William & Mary Law Review

Volume 15 (1973-1974)
Issue 1

Article 10

October 1973

Book Review of Federal Control of Business -- Antitrust Laws

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Elmer J. Schaefer, *Book Review of Federal Control of Business -- Antitrust Laws*, 15 Wm. & Mary L. Rev. 203 (1973), https://scholarship.law.wm.edu/wmlr/vol15/iss1/10

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BOOK REVIEW

FEDERAL CONTROL OF BUSINESS—ANTITRUST LAWS. By AUSTIN T STICKELLS. Rochester, N. Y.. The Lawyers Co-Operative Publishing Co., 1972. Pp. 930. $35

ELMER J. SCHAEFER*

Professor Stickells has treated the federal antitrust laws in an attractively printed and compact volume which discusses many interesting lower court opinions as well as landmark Supreme Court decisions. Unfortunately, a student or lawyer attempting to use the book will discover that it is a compendium of cases rather than an explanation of antitrust law Moreover, cases are either set forth in excessive detail or presented obliquely so as to obscure both the issues decided and the reasoning of the courts. Discussions of cases are juxtaposed with no attempt to explain the manner in which they fit together, and little attention is given to the principles of policy which guide or should guide the courts. Above all, the author reveals a reluctance to draw generalizations or to state rules of law The treatment brings to mind John Updike's comment that, while reading a book by an authority on comparative literature, he could hear "the rustle of the file cards."

The major premise of these criticisms—that it is the task of the textbook writer to provide simple and clear generalizations about the law—is founded upon the ostensible value of a textbook to a student or to a lawyer. In turning to a textbook, a student is probably seeking help in selecting the important facts or identifying the holdings in a series of seemingly inconsistent casebook opinions, the reasoning of which appears obscure and of no assistance in answering his teacher's questions. In an ideal textbook, the student expects to find generalizations about what the law is—black letter law, so to speak—together with answers to some of the questions that his teacher is raising as to why the law is that way To be of assistance, therefore, the textbook should provide concise treatment of the relevant cases, together with an indication of factual variations which may have influenced the outcomes.

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The author of the model textbook imposes clarity and simplicity on the variously reasoned and often contradictory opinions of a number of courts through skillful application of standard techniques of legal reasoning. Ambiguous judicial language is interpreted by consideration of the entire opinion and reference to the facts. Contradictory holdings are reconciled by careful distinctions or explained by consideration of an emerging trend in the cases, by classification into "majority" and "minority" rules, by construction of organizing principles not yet expressed in the cases, and by generous application of the assumption that the sounder rule will eventually prevail. In short, the author of a good textbook applies the type of legal analysis which the student is learning to undertake for himself.

In a sense, the simplicity and clarity which result are artificial: the ambiguities and uncertainties in the cases remain, although many are absent from the textbook treatment. However, any legal analysis which seeks to predict what courts will do requires the exercise of judgment and, inevitably, the expression of a personal opinion. Although the task of explaining a complex body of law in a limited number of pages may sometimes force the textbook author to express his opinions in a dogmatic form, writers with strongly held opinions often end up lively and interesting.

A practicing lawyer, as well as a student, may seek assistance in cutting through the complexities of relevant precedents and developing an intelligible generalization by consulting a relevant textbook. Even though the lawyer may not fully agree with the textbook, his analysis will often be focused by the author's formulation of the issues. The simplicity and coherence of textbook principles are inherently persuasive, and a good textbook will influence considerably the development of its area of the law

Antitrust cases, with their masses of facts and multiple economic theories, would seem to demand the analytical rigor of the model textbook described above.[1] *Federal Control of Business* falls far short in this respect.

1. This description of the textbook writer's role resembles the views of the role of the legal scholar expressed by Learned Hand and Karl Llewellyn. Hand argued that law professors should assume a special role in working for consistency and fairness of legal doctrine, partly because they have time to devote to such an endeavor. Hand, *Have the Bench and Bar Anything to Contribute to the Teaching of Law?* 24 MICH. L. REV. 466, 471 (1926) Llewellyn stated his view of the role of a legal scholar, whether teacher, practitioner, or judge, in characteristically picturesque terms: "Both in the structuring of whole fields and in the sweating of clarity out of tangled lumps of five

The effect of Stickells' failure to generalize effectively can be illustrated by considering the chapter on mergers. Most legal discussions classify mergers as horizontal, vertical, and conglomerate. Within these subheadings, it is convenient to assemble cases in which the same theories of anticompetitive effect have been alleged. For example, conglomerate merger cases can be classified according to whether potential competition, entrenchment, or reciprocity theories are alleged.[2] The author, however, has chosen not to organize his chapter on mergers around legal theories; as a result, he must repeatedly fall back on the language of the statute, on quotations construing the statutory language, or on a listing of facts which he feels a court might consider relevant.

