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Handbook of the Law of Antitrust by Lawrence Sullivan

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BOOK REVIEW

HANDBOOK OF THE LAW OF ANTITRUST. By Lawrence Sullivan. St. Paul: West Publishing Co. 1977. Pp. xxviii, 886. \$16.95.

*Reviewed by C. Paul Rogers III **

Professor Lawrence Sullivan's *Handbook of the Law of Antitrust* attempts to fill a gap in antitrust scholarship, by providing a treatment of the body of antitrust law which is at once sophisticated enough to be worthy of true intellectual exertion and is yet informative enough to be of certain value to the law student. While there is, of course, no dearth of antitrust literature, no work adequately emphasizes the historical underpinnings of antitrust development while presenting the current state of the law in an organized and detailed manner.¹ Professor Gellhorn's nutshell provides an excellent overview of antitrust law, but its utility is limited by space.² Other contemporary works are too theoretical to be of practical use to students first confronted with the vagaries of antitrust law.³ Some are pervaded with the economic and philosophical predilections of the author.⁴ Certainly such works are not aimed for the student audience; they presuppose a knowledge of case law and economics that students cannot be expected to possess.

How well does Professor Sullivan fill this gap? I believe his work to be of lasting importance. Its significance can easily be measured in its exhaustive thoroughness and detailed analysis. Further, the book's straightforward organization makes it eminently useful. Legal treatises (even in one volume) are not generally read cover to cover; rather, they derive their practical usefulness as a reference tool. They should provide a source for study of particular problems as they arise, whether in study or in practice. Thus, organization is essential to ease of use.

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1. A.D. NEALE, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* (2d ed. 1970), is helpful but the author is an Englishman reporting on the American system, and the approach is essentially that of a comparatist. Thus, the focus is not the most beneficial for the beginning student of antitrust. See also A.B.A. SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (1975); E. KINTNER, *AN ANTITRUST PRIMER* (1964); J. VAN CISE, *UNDERSTANDING THE ANTITRUST LAWS* (1976 ed.); *ANTITRUST ADVISOR* (C. Hills ed. 1971). The Kintner book is directed at the businessman, while the others are aimed at the antitrust practitioner.

2. E. GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* (1976). This work is excellent for a quick overview of antitrust policy and analysis. Its space constraints limit its depth and citations to cases and secondary authorities, though its scholarly worth should not be judged by its length. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549, 2558 n. 18 (1977) (citing E. GELLHORN *supra*).

3. For example, the classic work of Kaysen and Turner is probably of little value to one without some antitrust background. C. KAYSEN & D.F. TURNER, *ANTITRUST POLICY* (1959).

4. See M. HANDLER, *TWENTY-FIVE YEARS OF ANTITRUST* (1973); R. POSNER, *ANTITRUST LAW—AN ECONOMIC PERSPECTIVE* (1976). This is not to fault these works; they simply are useful at a higher level of learning and analysis.

Sullivan employs a typical organizational format, considering monopoly power before section 1 problems.⁵ Patents (pp. 502-75), mergers (pp. 576-676), and Robinson-Patman (pp. 677-707) all receive separate treatment. A pragmatic chapter on government and private enforcement is included along with coverage of the antitrust exemptions (pp. 708-96). But perhaps the introductory chapter is most telling of the book's breadth. Initially, without being pedantic, the author explains the role and importance of industrial organization economics in antitrust analysis and policy (pp. 1-7). Further, the limits of economics are brought into view (pp. 7-10). Sullivan rightly points to the social and political traditions present in the development of antitrust doctrine which often conflict with contemporary economic theory (pp. 10-13).⁶ He follows with a brief discussion of substantive antitrust legislation (pp. 13-14) and a welcome survey of the important legal and economic literature in the field (pp. 14-17). The seventeen page introductory chapter should be required reading for anyone undertaking the study of antitrust law.

