

ECONOMICS AND FEDERAL ANTITRUST LAW

Herbert Hovenkamp

Hornbook Series

Student Edition



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ECONOMICS AND FEDERAL ANTITRUST LAW

By

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**HORNBOOK SERIES
STUDENT EDITION**



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- Statsky's Legal Research, Writing and Analysis, 2nd Ed., 167 pages, 1982 (Coursebook)
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- Statsky and Wernet's Case Analysis and Fundamentals of Legal Writing, 2nd Ed., 441 pages, 1984 (Text)
- Teply's Programmed Materials on Legal Research and Citation, 334 pages, 1982. Student Library Exercises available (Coursebook)
- Weihofen's Legal Writing Style, 2nd Ed., 332 pages, 1980 (Text)

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- Davies' Legislative Law and Process in a Nutshell, 279 pages, 1975 (Text)
- Nutting and Dickerson's Cases and Materials on Legislation, 5th Ed., 744 pages, 1978 (Casebook)
- Statsky's Legislative Analysis: How to Use Statutes and Regulations, 2nd Ed., 217 pages, 1984 (Text)

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Preface

This book is an introduction to the complex, symbiotic relationship between economic theory and American antitrust policy. It presumes that the reader has no background in economics, and very little in antitrust law. Beginning with that premise, it attempts to integrate elementary price theory, organization economics and the existing body of antitrust case law in a way that has not been done in any single-volume survey.

This book's scope is necessarily limited by its size. Its coverage includes areas of substantive antitrust law in which economic theory plays an important part, and a brief discussion of the rapidly evolving law of private enforcement. It does not include procedure, jurisdiction under the commerce clause, state antitrust laws, the exempt industries, the "state action" exemption, or extraterritorial application of the antitrust laws.

Any discussion of the relationship between economics and antitrust law is necessarily affected with ideology. Economics is an ideological science, and antitrust an ideological and highly political area of law.

Traditionally, antitrust scholars have aligned themselves loosely around three different ideological positions. The liberal, or "Columbia School," which has origins at least as far back as the New Deal, places little confidence in the power of unregulated markets to function competitively, and very little confidence in the ability of economic theory to say anything useful about how real world markets work. Its members are skeptical about claims that antitrust or any other area of the law can either identify or pursue "allocative efficiency." As a result they believe that antitrust is legitimately concerned with distributive goals, such as the protection of small business or the control of large aggregations of economic and political power.

At the other extreme is the "Chicago School," whose name is virtually an epithet to the liberals. Orthodox Chicago economic analysis views antitrust "through the lens of price theory." The Chicago School ideologist believes that unregulated markets generally work quite well, and that most imperfections in markets are caused by interference from the State itself. Implicit in that view is a not-so-tacit suggestion that the antitrust laws have been over-enforced in a way that has done more harm than good to competitive processes.

In the middle is the "Harvard School," whose commitment to economic theory in antitrust is perhaps less than the Chicago School commitment. Traditionally, the Harvard School has expressed at least an abstract willingness to recognize noneconomic values as legitimate, although subordinate, in antitrust policy. The most important distinction

between the Chicago and Harvard approaches has not been the amount of economics in antitrust, however, but its nature. While the Chicago School is built on a foundation of price theory, the Harvard School draws more heavily from institutional economics and industrial organization. The traditional Harvard School economist believes that economies of scale and entry barriers have often interfered with the competitive process. He has been much more concerned than the Chicago School economist with the amount but which real world markets appear to deviate from the perfect competition model. As a result the Harvard School analyst has generally found more room for antitrust as a market-correcting mechanism.

The historical existence of three distinct antitrust schools is not as important today as the fact that during the 1970's and 1980's an outpouring of scholarship revealed major defections from the Harvard and Chicago positions, and—perhaps more important—a growing synthesis between the two. Both traditional positions have been widely criticized for employing static models that show little regard for real world markets in movement. This new synthesis suggests, for example, that entry barriers can be knocked down somewhat more easily than Harvard scholars assumed, but that they can be erected more easily than Chicago analysts have believed. Furthermore, each side had pushed its own good ideas to unrealistic extremes. On the one hand, the Chicagoans were right to think that most markets tend to correct themselves; on the other hand, they often overlooked the eminently practical fact that correction takes time, and even temporary monopolies impose a social cost. Likewise, Harvard scholars were correct to observe that economies of scale do not fully explain the level of industrial concentration in the United States; however, in measuring economies Harvard economists traditionally confined themselves to intraplant or multiplant economies, and often overlooked economies of distribution that can be achieved by vertical integration. Finally, and perhaps most importantly, both traditional models failed to account satisfactorily for strategic behavior.

This revisionist economics has made important contributions to antitrust theory. A resulting problem, however, is that economics in antitrust has lost much of the simplicity that kept it within the reach of antitrust lawyers who were not formally trained as economists. This book addresses that problem by giving the serious student of antitrust who has little or no economics training an economic perspective on federal antitrust policy.

I must thank some of the people who have supported my work—Charles Wright, who has helped me so many times I am embarrassed to recall them, Dean Bert Prunty and Dean Wayne Woody for institutional support, Vivien Williamson for research assistance, and Sandi Goodman and Peggie MacDonald and their staff for preparation of the manuscript. I am particularly grateful for the intellectual criticism of Professor Louis B. Schwartz, formerly of Pennsylvania, now a member of the Hastings Sixty-Five Club. Thanks to his persistence I came out of this project