The Consumer Welfare Debate Comes to the FTC Hearings: Who's on the Right Side of History?

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Introduction

One of the greatest virtues of a consumer welfare standard is the ability to distinguish harm to competition from harm to competitors using an objective and empirical framework rooted in economics. This is in contrast with standards that embody normative judgments about how many firms should exist in an industry to realize goals of furthering democracy or fairness. Unsurprisingly, the FTC's much anticipated hearing on the consumer welfare standard, which took place on November 1st at Georgetown University Law Center, put on display a fundamental and ongoing debate among commentators about the merits of welfarist antitrust policy. Unlike disagreements concerning the application of a consumer welfare standard to evaluate a particular category of business conduct, the FTC's hearing may come to represent a sea change in the consumer welfare debate from the economic framework of error costs and administrability to a larger normative discourse in which reference to these types of economic decision criteria risks begging the question against non-welfarist standards.[2]

Within this latter modality, appeals to history emerged as somewhat of a theme amongst several panelists critical of a consumer welfare standard.[3] That is, continued adherence to such a standard was not so implicitly suggested to be on the wrong side of history, with reasons sounding in both America's tradition of democratic political economy and the specific lessons of the 20th century given present levels of economic inequality. Even panelists seeking incremental change to the consumer welfare framework seemed to downplay the extent to which the current enforcement paradigm was justifiable within a broader intellectual tradition in American political economy, thus making it more readily modifiable to address contemporary concerns. While panelists defending a consumer welfare standard highlighted the well-known difficulties associated with rival standards focused on protecting small businesses or decentralized market structures as ends in themselves, an express defense of welfarist antitrust policy on the terms of these larger historical arguments was not made at the FTC's hearing.

The History of Economic Order as an Order of Economic History

The past two hundred years have been a renaissance in Western economic thought. While there have been many theories, at least eight, very general schools of economic thought can be identified in reference to three broad topics central to economic theory: theory of value, methodology, and market rationality or *laissez faire*. First, economic schools are distinguishable with respect to whether value is objective, such as with the labor theory of value, or subjective, as is the case with the hedonic posture of neoclassical economics. Second, economic schools are distinguishable by virtue of their methodologies. Whereas some economic schools admit or imply the possibility of discerning some kind of *a priori*, theoretical, or normative economic truth, others limit economic knowledge to that which is discerned *a posteriori* or empirically.[4] Third, while some schools consider the market to be a generally rational order in which competition serves the common welfare, others see markets as regularly imperfect or unjust so as to require state intervention into market outcomes to remedy these defects.

With these categories in mind, a brief and very general historical gloss of modern economic thought can follow, beginning with what is commonly understood as “classical economics.” Classical economists typically believed in an objective theory of value, which in many cases took the form of the labor theory of value mentioned *supra*. For the liberal classical economists, such as Adam Smith, market processes were made rational through the guidance of an “invisible hand” that ensured the harmony of interests, namely, that the pursuit of individual self-interest—hitherto the object of some suspicion in medieval Europe—cohered with the common good.[5] Consistent with broader philosophical divides at the time, liberal classical economists in the Anglosphere were more likely to approach economics from an empirical perspective. On the continent, however, where rationalism was more dominant, liberal classical economists were more readily associated with more deductive and *a priori* methods of economic reasoning.

The first industrial revolution that accompanied classical liberal economic thinking was, as is well known, not without its critics. For the Marxists, both the labor theory of value and a rationalistic historicism taken from Hegel underpinned a worldview that saw capitalism as irrational and intrinsically alienating labor. Classical liberal economics was also opposed by the German Historical School, which not only pushed back against its perceived *laissez faire* orientation, but signaled a turn to a more subjective theory of value based on individual desires. Unlike the classical Marxists, its historicism was heavily empirical. Indeed, the German Historical School’s affinity for empiricism would feature in the “Methodenstreit” (“method dispute”), which pitted its empiricism against the renewed *a priori* and theoretical economics of the Austrian school. While committed to a subjective theory of value, many Austrian economists, such as Ludwig von Mises, were also fervently *laissez faire*.[6]

As with their classical liberal predecessors, both the modern theories of *laissez faire* and the second industrial revolution that defined economic life at the turn of the 20th century gave rise to new economic schools supporting greater state intervention to correct perceived market failures and economic injustices.[7] While broadly maintaining the Austrian school’s commitment to both a subjective theory of value and some form of theoretical economic methodology, some economists associated with the University of Cambridge believed that the state could undertake substantial redistributionist policies that would increase overall economic welfare. Other critics, such as the American institutionalists, represented a more radical challenge to liberal orthodoxy. For many of these institutionalists, the subjectivism, rationalism, and *laissez faire* of the new liberal economics were rejected entirely in favor of an approach that took a larger view of the economy as shaped by institutions—most notably law—of which historical and empirical analysis could inform policymakers working to correct the ills resulting from unregulated markets, particularly in the labor context.