The book is admittedly intended primarily for student use (p. xv) and law school consumption of the treatise will dominate. Thus, it should be faithful to the student and reflect his needs. A work that will serve as the primary second source for the student should strive to present its analysis in a straightforward, noncontroversial manner. Of course, methodically reporting case decisions without attempts at insightful analysis provides no real intellectual challenge. Economic and legal prejudices are certain to be reflected in the writing. However, if preferences are carried too far the work becomes adversarial and the informational value of the content diminishes. Here, the book has shortcomings, despite its breadth and ease of use. Professor Sullivan is a member of the "Harvard school" of antitrust analysis and his work echoes his partiality.⁷ On occasion, Professor Sullivan's analysis tends toward indoctrination rather than investigation. While his arguments are persuasive and enlightening, it is questionable whether complex economic

5. This format follows the organizational mode of two of the leading antitrust casebooks, see P. AREEDA, *ANTITRUST ANALYSIS* (2d ed. 1974); M. HANDLER, H. BLAKE, R. PITOFKY & H. GOLDSCHMID, *TRADE REGULATION* (1975) [hereinafter cited as HANDLER]. Sullivan acknowledges (p. 15 n.1) his debt in organizing pursuant to relevant economic concepts to H. PACKER, *THE STATE OF RESEARCH IN ANTITRUST LAW* (1963).

6. It seems to me quite important to emphasize early that antitrust law arose as a result of social unrest caused by economic oppression. See Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956). These beginnings indicate that economic goals must co-exist with certain fundamental societal goals. Often the goals conflict and a major problem of contemporary antitrust doctrine is to discern when efficiency should be permitted by antitrust law to replace an inefficient, decentralized sector of the economy. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

7. Briefly stated, the "Harvard school" approach recognizes that antitrust has a populist tradition and that social factors that may conflict with economic progress must sometimes play a significant role in the formulation of antitrust policy. See note 6 *supra*. The so-called "Chicago school" believes that economic efficiency should be the guiding light for all antitrust analysis. The approaches taken by the leading casebooks reflect this divergent approach. Compare P. AREEDA, *supra* note 5, and HANDLER, *supra* note 5 (representative of the Harvard school) with R. POSNER, *ANTITRUST* (1974) (reflecting the views of the Chicago school).

and legalistic arguments best serve the student's needs.⁸ In addition, there are instances in the analysis where important cases are omitted⁹ and where the legal analysis is uncharacteristically superficial.¹⁰

A treatise, like a casebook, should stimulate the student's intellectual curiosity and entice him to explore additional sources. Learning is enhanced by the assimilation of cross-currents of ideas. Thus an important scholastic work should encourage the reader to tread farther and not accept the author's views as the gospel. In this respect, Sullivan comes up short. There is in many sections a paucity of citation to secondary material, including recognized major works of scholarship.¹¹ This defect is as serious as that brought about by the casebook editor who provides no bibliography or limits his citations to his own law review articles.¹² A similar weakness is the lack of lower court citations in many sections.¹³

8. The work is quite sophisticated and frequently presupposes that the reader has at least a working knowledge of industrial organization economics and its vocabulary. Helpful economics discussions are, however, included in the introductory chapter (pp. 1-13) and in an appendix (pp. 797-806). The author's frequent legal criticism is often complex, but generally it is offered after an adequate introduction to the cases. His discussion and analysis of *Standard Oil Co. v. United States*, 221 U.S. 1 (1911) illustrates his methodology (pp. 171-74). The sophistication exhibited, which enhances the value of the work as scholarship, may in some cases have little utility for the law student.

9. For example, Professor Sullivan's discussion of the *Parker v. Brown*, 317 U.S. 341 (1943), state action antitrust exemption (pp. 731-40) contains no reference to *Olsen v. Smith*, 195 U.S. 332 (1904), the first case in which the Supreme Court held that state regulatory activity was exempt from federal antitrust application.

10. The book's sections on monopoly power, particularly on the current state of the law concerning attempts to monopolize (pp. 132-40), seem to lack the care taken with other subjects.

Also, there are more specific omissions. The anomaly produced by organized baseball's continuing antitrust exemption, see *Flood v. Kuhn*, 407 U.S. 258 (1972); *Toolson v. New York Yankees, Inc.*, 346 U.S. 356 (1953); *Federal Baseball Club v. National League of Professional Baseball Clubs*, 259 U.S. 200 (1922), is given very short shrift (p. 709). No mention is made of the fact that other professional sports and entertainments have been specifically denied an antitrust exemption. See *Haywood v. National Basketball Ass'n*, 401 U.S. 1204 (1971) (Douglas, Circuit Justice); *Radovich v. National Football League*, 352 U.S. 445 (1957); *United States v. Shubert*, 348 U.S. 222 (1955); *United States v. International Boxing Club Inc.*, 348 U.S. 236 (1955); *Denver Rockets v. All-Pro Management, Inc.*, 325 F. Supp. 1049 (C.D. Cal. 1971).

