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Failure Everywhere? The Expansion of Goals for Antitrust

by

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I. Introduction and Summary: The Current Controversy

Since the 1970s, antitrust law has had the goal of promoting consumer welfare through banning practices that would reduce competition. The short version of “consumer welfare” is keeping prices low, but it is safe to say that practices that reduce the quality of products, the effectiveness of their marketing, and the innovation that creates new ones all fall within the reach of antitrust's consumer welfare standard.

More controversial has been whether “consumer welfare” counts only benefits to buyers, or whether benefits such as reduced costs or more efficient production that accrue to sellers should be counted. The aphorism summarizing the tradition has been that antitrust is about protecting consumers, not competitors. A colleague long ago summarized this in what he called the “First Theorem of Antitrust”: “If a competitor complains about something, it must be good.”

In recent years, this consumer welfare tradition has [come under attack](#). The core of the critique is first that on a number of dimensions, the economy is failing. Among other claimed concerns, privacy is falling, inequality is rising, workers are getting little if any of the economic growth in the economy, and a larger share of the economy is flowing through fewer and fewer firms.

[Critics specifically cite the growth of “big tech” Internet platforms, such as Google, Facebook, and Amazon](#), which offer services to customers at a zero price. Although customers may “pay” by disclosing information about themselves that these firms can monetize through targeted advertising and marketing, the “zero price” aspect has made it hard to claim that consumers are hurt by these practices. Moreover, to many these platforms have facilitated the spread of false information or, on the other side of the political spectrum, to allow all to have a voice.

Under traditional antitrust, one would say that these platform companies act within the law unless one can identify practices that subverted competition that would have made consumers better off. However, under what has come to be called [neo-Brandeisian antitrust](#), the problem has been that antitrust has led to the aforementioned deleterious economic trends, because antitrust became detached from its motivating concerns with political and economic fairness. With [legislation introduced](#) from [both sides](#) of the political aisle in Congress and [appointment of critics to prominent roles in the Biden administration and antitrust agencies](#), accompanied by President Biden’s [executive order](#) on competition, this concern has moved beyond the commentariat to the potential of these developments to affect real policy and the economy.

[Many have called into question](#) the veracity and relevance of the empirical critique outlined above. Others have pointed out that moving away from the consumer welfare standard will make [antitrust unworkable in the courtroom](#). To me, these critiques sound pretty plausible. But I’m neither a lawyer nor at the top of anyone’s list of empirical economists.

I do find the recent turn of events troubling, though, for reasons that might give some pause to those applauding the traditional consumer welfare critique. Expanding the range of goals to pursue with antitrust may end up not only doing a poor job protecting consumer welfare, but also will impede achieving the equity, employment, fairness, and other social objectives motivating the critics of traditional antitrust – many of which objectives I share with neo-Brandeisian critics.

The simple version of the argument is a principle relating to policy development familiar to economists, especially macroeconomists: The number of policy tools needs to equal the number of policy goals. In other words, if you try to address two or more problems with one policy tool – in this case, antitrust enforcement – one will be needlessly ineffective at achieving either.

It may help to see this the way I learned it through personal experience, illustrated by the three following anecdotes that span three different decades.

II. The Three Lessons Learned

A. The 1980s: Telephone Pricing

Shortly after I joined the telecommunications policy program at George Washington University in the late 1980s, I attended a summer communications issues workshop put on by the Annenberg Washington program. A hot issue of the day, and a topic of one of the sessions, was a long-standing policy by which per-minute surcharges on long distance telephone calls were used to subsidize monthly telephone rates. (For readers under 45: In the Mesozoic era, all telephones were landline and “long distance” was a separate and sometimes expensive service.) [On](#)

[economic grounds, this subsidy was notoriously inefficient, with perhaps the largest economic loss of any in the U.S. at the time.](#) It raised the price of long distance calling, where people were sensitive to the price, and used the higher price to subsidize basic local telephone service, to which almost everyone would subscribe regardless of the price.

Nevertheless, at this workshop session, this subsidy was vociferously defended, with many citing the harm to households if they had to pay \$30/month rather than \$15/month to have a telephone line. Sitting in the audience, I could not help but think that the \$180/year difference (\$15/month times 12 months) was not going to move an appreciable number of households above or below the poverty line. This was my introduction to the idea that the energy needed to pursue worthy goals – here, distributive justice – could be dissipated on policies where the effects would be trivial.

B. The 1990s: The “Nth Best Theorem”

Skipping a decade gets to the second anecdote. In the late 1990s, I spent a year on the staff of the White House Council of Economic Advisers. I learned a lot about how policy gets made, although I harbor doubts whether the lessons were intended. One of those lessons involves what economists call “Nth best” policies. The concept, [originated by Richard Lipsey and Kelvin Lancaster in the 1950s as the “theory of the second best,”](#) is that if the optimal economic policy is blocked because of some inefficiency, such as a monopoly price or unresolved externality, then the best thing to do will generally entail a compensating divergence from the usual guidance to find outcomes that set “marginal benefit” equal to “marginal cost.” To take a current non-antitrust example, if climate change externalities are not appropriately reflected in costs associated with emitting greenhouse gases, then otherwise inefficient subsidies of alternatives to burning fossil fuels, such as requirements to generate a minimum percentage of electricity with renewable sources, might be reasonable.