Consumer Welfare and Neoliberalism in the 20th Century

This brief and very general historical gloss of modern economic thought provides a helpful backdrop for understanding the economic foundation upon which contemporary antitrust is based—namely, a hedonic and empirical theory of positive economics that supports antitrust law as a set of general market rules by employing assumptions of self-correction to usefully predict economic behavior in a way consistent with empirical learnings.[8] As such, rather than

emerge *ex nihilo* out of an ideological vacuum, or constitute a subversive political pretext, this neoclassical, empirical, and liberal paradigm—and the present industrial and technological revolution it has been concomitant with—represents the culmination of two centuries of modern economic thought, industrial progress, and vast improvements in the quality of life for the working classes. This history of economic thought is also instructive toward recognizing what are sometimes claimed to be novel theories of competition policy challenging a consumer welfare standard as restatements of old economic thinking that failed the test of history.

Consider the New Brandeis movement, a highly noted cadre of consumer welfare critics, which conceives of the market economy as both essentially shaped by law and desirable not just as means for economic exchange, but also to protect individual liberty and foster democratic political community.[9] To be sure, such views sound distinctly in American institutionalism, which contributed to the New Deal economic thinking that ultimately informed the structuralist antitrust policies of the 1950s and 1960s.[10] As a school of thought, however, institutionalism failed to articulate an adequate theory of economic behavior within this larger social and political context upon which practical policy could rely—with their arguments "often decay[ing] into descriptive, polemic historicism."[11] As the hearings made clear, panelists of this persuasion still do not appear to have articulated a non-arbitrary standard for determining what levels of market concentration are impermissible from their social and political vantage point. Indeed, one panel exchange highlighted how such an approach might be in tension with protecting the competitive process by condoning a type of rule of reason approach to cartels that would legitimize some nakedly collusive behavior if conducted by small businesses.

Other panelists critical of the consumer welfare standard, but more receptive to the unique importance of economic analysis to antitrust generally, suggested a need for antitrust law to be flexible in light of growing concerns about economic inequality. The use of a neoclassical economic framework to support progressive economic policies aimed at eliminating relative poverty builds upon the work of Arthur Pigou and other economists of the Cambridge School. However, incorporating concerns about inequality into a neoclassical policy apparatus—without incorporating political judgments—would appear to inevitably face difficulties similar to the issues associated with making the sort of interpersonal utility comparisons upon which progressive Cambridge school theories relied. As economist Lionel Robbins argued at the time, interpersonal utility comparisons are simply beyond the scope of economic science, as they involve an essentially normative and extra-economic valuing assumption.[12] Indeed, the problem of interpersonal utility comparisons has been highlighted in the context of considering antitrust as a potential vehicle for reducing economic inequality.[13]

Rather than repeat the mistakes that contributed to the rise of totalitarianism and mass human suffering, the economic paradigm that underlies contemporary antitrust heeds two of the 20th century's most important lessons. The first of these is to avoid giving the state general power over economic planning—a commonality amongst totalitarian regimes during this period. Rather than undermine individual liberty, liberal theories of political economy that limit antitrust intervention to protecting competition—as distinct from powers to decide how many firms should exist in any given industry, or to permit cartel behavior, commensurate with political or social ends—separate economic and political power in a way conducive to it's long

run security. Second, instead of interweaving political economy with the sort of world-historical theories appealing to abstract conceptions of equality or a civic will to power that vitiated 20th century totalitarian regimes,[14] a welfarist antitrust policy categorically prevents policymakers from introducing this type of potentially dangerous theorizing into law.[15]

Conclusion

Liberalism is supposed to work for the many. Concerns about economic inequality and the need for increased antitrust enforcement should be addressed with the utmost seriousness. The important advances made in price theory should not mean that, for conduct to be found illegal, a plaintiff must always produce a sophisticated economic model demonstrating a high likelihood of negative price effects. Harm to consumer welfare can also take the form of reduced quantity, product quality, or innovation.[16] Indeed, *U.S. v. Microsoft* remains a testament to vigorous enforcement protecting non-price competition using a case-in-chief in which economic models played a relatively limited role. In the ongoing debate about competition policy, the merits of welfarist antitrust should not be assessed with a longing, however well intentioned, for history to reverse course, but rather by history's lessons as a guide for moving forward. Judged by the latter, the rationale for a consumer welfare standard remains compelling and should continue to guide policymakers in their commitment to maintaining a liberal and competitive economic order in the American political economy and around the world.[17]