11. For example, with regard to the antitrust immunity for state authorized activity Professor Sullivan gives detailed discussion of *Parker v. Brown*, 317 U.S. 341 (1943), and *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), cases leading to the recent Supreme Court pronouncements on the subject, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *Bates v. State Bar of Ariz.*, 97 S. Ct. 2691 (1977) (pp. 731-43). Nowhere is reference given to any of the many excellent studies of this antitrust exemption. See Posner, *The Proper Relationship Between State Regulation and the Federal Antitrust Laws*, 49 N.Y.U. L. REV. 693 (1974), cited in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 615 (1976) (Blackmun, J., concurring); Robinson, *Recent Antitrust Developments: 1975*, 76 COLUM. L. REV. 191, 209-15 (1976), quoted in *Cantor*, 428 U.S. at 597-98, Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 Nw. U.L. REV. 71 (1974), cited in *Cantor*, 428 U.S. at 632, 637 (Stewart, J., dissenting); Verkuil, *State Action, Due Process and Antitrust: Reflections on Parker v. Brown*, 75 COLUM. L. REV. 328 (1975), cited in *Cantor*, 428 U.S. at 640 (Stewart, J., dissenting).

12. The shortcoming is doubly surprising in view of the specific mention made of the major economic and legal analyses of antitrust doctrine in the text of the book (pp. 14-17). The author doubtless recognizes the importance of collateral reading.

13. For example, Professor Sullivan, in discussing the early cartel cases, points out that the decision in *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) provided "a rich jurisprudence which courts since 1898 have been developing and elaborating" (p. 169). No

One of the potential, generally unexploited, uses of a hornbook is its ready accessibility as a law teacher's aid. In this the Sullivan book excels, for the minor difficulties present for student use are not obstacles for satisfactory professorial use. Presumably, the antitrust teacher is sophisticated enough to judge Professor Sullivan's analyses on their merits; therefore, analytical shortcomings, where they exist, are not as objectionable. Similarly, the lack of citations to secondary authorities and lower court decisions is not a problem.

The analytical effort put into the work is of particular benefit to the law teacher. The work's depth and completeness would make it a valuable complement to specific class preparation in virtually all areas covered in the standard antitrust course. The economic analyses of the author, generally stated in comprehensible terms, can augment case discussions and provide additional insight into the economic reasons for industrial concentrations which run afoul of the antitrust laws. Class discussion is thereby enriched.¹⁴ This type of fundamental economic analysis can too easily be overlooked in class.¹⁵ Its importance is manifest not only for a basic understanding of the economics of antitrust, but also for an understanding of the influence that economic analysis has played in the judicial formation of antitrust policy.¹⁶

It is easy to sit back and poke holes in a massive work. But the shortcomings (or perhaps differences of opinion) indicated in no way diminish the value of the Sullivan hornbook. The depth and care of analysis speak for themselves. It is a work against which all others will be measured.¹⁷

citation to judicial decision or collateral sources accompanies this broad statement. While later pages reflect the influence of *Joint Traffic* in subsequent decisions, the lack of initial citations to authorities leaves the reader hanging and does not immediately reward the curiosity engendered.

14. For example, in treating the early railroad cartel cases, Professor Sullivan takes pains to point out how the structure of the railroad industry is particularly subject to cartelization (p. 167).

15. For example, class treatment of the early railroad cartel decisions should be coupled with a discussion of the economics of cartelization. Students not only learn how the antitrust law was given content but can see the economic significances of the Court's decisions.

16. Specifically, in the early cases, the Court emphasized the competitive effect of practices attacked, as opposed to specific considerations of societal benefits. See *United States v. Southern Pac. Co.*, 259 U.S. 214 (1922); *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); *Northern Sec. Co. v. United States*, 193 U.S. 197 (1904); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Addyston Pipe & Steel Co.*, 85 F.2d 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899).

17. An inherent problem with the work arises from the rapidly changing state of antitrust law. Its usefulness, particularly to the student, will diminish greatly as new law is made. The past Term of the Supreme Court is indicative: five significant decisions were handed down. See *Bates v. State Bar of Ariz.*, 97 S. Ct. 2691 (1977); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977); *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977). It would seem that some provision for supplements or frequent new editions must be made if the work is to retain its present value.