民商法精要系列·影印注释本

West Nutshell Series

反垄断法律与经济

（第四版）

[美] E.吉尔霍恩
W.E.科瓦西克 著
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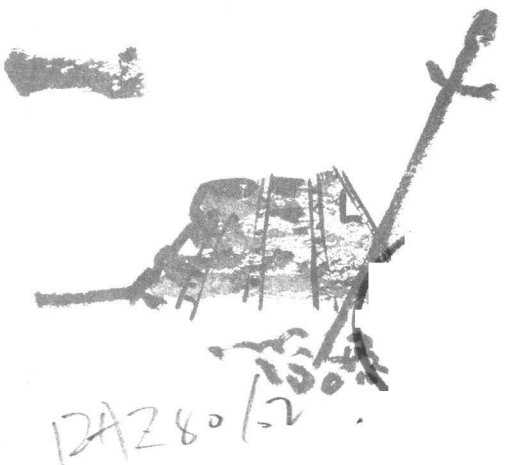

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导　读

呈现在读者面前的是美国西方出版公司（WEST GROUP）出版的“民商法精要系列·影印注释本”（West Nutshell Series）中1994年出版的《反垄断法律与经济》第四版。正如该书作者E. 吉尔霍恩教授和W.E. 科瓦西克教授在序言中指出的，本书的目的是向读者提供一个关于美国当代反垄断实践中的法律原则和经济理论的指导，目的是使他们认识美国反垄断法在今后的走向。

美国反垄断法的产生是美国市场经济发展的结果。1865年美国南北战争结束后，随着全国铁路网的建立和扩大，原来地方性和区域性的小市场被迅速融为全国统一的大市场。大市场的建立一方面推动了美国经济的迅速发展，另一方面也推动了垄断组织即托拉斯的产生和发展。1879年美孚石油公司即美国石油业第一个托拉斯的建立，标志着美国历史上第一次企业兼并浪潮的开始，从而托拉斯在美国成为不受控制的经济势力。过度的经济集中不仅使社会中下层人民饱受垄断组织滥用市场势力之苦，而且还使市场普遍失去活力，从而直接危及到资本主义市场经济赖以存在的前提，即自由竞争。在这种背景下，美国在19世纪80年代爆发了一场抵制托拉斯的大规模群众运动，这种反垄断的思潮最后导致美国在1890年颁布了《谢尔曼法》。

美国作为一个资本主义的市场经济国家，其基本的经济政策是推动和保护竞争，即以竞争作为配置资源和推动经济发展的根本途径。本书简要论述了1890年的《谢尔曼法》、1914年的《克莱顿法》、1914年的《联邦贸易委员会法》、1936年的《罗宾逊－帕特曼法》和1950年的《赛勒－克福弗反合并法》等美国主要反垄断法规的产生背景和基本内容，论述了美国反垄断法主要实体规范和程序法。在实体法方面包括横向限制（即卡特尔）、寡头垄断、纵向限制、合并、垄断化行为（即滥用垄断势力行为）以及价格歧视等。实施美国反垄断法的主要机构是美国司法部反垄断局和联邦贸易委员会。为了提高反垄断法的效力，法律还允许受害者对违法者提起三倍损害赔偿之诉。为了说明这些法律制度的内容和发展，本书选择了美国联邦法院最著名的反垄断案例，如1962年的“布朗鞋（Brown Shoe）案”；1967年的“施温恩（Schwinn）案”；1974年的“通用动力公司（General Dynamics）案”；1977年的“西尔维尼阿（Sylvania）案”；1986年的

“松下（Matsushita）案”；1992年的“柯达（Kodak）案”等。除了成文法和判例法，美国反垄断法还包括司法部和联邦贸易委员会发布的反垄断指南，如现行的1992年横向合并指南。反垄断指南虽然不具有法律效力，对法院不具有约束力，但它们表明了美国政府的反垄断政策，对反垄断执法机关有着重要的指导意义。