Beginning with a history of section 7 of the Clayton Act,[3] the merger chapter proceeds to a brief definition of four merger types: horizontal, vertical, conglomerate, and "other."[4] Thereafter follows a section on

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or fifteen or fifty or a hundred and fifty cases, it is the scholar who must carry the load first of stump-pulling and then of dreaming or sweating up intelligible tentative drafts of sound design." K. LLEWELLYN, DECIDING APPEALS: THE COMMON LAW TRADITION, 346-47 (1960).

Llewellyn noted, however, that a case rarely arises which can be resolved simply by following the scholar's prescription: "For the normal case, the scholar's work provides information , suggestions as to some useful arrangement of material and as to some more useful posing of an issue, and further scattered suggestions as to wise solutions." *Id.* at 347

The role to be played by the legal textbook may be compared to that ascribed to scientific textbooks by Thomas Kuhn, the historian of science. Kuhn regards scientific textbooks as expounding currently accepted scientific beliefs, embodied in what he calls "paradigms." "Normal science" consists of working out the application of these paradigms to a variety of situations which have not yet been analyzed. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 10-12 *passim* (2d ed. 1970). At one point, Kuhn compares a paradigm to "an accepted judicial decision in the common law, [which] is an object for further articulation and specification under new or more stringent conditions." *Id.* at 23.

The author of an antitrust textbook will encounter fewer accepted views and accordingly have more need for creativity than an author of a scientific textbook as portrayed by Kuhn. What appears to be greater consensus among Kuhn's scientists than among judges and lawyers may be due to the ability of scientists to generate their own experiments, whereas courts and lawyers must wait for cases to arise. The difference may also be a matter of emphasis. Kuhn focuses on the beliefs scientists share rather than the still-unsettled questions. He sees the glass as half-full rather than half-empty

2. The merger guidelines of the Department of Justice, outlining the circumstances in which the Antitrust Division will ordinarily challenge mergers, proceed along these lines. Stickells sets forth these guidelines in Appendix A of the book but does not discuss them in the text.

3. A. STICKELLS, FEDERAL CONTROL OF BUSINESS 305-19 (1972).

4. *Id.* at 320-23.

concentration, including a discussion of *Brown Shoe Co. v. United States*,[5] a section on reciprocity, and a section on "ease of entry" [6] At this point the language of the statute is quoted, and the reader is told that a "study of the companies involved, the industry, the resulting differences in competition, the probable differences, the markets affected, access to the markets, share of the market foreclosed are indicative of the factors that must be considered in determining the probable competitive consequences of an acquisition" [7]

After discussing the definitions of several important phrases, Stickells returns to the general legal test, endorsing what he calls a "broad factual analysis" [8] and rejecting the conclusion of the 1968 supplement report to the Attorney General's National Committee to Study the Antitrust Laws that there has developed "a substantial body of post-1955 decisions which provides some guidelines for defining product and geographic markets [and affords] significant indicia of probable illegality for horizontal, vertical, and to a lesser degree—conglomerate mergers" [9] There follows a section entitled "Functional Approach," in which *Brown Shoe* is again summarized at great length, the author concluding:

> The total effect of [*Brown Shoe*] is to adopt a flexible or case by case approach, a 'functional' view of the merger in the 'context of its particular industry' Economics and historical factors, including the trend to concentration in the industry; statistics, including statistical and economic analysis of the market shares, are all factors for consideration.[10]

This is as much assistance as the author can give.

Stickells' reluctance to attempt a formulation of general principles of antitrust law may be due to a belief that judicial decisions, at least in the area of antitrust, should be guided solely by the facts, and that the application of a rule formulated in a previous case may distort the court's judgment by causing it to ignore significant facts which distinguish that prior decision. Throughout the text he praises a "fluid," "flexible," case-by-case approach, in passages such as: "The basis for determining the line of commerce or the relevant product market is fluid, requiring a

5. 370 U.S. 294 (1962).
6. A. STICKELLS, *supra* note 3, at 323-35.
7. *Id.* at 335.
8. *Id.* at 360.
9. AMERICAN BAR ASSOCIATION, ANTITRUST DEVELOPMENTS 1955-1968, at 65 (1968).
10. A. STICKELLS, *supra* note 3, at 369.

