrasting divergent constructions of the Sherman Law by Justices Peckham, White, Taft, Holmes, Brandeis, and Stone. In only 25 pages we are provided with an excellent study of the specific content which the Supreme Court has given to the general statement of the policy of maintaining competition that Congress borrowed from the common law and applied to interstate and foreign commerce in 1890. Professor Handler clearly demonstrates that the development of antitrust law has been more orderly than a superficial study of the major cases might suggest. In the concluding paragraph of the first lecture he says: "Those who naively expect a complex jurisprudence to spring full-panoplied from the brain of a lawgiver or who would have the law proceed in a straight line, like a guided missile, from initial premise to ultimate solution, may find this tortuous development uninspired and unrewarding." Although the development of antitrust law may appear tortuous, Professor Handler's book will enable the student of the law to retrace its path with ease.

In the second and third lectures, the author compares the legislative standard provided in the Clayton Act with the "rule of reason" evolved in the administration of the Sherman Law. The second lecture considers the interpretation of section 3, and the last lecture section 7, of the Clayton Act.

Professor Handler concludes that by the construction given the Clayton Act provisions with respect to exclusive dealing in the *Standard Stations* case ". . . the 'substantial lessening of competition' standard is reduced to the level of a *per se* invalidation of exclusives save in *de minimis* situations."² He points out that Justice Frankfurter's reluctance to have legality turn on a conjecture about the probable effects of alternative business practices did not require "his flight to the opposite extreme," since the "ordinary skill of their calling" would suffice for judges to ascertain whether exclusive dealing contracts which exclude competitors "from a substantial number of outlets may seriously handicap them in their competition," or whether "suitable channels are open to them in adequate number."

As an economist rather than a lawyer, this reviewer concurs with Professor Handler's dissatisfaction with the "quantitative substantiality" test of illegality, but takes issue with his tendency in this context to view substantial lessening of competition in terms of injury to competitors rather than in terms of overall market performance. Handler says: "If there is a reasonable likelihood of injury to competitors by preventing them from reaching the ultimate consumer, the practice should not be countenanced. Otherwise, it should be sanctioned as compatible with the underlying philosophy of antitrust."³ The underlying philosophy of antitrust is not an ambiguous philosophy on which a consensus exists. Much

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1. 353 U.S. 586 (1957).
 2. Page 28.
 3. Page 37.
 4. Page 38.

of the current controversy over antitrust policy seems to stem from the dual goal of protecting "competitors" from injury and protecting the public from so much centralization of control in a particular segment of economic activity that decisions which benefit private interest [is served by decisions which] adversely affect the interest of the public [interest]. The latter danger may be made possible by business practices which do not injure any competitor. This is particularly true in merger cases. In this writer's opinion, injury to *competitors* should not be made a basis for illegality under the Clayton Act except insofar as it results in injury to *competition* in the sense of a tendency to create conditions in which monopoly power is enhanced.

With respect to the meaning of the amended Section 7 of the Clayton Act, Professor Handler says:

The best that can be said about this legislative history is that it is obscure, ambiguous, and inconclusive. The weight of the evidence, I submit, requires the measurement of the potential anticompetitive effects of an acquisition in the industry generally and not a quantitative measurement of the amount of disappearing competition.⁵

This reviewer is in agreement with this conclusion, but "potential anticompetitive effects" are not easy to define and even more difficult to measure in particular cases. Professor Handler says:

Taking the pending Section 7 cases as a whole, it is difficult to discern any golden thread running through them. The complaints disclose no unifying theme. They merely exhibit the idiosyncratic approaches of different pleaders. . . . The line of commerce in which competition has allegedly been impaired is rarely defined with any explicitness. What is more, very few of the complaints describe in meaningful detail the economic strength of the acquiring and acquired companies or adequately explain the competitive texture of the affected markets. Hence the two basic questions—the boundaries of the relevant market and the existence of competitive injury in that market—are not put into sharp focus.⁶

Rather than being the fault of the Justice Department, this lack of focus seems to arise from the nature of the problem. Lines of commerce cannot be explicitly defined simply because markets do not in fact have clear-cut boundaries either with respect to the spatial or temporal extension, or the definition of the product. This reviewer agrees with Professor Handler that section 7 should not be reduced to a *per se* prohibition, but the economic analysis required for the sort of implementation called for by the law will necessitate significant developments in the economists' tools of analysis.

This book should not only prove most useful to readers who approach it with considerable knowledge of antitrust law, but for others these lectures along with the specific references provided in the notes should provide an excellent introduction to the subject.

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5. Page 64.

6. Page 66.

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