通过这些著名案例，特别是通过1962年的“布朗鞋案”和1977年的“西尔维尼阿案”的比较，我们可以清楚地看到，美国反垄断法的执行在不同的年代呈现出不同的画面。在布朗鞋一案中，美国联邦最高法院认定，共同占有5%市场份额的两个企业的合并违反了美国反垄断法。这说明，当时美国法院认为合并的经济效益应从属于对美国的社会民主、政府民主和经济民主的考虑。从西尔维尼阿一案开始，美国法院在反垄断案件中开始注重经济分析，特别是注重价格理论的分析。西尔维尼阿一案的判决从而也被称为美国反垄断法现代史上的珠穆朗玛峰。在20世纪80年代，随着里根政府将芝加哥学派几个重要人物任命为联邦法院的法官，芝加哥学派的思想在美国反垄断政府中起着重要的作用。这个期间的反垄断判决基本上是以经济效益为导向，政府几乎仅是干预企业间的横向价格限制和横向合并。然而，1992年美国联邦最高法院关于柯达公司一案的判决说明，美国法学界和经济学界对于芝加哥学派的观点正在进行新的评价。事实上，有些美国下级法院从来也没有接受过芝加哥学派的观点，它们的反垄断判决从来不仅仅是考虑企业的经济效益，而且还考虑国家的社会、政治和经济的利益，特别是考虑市场竞争对市场经济的重要意义。本书作者指出，美国反垄断政府今天虽然仍处于不断变化的过程，但是与20世纪80年代相比，现在的变化前景显然是在强化反垄断法的执行。1997年美国司法部对计算机软件业巨头——微软公司提起了反垄断诉讼，指控它捆绑销售互联网浏览器，排斥其他企业进入软件市场，从而减少了美国消费者选择产品的机会，这在一定程度上说明了克林顿政府严格执行反垄断法的决心。

反垄断法是一个跨经济学的部门法。因此，本书不仅论述了美国反垄断的法律制度，而且还以较大篇幅论述了反垄断的基本经济概念和经济学原理，特别是关于竞争理论中基本的经济模式，包括完善的竞争、垄断竞争和有效竞争。通过这些经济学概念和原理的阐述，人们可以更深刻地认识反垄断政策和反垄断法在推动美国经济发展和扩大社会福利方面所起的决定性作用。这里可以引用美国联邦最高法院布莱克法官的判词来说明反垄断法的重要意义：“《谢尔曼法》依据的前提是，不受限制的竞争将产生最经济的资源配置、最低的价格、最高的质量和最大的物质进步，同时有助于创造一个有利于维护民主的政治和社会制度的环境”。正是因为反垄断法对美国企业的发展所起的巨大推动作用，反垄断法在美

国被称为“自由企业的大宪章”。

我国经济体制改革的方向是建立社会主义的市场经济体制。为了建立一个开放、竞争和全国统一的大市场，为了给企业创造一个公平竞争的环境，当前亟待制定和完善我国的竞争制度。然而，我国至今还没有颁布反垄断法，许多政府部门和企业不了解反垄断法，致使我国现实经济活动中公然出现了行业价格自律、企业联合限价或者限产等严重限制竞争的现象。电信、电力、铁路等具有自然垄断或国家垄断性质的部门仍在滥用其市场优势地位，损害消费者的合法权益。此外，地方保护和部门封锁等不合理的行政性限制竞争行为也很严重。这种状况不符合我国建立社会主义市场经济体制的需要，也不适应我国加入世界贸易组织和扩大对外开放的形势。因此，我国应当大力加强对反垄断法的研究，目的是实现我国法律制度的现代化和科学化。

鉴于美国反垄断立法的经验和司法实践，鉴于美国在国际经济中的重要地位，我国的法律工作者和法学研究人员要比较、研究反垄断法，首先应当研究美国的反垄断法。因为美国西方集团的这套书具有简单、概括和重点突出的特点，而且在国际上又有较大的影响，具有权威性，因此我很愿意向读者推荐 E. 吉尔霍恩教授和 W.E. 科瓦西克教授编写的这本《反垄断法律与经济》。

中国社会科学院法学研究所　王晓晔

2001 年 10 月

PREFACE

The fourth edition of this text continues to pursue the goal that guided its predecessors–to provide a basic understanding of the legal and economic principles that govern modern antitrust practice. As with earlier editions, we seek to give students and practitioners a reliable guide to the antitrust landscape they will confront in the coming years. A brief tour through recent antitrust history indicates that the tasks of defining the existing equilibrium of antitrust doctrine and predicting its future location remain elusive and difficult.

The past few decades present striking contrasts in doctrine and enforcement policy. This era embraces two notably dissimilar periods of analysis. In 1962, the Supreme Court decided Brown Shoe Co. v. United States (1962), which held that a merger between two firms accounting for five percent of total industry output violated the principal antimerger provision of the antitrust laws. In doing so, the Court laid the foundation for an antitrust jurisprudence that often subordinated economic efficiency to the decentralization of social, political, and economic power. In the ten years between *Brown Shoe* and United States v. Topco Associates, Inc. (1972), which forbade an allocation of territories adopted as part of the operation of a joint purchasing cooperative, the Court adopted a hostile view of mergers and vertical contractual restrictions and used brightline, per se tests expansively to prohibit questioned conduct. This trend crested in United States v. Arnold, Schwinn & Co. (1967), where the Court ruled that nonprice vertical restraints were per se illegal. Relying mainly on antiquated concepts of title applied in property or sales law, *Schwinn* concluded that vertical market division agreements "are so obviously destructive of competition that their mere existence is enough" to warrant condemnation.