case-by-case approach. No one factor is determinative. It is not a matter solely for mechanical or statistical calculation. Flexibility in approach is necessary" [11] The argument, as stated, does not justify discarding rules: a court can refuse to apply a rule to a distinguishable case or, if necessary, modify the rule.[12] The result of a hesitancy to apply rules is demonstrated in *Federal Control of Business*. Without some effort to formulate general principles, it is very difficult to compare one case with another; to make comparisons among a number of cases without attempting to generalize is impossible.[13]

In emphasizing facts rather than analysis, Stickells makes sparing use of economic theory, even where the courts have explicitly relied on such theory in shaping their decisions. For example, in *United States v. E.I. DuPont de Nemours & Co.*,[14] the Supreme Court employed the concept of "cross-elasticity of demand" to test whether DuPont's position in the cellophane market amounted to a monopoly Aside from quoting the language of the opinion, the textbook does not explain the concept or discuss its applicability to other cases.[15]

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11. *Id.* at 343-44.

12. The author's position seems to resemble one of the variants of "rule-skepticism." A concise statement of "rule-skepticism" is presented and the concept then criticized in H. HART, THE CONCEPT OF LAW, 135-36 (1961). *Cf.* K. LLEWELLYN, DECIDING APPEALS: THE COMMON LAW TRADITION 179 (1960) ("Rules are not to control, but to guide decision."); B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 23 (1921) ("The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered.").

13. The author's preference for a "case-by-case" approach may have its roots in the "rule of reason" theory of antitrust law, which holds that the legality of a restraint of trade must be tested in the light of "the facts peculiar to the business to which the restraint is applied." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918) (Brandeis, J.) A rule of reason approach does not, however, preclude the use of rules which treat similar cases in a like manner. Once a restraint has been tested in the light of relevant facts and held to be illegal, a rule prohibiting all similar restraints, in the absence of distinguishing circumstances, would be consistent with the rule of reason.

14. 351 U.S. 377 (1956).

15. A. STICKELLS, *supra* note 3, at 169, 171. Milton Handler recently commented on the usefulness of economic theory in antitrust law, cautioning that the assumptions of the theory may not be valid in the real world:

> It is our responsibility as practitioners to help the courts in attaining precise definitions, and in converting economic concepts into administrable legal principles. It is no disrespect to economists to point out that while they can assist the bench and bar by formulating the questions needing

Because of the noncommittal character of *Federal Control of Business*, a student would receive from it less help in analyzing the cases than he can obtain from his casebook. For example, in the portion of the book discussing price-fixing,[16] the doctrine that such conduct is a per se violation of section 1 of the Sherman Act is stated but then in effect qualified by summary recitations of the facts and opinions in *United States v. Socony-Vacuum Oil Co.*,[17] *Appalachian Coals, Inc. v. United States*,[18] *Virginia Excelsior Mills, Inc v. Federal Trade Commission*,[19] *Chicago Board of Trade v. United States*,[20] and several other cases. *Appalachian Coals* and *Chicago Board of Trade* were decided before the per se rule was fully formulated and are not consistent with such a rule. The textbook does provide some assistance to the reader in reconciling *Appalachian Coals* with *Socony* by noting that *Socony* would be followed today, by referring to the finding in *Socony* that the defendants' activities had had an effect on price, and by pointing out that the defendants in *Appalachian Coals* had not yet put their plan into operation. Nevertheless, the student will be likely to find a more helpful analysis of *Appalachian Coals* in his casebook.[21] Because the textbook intertwines the discussions of the two cases while omitting a full statement of the facts in *Socony*, a student who reads only the textbook without examining the cases themselves may not even realize that there is a sharp contrast between *Socony* and *Appalachian Coals*. As for *Chicago Board of*

> exploration, they don't purport to have all the answers. They expect no more than that their investigations provide illumination in policy making—not that their speculations be treated as black letter rules. They recognize that the imponderables of policy are as baffling to them as they are to lawyers. Economic theory, if accepted for what it is, can be a valuable tool in the hands of lawyers. But we do not advance legal science if we place untried theories on the pedestal of infallibility and foreclose all inquiry into pertinent facts.

2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 1072 (1973)

A role for economic theory in antitrust law might be justified even without factual verification of its assumptions on the basis of Richard Posner's argument that "many areas of the law, especially the great common law fields of property, torts, and contracts," reflect the principles of economic theory *See* R. POSNER, ECONOMIC ANALYSIS OF LAW 6 (1972).

16. A. STICKELLS, *supra* note 3, at 116-27

17. 310 U.S. 150 (1940).

