

# Michigan Law Review

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Volume 57 | Issue 3

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1959

## Handler: *Antitrust in Perspective: The Complementary Roles of Rule and Discretion.*

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### Recommended Citation

James A. Rahl, *Handler: Antitrust in Perspective: The Complementary Roles of Rule and Discretion.*, 57 MICH. L. REV. 440 (1959).

Available at: <https://repository.law.umich.edu/mlr/vol57/iss3/17>

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ANTITRUST IN PERSPECTIVE: The Complementary Roles of Rule and Discretion. By *Milton Handler*. New York: Columbia University Press. 1957. Pp. 151. \$3.00.

The distinguished author is one who enjoys a nation-wide franchise for anything he writes on antitrust law. When he offers a "perspective" for this many-dimensioned field, he therefore commands careful attention. Twice before he has marked off the boundaries with comprehensive skill—in the first edition of his casebook in 1937, and in the remarkable T.N.E.C. monograph of 1940. To him and to Professor Oppenheim of Michigan, a generation of students and lawyers largely owe their antitrust frame of reference.

This short book (the James McCormick Mitchell lectures given at the University of Buffalo School of Law) attempts no new comprehensive survey. It does attempt, however, a general standard for modern antitrust administration. The author argues for the overriding principle of judicial discretion in the application of both the Sherman and the Clayton Acts. This principle requires a full appraisal of the facts in all but the most extreme cases in order to ascertain whether the challenged transaction is compatible with the "precepts" of competition.

In an interesting first chapter, with many valuable notes appended, the author traces the emergence of this principle in the form of the "Rule of Reason" from the conflicting views of a series of great justices whom he identifies as "the outstanding representatives of the main schools of antitrust thought" (White, Peckham, Taft, Holmes, Brandeis, and Stone). This selection of "architects" is a tolerant one indeed, for it includes one who rejected the Rule of Reason entirely (Peckham), one whose scholarly but unworkable dichotomy would have destroyed it (Taft), and one who thought that the whole policy with or without judicial discretion was a monument to ignorance (Holmes). The interaction of their views with the more profound approaches of White, Brandeis, and Stone, however, contributed in the author's view to the ultimate forging of the rule. This somewhat romantic treatment may not fully quell the suspicion that some of these justices contributed more to confusion in this field than to enlightenment (e.g., Holmes, in *Northern Securities*, *Federal Baseball*, *American Banana*). But it sets nevertheless

a broad stage for the author's criticism of more recent developments in the Clayton Act field.

Sections 3 and 7 of the Clayton Act, subject to the somewhat lower standard of competitive harm set by Congress, should be interpreted in the Rule of Reason manner, the author argues. The much-harassed *Standard Stations* opinion on exclusive dealing is an inexcusable departure. Recent contentions for similar "quantitative substantiality" construction of the amended anti-merger section are equally objectionable. The author plainly fears that "per se" application of these sections may do incalculable harm to legitimate business and competitive moves. It is odd that, having established this context, he does not go on to examine the Robinson-Patman Act in the same way. The book is silent on this pinnacle of *per seism*. The Federal Trade Commission Act receives a similar snub.

Although the author is a strong admirer of antitrust in the abstract, and although he is troubled by what he sees in some recent developments, the concrete view which his perspective uncovers must be even less to his liking than he admits. If judicial discretion and full appraisal of economic facts are necessary to proper administration of most Sherman and Clayton Act cases, the policy has wandered badly astray. The great majority of Sherman Act cases have been made by the courts to fit into one of the growing list of "per se" categories (as I count them—price fixing, division of territory, division of fields, limitation of output, tying and boycotts, with monopoly teetering on the brink). It is true that there have been some full-blown reasonableness cases, and there would be many more were it not for the natural preference of plaintiffs for "per se" theories. But the policy, after 68 years, must be judged by what we see in the cases, and what we see looks more like a rule of "per se" with a little room left for occasional "reasonableness."

In the one major Sherman Act area in which the Court has persisted in a full use of discretion—mergers—Congress has shown its dissatisfaction in the amendment to section 7 of the Clayton Act, although it is clear that the amendment did not go all the way over to "per se." In interpretation of section 3, and section 2 of the Clayton Act as amended by the Robinson-Patman Act, the courts have relentlessly dragged most of the substance into the non-discretionary fold. Of the major antitrust provisions, only section 5 of the Federal Trade Commission Act seems to stand fully equipped with almost pure discretion—but this is administrative, not judicial discretion.

Many, including this observer, share the author's partly stated, partly implicit view that the courts have been going too fast and too far in cutting off inquiry into the economic consequences of some of the things now made invalid by "per se" doctrines. It does not follow, as the author seems to believe, that the remedy is a simple reinvigoration of the philosophy of discretion. Some of the drive toward inquiry-stopping rules is due to nothing more than the growing impatience of federal judges

with the docket-wrecking propensities of long, "big" cases. The remedy for this is not legal theory, but rather more judges.

Some of the "per se" movement, however, is due to increasing judicial discomfort about the standards supposedly available to a judge who sets out bravely to exercise his full powers of reason. The "precepts" of competition may once have seemed sufficiently clear to serve as an adequate guide, when placed against the contrasting darkness of the bad "trust" and the conspiracy to mulct the public. With the coming of greater business morality and new schools of economic thought, however, the difference between good and bad has become considerably dulled. The resulting closer focus on the concept of competition itself has shown not a single guiding image, but a bewildering multiplicity of images—pure competition, effective competition, countervailing power, political anti-bigness, social anti-pluralism, civil freedom of enterprise, and so on. These partly divergent standards are themselves under the constant pressure of other powerful forces—requirements of national defense, fiscal control of inflation, tendencies toward more positive regulation of industry, collective bargaining, price supports, paternalism toward small business and agriculture, and so forth.

It is perhaps not surprising that courts and Congress alike keep looking for the shelter of rules which will at least temporarily relieve the agony of trying to balance all these phenomena anew in every case. This may be what Justice Frankfurter was trying to say in *Standard Stations*; if so, he ought to be added to the list of representatives of the main schools of antitrust thought.

We can agree with the author that antitrust is a "basic instrument of social control." It has a long record of specific accomplishments; it has been a major factor in freeing the dynamic forces of our economy for their stupendous gains; it is the present envy and model of the nations of the Western World. Its genius must be saved from those who would reduce it to a set of blind rules, and from those who would drown it in an insipid discretionary stew. It is to be hoped that the author and others like him will draw upon their vast experience and insight to supply the perspective so badly needed to accomplish this.

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