But the contesting forces in antitrust are never at rest. Thus, it was only a few years later, in United States v. General Dynamics Corp. (1974) (rejecting challenge to horizontal merger predicated on the parties' combined share of historical output) that the tide of robust interventionism began to ebb, followed shortly in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977) and Continental T.V., Inc. v. GTE Sylvania (1977) by a massive sea change. In its holding and outlook, *Sylvania* quickly became the most important case in the post-World War II era. *Sylvania* repudiated *Schwinn's* rule of per se illegality for nonprice vertical restraints and abandoned the indifference or hostility to efficiency that marked many Warren Court antitrust decisions. In subjecting nonprice restraints to rule of reason analysis, *Sylvania* gave decisive effect to transaction cost theories that emphasized the efficiency gains from vertical contractual restrictions. Although it did not discard other analytical tools, *Sylvania* gave primacy to economic analysis—particularly price theory—in formulating and applying antitrust rules.

If *Sylvania* is antitrust's modern Everest, then *Brunswick* is its K2—overshadowed by a more conspicuous neighbor, but barely less impressive a landmark. In a powerful doctrinal and symbolic departure from *Brown Shoe's* egalitarian antitrust philosophy, *Brunswick* provided the much-quoted declaration that the antitrust laws "were enacted for the 'protection of competition, not competitors.'[1]" By this aphorism, the Court encumbered private antitrust litigants with the formidable requirement that they prove "antitrust injury" and discarded the view that the demise of individual firms necessarily harmed the competitive process.

1. *Brunswick* quoted the phrase "competition, not competitors" from the Court's *Brown Shoe* merger decision. As discussed in Chapter 2 below, this language appears twice in *Brown Shoe*. In the first instance, the phrase is unqualified; in the second, the Court added that the Clayton Act's antimerger provision sought to preserve small business as an end in itself. *Brunswick* invoked the first, unqualified mention of the phrase—a choice that bespoke a retreat from the social and political decentralization goal embodied in the second reference.

In the spirit of *Sylvania* and *Brunswick*, most (but not all) of the Court's subsequent decisions have narrowed antitrust's reach. Occasionally the Court has accomplished this result by adopting more permissive liability standards. See, e.g., Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co. (1985) (narrowing the circumstances in which group refusals to deal can be summarily condemned). More frequently, retrenchment has occurred through the strengthening of evidentiary, injury, and standing requirements that antitrust plaintiffs must satisfy. See, e.g., Monsanto Co. v. Spray-Rite Corp. (1984) (ruling that proof of a sequence consisting of complaints from retailers to a manufacturer followed by the manufacturer's termination of a disfavored retailer fails, without more, to establish a vertical agreement to maintain resale prices). Some Warren–era precedents (such as *Schwinn*) have collapsed, yet many others remain standing, even though they rest on dubious analysis and afford protection only to private litigants who first satisfy daunting antitrust injury and standing requirements.

When the previous edition of this text appeared in 1986, the more permissive philosophy embodied in *Sylvania* and *Brunswick* had deeply influenced the federal antitrust enforcement agencies and the courts. During Ronald Reagan's presidency, the Department of Justice and the Federal Trade Commission adopted a rigorously-focused efficiency orientation and used their resources almost exclusively to prosecute horizontal output restrictions and large horizontal mergers. By 1986, efficiency-based analysis had gained broad acceptance in the federal courts. With rare exceptions such as Aspen Skiing Co. v. Aspen Highlands Skiing Corp. (1985) (condemning a monopolist's unjustified refusal to continue to deal with a rival), Supreme Court decisions continued to erode the legacy of *Brown Shoe* and its progeny by retreating from reliance on per se standards and bolstering evidentiary and procedural biases against intervention. In Matsushita Electrical Industrial Co. v. Zenith Radio Corp. (1986), the Court endorsed a district

court's summary dismissal of allegations that a collection of Japanese television manufacturers had engaged in a twenty-year long conspiracy to price their products below cost in the United States and drive American electronics equipment manufacturers out of business. In the Court's strongest testament to nonintervention in the 1980s, *Matsushita* treated predatory pricing claims skeptically and encouraged recourse to summary judgment to dismiss claims that rested on ambiguous circumstantial evidence or lacked "economic rationality." From academia, the theory of contestable markets (which posited the sufficiency of competition in markets occupied by a single firm so long as entry and exit conditions permitted hit-and-run attacks by other companies) had expanded the circumstances in which courts and enforcement officials would regard even highly concentrated markets as susceptible to entry and thus subject to effective competitive discipline.