If the “second best” is also not available because of a government or market failure, then the “third best” describes the best one can do under that contingency. If that’s blocked ... well, you get the idea. At the CEA, I saw that in many policy settings, numerous political and economic impediments may stand in the way of doing the right thing. This led me to what I call the “Nth Best Theorem”: [“In an Nth best world, any policy is optimal for a sufficiently large N.”](#)

If you have a policy you like for whatever reason, you (or your staff and consultants) can come up with a sufficiently large set of impediments so that your favorite policy is the best remaining option. The downside is that doing this takes one’s eyes off the ball: If we really want to solve this problem, what would be the right thing to do, and how can we fix the things that stand in the way? In other words, does having antitrust take on these other objectives mean that we are taking our eye off of those balls? Important – but often neglected – questions.

C. The 2000s: The Antitrust vs. Innovation Debate

This brings us, a decade later still, to the third story. In 2007, I was invited to contribute to a symposium in an [annual “Pros and Cons” series](#) published by the Swedish Competition Authority; that year’s topic was “The Pros and Cons of High Prices.” Most contributors were

from Europe and discussed whether EU competition law, unlike U.S. antitrust law (at least so far), should target high prices themselves, over and above practices that might lead to them. Instead, I focused on the then prominent contention that antitrust stood in the way of innovation. In this Schumpeterian view, antitrust was seen as trivial at best and counterproductive at worst, because the fundamental driver of benefits to consumers was innovation. In the jargon of the day ([and continuing](#)), the “dynamic” benefits from innovation dwarf the benefits from “static” ongoing competition. Antitrust that limits monopoly profits caps the returns to innovation, suggesting a “pro” for high prices.

I argued that [the debate about whether monopoly or competition best promoted innovation was off the mark](#). Rather, antitrust is not the right tool to promote innovation. Antitrust arises only on a case-by-case basis – we see only those mergers that are proposed or those cartels that are undertaken – whereas innovation is an ongoing issue that needs to be considered throughout the overall economy. We have better economy-wide tools to promote innovation; a short list includes intellectual property protection, research and development subsidies, investment tax credits, and the like.

In contrast, other than very rare instances of price regulation, we have no policy other than antitrust to protect consumer welfare by deterring the deleterious creation of market power. Certainly, if the evidence in a particular antitrust case reveals that parties would subvert competition by reducing innovation, whether through collusion, merger, or anticompetitive exclusionary practices, that should be recognized in antitrust enforcement. But I concluded that antitrust as a whole ought not be subverted to promote economy-wide goals for which there are more effective economy-wide tools. That critique of a position then espoused from the more conservative side of the philosophical spectrum applies just as well to the current position reflected in the current executive order and antitrust agency appointments.

III. Lessons, Questions, and a Plea

We can summarize the lessons from these experiences for the current antitrust movements in the Biden administration. The stridency in the “telephone subsidy” debate opposing efficient pricing with virtually no effect on inequality shows that zeal can be easily misplaced. The “Nth Best Theorem” learned from my CEA experience teaches that one can get so wrapped up in conjuring convoluted rationales for some favored policy that genuinely effective approaches fall off the radar. The “antitrust vs. innovation” assessment tells us that broadening the objectives of antitrust takes attention away from much more effective means to address economy-wide ends while weakening the only tool we have to promote consumer welfare through protecting competition.

[An obvious question for the neo-Brandeisian advocates is this: How much consumer welfare should we be willing to sacrifice to promote particular non-consumer welfare ends?](#) To take but one example, one might be able to protect small stores in the name of “consumer choice” by limiting the ability of large big box or electronic retailers to expand operations, resulting in higher prices. How high should the price go? Not knowing the answer, I can imagine that the neo-Brandeisian response is that there is no trade-off. Promoting other social goals through antitrust enforcement will promote consumer welfare as well or, to invoke the economists’

favorite aphorism, the lunch is free. While I doubt that – see the above example or make up a few of your own – if there is no trade-off, then the neo-Brandeisian approach is nothing more than promoting consumer welfare, with some extra benefits on the side.

This leads to an important distinction. (I draw here from a recent talk by former FTC Chair Bill Kovacic.) The neo-Brandeisian program differs from another criticism of the last few decades of antitrust enforcement. This alternate criticism accepts the primacy of the consumer welfare standard, but argues that enforcement has been too lax. Alleged causes of this putative inadequate enforcement include the [dominance of the “Chicago school”](#), [under-resourced enforcers](#), and [excessive burdens of proof](#).

The first of these is something of a straw man, and the second has an obvious budgetary solution. The last, regarding burdens of proof, is conceptually more interesting. One could reduce or even reverse the burden, for example, to require parties to show that their merger would increase consumer welfare. [Some would make that burden infinite in some cases, by banning mergers by firms above a certain capitalization](#), without regard for potential incentives to entrepreneurs and benefits to consumers. [The long-standing argument for high burdens has been the view that the market will correct too little enforcement but cannot correct excessive enforcement](#). While I generally share this perspective, especially [a higher burden for vertical mergers](#), this should be an empirical question rather than an ideological commitment.

A debate about burdens is important, but it should stay within the context of antitrust as protector of consumer welfare through competition rather than a context of having antitrust become all things to all people. The distinction is crucial. Advocates of expanding antitrust's scope should realize that, perhaps themselves excluded, policy indignation is a scarce resource. If the world is run by a star chamber of plutocrats, nothing would please them more than to have their opponents squander their energy attacking them – most likely ineffectively – through antitrust rather than through policies that might really address inequality and other social ills.

So, if you care about these other problems, please do not waste your energy, and perhaps everyone else's, by pursuing this ineffective path.

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