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[2] This is to say that, against some current critics, it may not be a convincing defense of welfarist antitrust to argue that rival standards fail to produce efficiently administrable rules, as such arguments could be said to assume that which is to be proven, namely, that the purpose of the antitrust laws is to maximize some measure of economic welfare. Indeed, as some critics suggested at the hearings, a structuralist analysis based on the 1968 merger guidelines may be more administrable than the current effects focused analysis.

[3] The author acknowledges both the historical ambiguity of the term "consumer welfare standard" as denoting either total surplus or consumer surplus, and the likelihood that some of the panelists' criticisms of the consumer welfare standard were directed primarily at the total surplus interpretation. There is also an ambiguity as to whether, for the consumer surplus variant, the welfare of only end consumers or buyers generally is the appropriate measure. For the purposes of this article, "consumer welfare standard" refers more broadly to encompass both the total surplus and consumer surplus interpretations by generally denoting some measure of neoclassical welfare within a partial equilibrium analysis—either of the market as a whole, as with total surplus, or of a part, as with consumer surplus—and is therefore proceeded by the indefinite article. The term "consumer welfare standard" is thus coextensive with "welfarist antitrust."

[4] To include normative economics within the realm of empirical knowledge would seem to risk deriving an "ought" from an "is," and thus commit the—albeit disputed—naturalistic fallacy.

[5] SMITH, WEALTH OF NATIONS (1776).

[6] *See, e.g.*, VON MISES, HUMAN ACTION (1949).

[7] For a more extended discussion of both the Cambridge School and the American institutionalists, see Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L. J. 499 (2011).

[8] For the nature of assumptions in Chicagoan economic methodology, see Friedman, *The Methodology of Positive Economics*, in ESSAYS IN POSITIVE ECONOMICS 3, 15 (1953). Contrary to some commentators, these assumptions should not be understood as confessing faith in "natural market forces." See Coniglio, *Why the 'New Brandeis Movement' Gets Antitrust Wrong*, LAW360 (2018).

[9] *See, e.g.*, LYNN, CORNERED: THE NEW MONOPOLY CAPITALISM AND THE ECONOMICS OF DESTRUCTION (2009).

[10] *See generally* Hovenkamp, *Is Antitrust's Consumer Welfare Principle Imperiled*, UNIV. PENN. FACULTY SCHOLARSHIP 18-19 (2018) (linking the New Brandeis movement to turn of the century progressive politics and institutionalist theories in corporate law).

[11] Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L. J. 499, 525-6 (2011).

[12] *See* ROBBINS, AN ESSAY ON THE NATURE & SIGNIFICANCE OF ECONOMIC SCIENCE 139 (2d ed. 1935).

[13] *See generally* Baker & Salop, *Antitrust, Competition Policy, and Inequality*, 104 GEO. L.J. 1 (2015) (noting both that interpersonal utility comparisons are beyond standard economic models and indicating how making reduction of inequality a goal of antitrust would result in difficult distributional questions for merger policy).

[14] *See, e.g.*, POPPER, THE OPEN SOCIETY AND ITS ENEMIES (1945); GLUCKSMANN, THE MASTER THINKERS (1977).

[15] This is not to say, of course, that all non-economic conceptions of antitrust law inevitably lead policymakers to a totalitarian temptation. Rather, it is to highlight how claims of practical knowledge concerning the implementation of vague moral, social and political goals may admit of no limiting principle and represent a real risk of being exploited to the detriment of liberal and democratic societies.

[16] Recent testimony by Chairman Simons confirms the breadth of the consumer welfare standard in accounting for dynamic dimensions of competition. See *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the S. Comm. on the Judiciary*, 115th Cong. 23-24 (2018) (Questions for Joseph Simons, Chairman, Federal Trade Commission), *available at* https://www.judiciary.senate.gov/meetings/10/03/2018/oversight-of-the-enforcement-of-the-antitrust-laws.

[17] *See id.* at 15 ("Internationally, the FTC has long advocated that competition law should be focused on maximizing consumer welfare and applied in a non-discriminatory manner.").