The permissive philosophy of *Sylvania* and *Brunswick* remains powerful, but a continued narrowing of antitrust doctrine and policy is less certain today than it was in 1986. Intervening developments have complicated the picture in several ways. First, numerous commentators have challenged the view (implicit in *Sylvania* and *Brunswick*) that antitrust's central (if not exclusive) appropriate aim is to enhance economic efficiency.[2] These views have been accepted in lower court decisions such as McGahee v. Northern Propane Gas Co. (1988) (reversing dismissal of predatory pricing allegations) which embrace a multidimensional goals structure reminiscent of *Brown Shoe*. Non-efficiency concerns are not a dominant theme of modern antitrust jurisprudence, but they remain a potentially important undercurrent in many litigated disputes.

Second, there is an expanding economics literature which suggests that efficiency concerns, properly evaluated,

2. See John J. Flynn, *The Reagan Administration's Antitrust Policy, "Original Intent" and the Legislative History of the Sherman Act*, 33 Antitrust Bull. 259 (1988) (discussing non-efficiency goals literature).

dictate tighter antitrust controls on conduct such as vertical restraints, leveraging, and dominant firm pricing, product development, and investment conduct.[3] The redirection of antitrust liability standards accomplished by *Sylvania* and later cases had followed substantially from judicial acceptance of "Chicago School" perspectives reflected in treatises such as Robert Bork's *Antitrust Paradox* (1978) and Richard Posner's *Antitrust Law* (1976). Since the late 1970s, many researchers have reexamined Chicago School orthodoxy and, using tools such as game theory and information economics, have sought to disprove assumptions underpinning Chicago's austere enforcement prescriptions. Several recent judicial decisions show signs of heeding the pro-enforcement implications of this literature, and the history of antitrust policy suggests that future significant instances of absorption are likely.

The possibilities for a reassessment of Chicago precepts are most evident in Eastman Kodak Co. v. Image Technical Services, Inc. (1992). In *Kodak*, the Supreme Court sustained the Ninth Circuit's reversal of summary judgment against claims that a manufacturer of copiers unlawfully had tied the sale of service for its machines to the sale of replacement parts. The Court rejected Kodak's argument that its lack of market power in copiers precluded substantial competitive harm, as purchasers could account for service policies when bargaining with rival suppliers of original equipment. After warning about the dangers of relying on economic theory as a substitute for examining "actual market realities," the Court cited various economic authorities for the view that Kodak could inflict competitive harm by exploiting imperfections in the ability of some purchasers to obtain and act on information relating to lifecycle service costs. *Kodak* indicates doubts about giving decisive effect to

3. See, e.g., Janusz A. Ordover & Garth Saloner, *Predation, Monopolization, and Antitrust*, in 1 Handbook of Industrial Organization 537 (Richard Schmalensee & Robert D. Willig eds. 1989) (discussing economic literature favoring closer scrutiny of single-firm behavior).

economic theory in a limited factual framework, and it suggests how "post-Chicago" economics may lead courts to sustain theories of competitive harm that the Chicago School disregarded.

Third, public enforcement officials at the federal and state levels have embraced antitrust programs that surpass the Reagan Administration's restrictive antitrust agenda. In the late 1980s, state governments attacked mergers and distribution practices that the Reagan antitrust agencies deemed benign or procompetitive. Such efforts received powerful support from the Supreme Court in California v. American Stores Co. (1990), which upheld the ability of state governments to obtain divestiture to remedy antitrust violations such as illegal mergers. In April 1992, the Bush Administration issued enforcement guidelines that seek to overcome recent, judicially-imposed limits on merger enforcement and to apply the U.S. antitrust laws extraterritorially on grounds other than the consumer welfare standard that animated Reagan-era policy. And the Clinton Administration is striving to expand enforcement beyond frontiers established by the Bush antitrust enforcement agencies.

Fourth, in decisions such as Federal Trade Commission v. Superior Court Trial Lawyers Ass'n (1990), the Supreme Court occasionally has strayed from a path that foreshadowed abandonment of the sharp historical dichotomy between rule of reason and per se offenses.[4] The Court reversed a court of appeals ruling that applied a rule of reason standard to an agreement by a group of attorneys to refuse to accept cases involving indigent criminal defendants unless the District of Columbia government increased the fees for such cases. Unlike several earlier cases since the late 1970s, *Superior Court Trial Lawyers* emphatically reasserted the dichotomy between per se and reasonable-

4. See also Palmer v. BRG, Inc. (1990) (citing, without elaboration, *Topco* for the proposition that agreements between competitors to allocate sales territories are illegal per se).

ness inquiries and displayed little recognition that the boundary between the two forms of analysis is often indistinct.