18. 288 U.S. 344 (1933).

19. 256 F.2d 538 (4th Cir. 1958).

20. 246 U.S. 231 (1918).

21. *See, e.g.*, P AREEDA, ANTITRUST ANALYSIS 272-75 (1967); M. HANDLER, CASES AND MATERIALS ON TRADE REGULATION 231-32 (4th ed. 1967).

Trade, no attempt is made to explain the significance of Justice Brandeis' famous opinion, and the "price-fixing" aspect of the case is obscured by a material misstatement of the facts.[22]

By muting the conflict between principles of antitrust law in cases where they clash, the author has made it difficult for his readers to tell what has been decided. The text tends generally to neglect the arguments of dissenters, with the result that the reader is often unable to appraise the full significance of a decision. For example, the definition of the market in which to measure the monopoly power of the defendants in *United States v. Grinnell Corp.*[23] has perhaps had a greater impact because of Justice Fortas' dissent that the Court "tailored the market to the dimensions of the defendants" by adopting a "strange, red-haired, bearded, one-eyed man with-a-limp classification" [24] than because of the principles adduced by the majority to support its market definition. Yet from Stickells' discussion of *Grinnell*,[25] the reader would not be aware of the point at issue between majority and minority As a result, the book not only lacks the liveliness it could have but also conveys the misleading impression that recent antitrust decisions of the Supreme Court have not been controversial.

Quite aside from a deficiency of analysis, the book's usefulness is impaired by confusing and repetitious summaries of individual cases. The reader, for instance, would probably be unable to understand from the discussion[26] of *Sears, Roebuck & Co. v. Stiffel Co.*[27] that in that case the Supreme Court construed federal antitrust and patent laws as forbidding the application of state unfair competition laws to prevent copying of an unpatentable item. Antitrust laws are not mentioned, patent laws are not discussed except for the use of the word "unpatented," and there is no mention of a conflict between federal and state laws. Although the reasoning of the Court in *Silver v. New York Stock Exchange*[28] is sum-

22. The "call" rule, the legality of which was in question in *Chicago Board of Trade*, is described as prohibiting members of the exchange from "producing or offering to purchase certain grains" while the exchange was closed. A. STICKELLS, *supra* note 3, at 121. In fact, the rule prohibited members from purchasing or offering to purchase the grains in question while the exchange was closed except at a price equal to the closing bid of the previous session of the exchange. 246 U.S. at 237

23. 384 U.S. 563 (1966).

24. *Id.* at 590-91.

25. A. STICKELLS, *supra* note 3, at 175-77

26. *Id.* at 34-35.

27. 376 U.S. 225 (1964).

28. 373 U.S. 341 (1963).

marized,[29] treatment of the case suffers because the facts are stated after, rather than before, the applicable legal principles are discussed.

The book is poorly edited. Verbosity,[30] repetitious discussions,[31] unclear sentences,[32] misprints,[33] and spelling mistakes[34] have been permitted to remain in the text. In the index of cases, section references are provided for only a small percentage of the cases listed. Frequently, cases are discussed in several different sections of the book without cross-references to the other discussions. Since facts are sometimes omitted when a case is discussed a second time, lack of cross-references results in confusion.[35]

Federal Control of Business compiles into a convenient format much useful information. For example, the author reprints from *Farmington Dowel Products Co v. Forster Mfg. Co*[36] the table of attorney's fees awarded in some 30 private treble damage actions. Nevertheless, because of its lack of analysis and confusing presentation, the book cannot be recommended.

29. A. STICKELLS, *supra* note 3, at 130-31.

30. For example, a quotation is introduced as follows: "The summary of the principles may be seen in the statement from the Fourth Circuit Court of Appeals in the following statement *Id.* at 735.

31. For example, the last full sentence on page 344 is identical to the first full sentence on that page, except for addition of the word "also" and correction of a misprint.

32. An illustration is the following statement: "The commodity is one subject to competition by other like products, which is to say a commodity which is in free and open competition with commodities of the same general class produced or distributed by others." *Id.* at 299.

33. For example, a book by Kaysen and Turner is attributed to "Kagsen and Tunner." *Id.* at 168 n.51.

34. At one point, reference is made to the "Cannons of Ethics." *Id.* at 746.

35. For example, United States v. Penn-Olin Chemical Co., 378 U.S. 158 (1964), is discussed cryptically on page 334, with no cross-reference to the earlier discussion of the case on page 319.

36. 297 F Supp. 924, 931-36 (D. Me.), *remanded on other grounds*, 421 F.2d 61 (1st Cir. 1970).