Finally, the Supreme Court in recent years largely has avoided wrestling with substantive liability rules and has focused mainly on evidentiary and procedural requirements. This has undermined, but not extinguished, the ability of private litigants to invoke expansive precedents from the 1960s and early 1970s. Much criticized (but not overruled) decisions such as United States v. Von's Grocery Co. (1966) (forbidding a merger between two grocery chains accounting for 7.5 percent of retail grocery sales in metropolitan Los Angeles) remain fair game for litigants to cite as bases for applying broad liability standards.[5]

Collectively, these developments present important challenges to or qualifications of the comparatively narrow enforcement approaches dictated by *Sylvania*, *Brunswick*, and their progeny. Thus, antitrust today remains in transition. Amid the recent evolution of legal doctrine, public enforcement perspectives, and academic commentary, the principal task of this volume remains the same: to provide a critical examination of antitrust law. Although the basic approach of previous editions has been preserved, developments in recent years have dictated some changes in coverage and emphasis.

The fourth edition's exposition of antitrust's legal framework gives increased attention to the expanded role of evidentiary standards and procedural screens in determining litigation outcomes, and to the tension between per se tests and reasonableness standards. This edition also treats recent revisions of public enforcement guidelines for mergers and addresses their relationship to existing case law. Fuller coverage of immunity-related doctrines also appears,

5. In Hospital Corp. of Am. v. FTC (1986), Judge Richard Posner examined the Supreme Court's horizontal merger jurisprudence (including *Von's Grocery*) since the early 1960s and observed that "[n]one of these decisions has been overruled."

as the Supreme Court has devoted unusual energy in recent years to examining the antitrust significance of government intervention (and attempts to solicit such intervention) in the economy. To indicate how recent case law and commentary are likely to affect the future equilibrium of antitrust doctrine, current trends in law and policy are placed in their historical context.

The fourth edition continues its predecessors' focus on economics in introducing the antitrust newcomer to the law's framework and operation. In using economic analysis to illuminate antitrust case law, we frequently have made simplifying assumptions and excluded technical justifications. Admittedly, neither is irrelevant, and this text can only serve as a beginning. The notion that economic analysis should play an integral role in devising and applying antitrust legal standards is no longer remarkable. So pervasive is economic analysis is antitrust adjudication and policymaking that familiarity with basic industrial organization concepts is indispensable. Current debate deals less with the appropriate role for economic analysis than with the choice among rival economic models for evaluating business conduct. This text does not espouse exotic new economic ideas or theories; instead, it focuses on generally accepted economic doctrine and applies widely accepted concepts to antitrust. Where significant differing or emerging views appear in thoughtful antitrust cases or commentary, we have sought to present those positions with clarifying observations. Our goal is to acquaint the reader with economic ideas that now have wide currency in the courts and enforcement agencies or promise to have a major impact in the coming years.

The ongoing reformulation and refinement of legal theories and economic hypotheses place progressively greater demands on the antitrust student and practitioner. More than ever, mastery of antitrust demands the skills of the legal technician, the economist, the historian, and the political scientist. The ambiguity and uncertain direction of spe-

cific doctrines pose vexing analytical challenges, but they stem from economic, political, and social adjustments that give antitrust continuing relevance and intellectual vitality. Indeed, attempts to define antitrust's core principles and distill its critical insights proceed with unequalled urgency today.

For most of this century, antitrust mainly has been the parochial concern of the United States and a handful of countries in Western Europe. Competition policy now commands a much broader audience. Although shaped somewhat differently, antitrust plays a key role in the European Community. Canada has given antitrust an expanded role, and Japan has begun more serious enforcement efforts in response to intense U.S. political pressure. The discrediting of central planning has inspired many nations in Africa, Asia, Eastern Europe, Latin America, South America, and the former Soviet Union to create antitrust systems to facilitate the adjustment to a marked-based economy. For the student and practitioner, the effort to analyze antitrust law and economics today yields more than insight into the economies of a few western nations. Increasingly it offers a valuable tool for understanding how a growing number of developed and developing nations will expand the role of market rivalry as the foundation for economic organization and growth through the end of this century and well into the next.

ERNEST GELLHORN
WILLIAM E. KOVACIC

Washington, D.C.
May 1994

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