ANTITRUST AMORPHISMS

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I. INTRODUCTION

I suspect that every antitrust attorney and economist has at some point participated in a version of the following conversation.

Lay person: "So what area of law do you work in?"

Me: "Mainly antitrust."

Lay person: "Oh okay. So, like, breaking up big tech companies?"

Me: "Well, not exactly. Antitrust isn't directly concerned with the size of a firm. It isn't illegal to be big."

Lay person: "I thought it was illegal to have a monopoly."

Me: "It can be illegal to monopolize, but it isn't illegal to be a monopolist."

Lay person: "What's the difference?"

Me: "Well, monopolize is a verb and …"

Lay person: "You know what? I don't care. Just tell me this. What does antitrust law actually prevent?"

To be honest, I don't answer that last question. I dodge it. And I suspect that most antitrust specialists do the same. Oh, I give an answer. I say something like antitrust is about preventing "harm to competition" or that it is about protecting "consumer welfare." These are talismanic words in antitrust. But in reality, they don't convey much meaning. Just looking at the range of conduct to which each label has been applied and withheld over the years, it becomes clear that neither statement is even close to a literal description of antitrust policy.

The fuzziness of these foundational concerns is disquieting, but not necessarily bad in itself. Jonathan Baker has described the unresolved tension between total welfare and consumer welfare norms of antitrust policy as part of the political compromise upon which modern antitrust rests.[2] Something similar may apply to things like the consumer welfare label. Depending on the context, "consumer welfare" has been used to mean total welfare, to mean allocative efficiency, to mean what Steve Salop has termed "true consumer welfare,"[3] to mean certain types of concerns about wealth redistribution, and to mean other things as well. This flexibility undoubtedly has forestalled some irresolvable debates and probably has facilitated cogent reasoning in at least as many cases as clearer but more rigid terminology would have allowed.

2 Jonathan B. Baker, *Economics and Politics: Perspectives on the Goals and Future of Antitrust*, 81 Fordham L. Rev. 2175, 2180-92 (2013).

3 Steven C. Salop, *Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard*, 22 Loy. Consumer L. Rev. 336, 336 (2010).

But there remains a dark side to antitrust's heavy reliance on amorphous phrases like "harm to competition" and "consumer welfare." These antitrust amorphisms make it damn near impossible to explain antitrust policy to lay people in finite time. That would be regrettable under the best of circumstances. In times of antitrust populism — now, for example — it obstructs and delays important conversations, and risks confused policy-making at a time when we can least afford it.

To be concrete, consider some of the recent critiques of antitrust, and the corresponding proposals for antitrust reform. One critique of antitrust is that it is responsible for the perverse U.S. income distribution; antitrust policy is argued to be an appropriate tool for addressing and correcting income inequality.[4] Another critique is that lax and ineffective antitrust enforcement has allowed market concentration to explode across the economy.[5] The growth of wealthy companies in concentrated markets is a topic of special concern. Large companies are seen to have too much economic and political influence. To combat this, some politicians propose to break up large companies,[6] deconcentrating markets and reducing undue political influence in the process.

There is room to debate the accuracy of these critiques and the wisdom of the corresponding proposals. But nobody can seriously deny that these ideas deserve reasoned responses. Indeed, many of these very sentiments are what motivated the adoption of the antitrust statutes in the first place. Speaking during Congressional debate of the Sherman Act, for example, Senator Sherman relayed the following concerns and implicit proposals:

> The popular mind is agitated with problems that may disturb social order, and among them all none is more threatening than the inequality of condition, of wealth, and opportunity that has grown within a single generation out of the concentration of capital into vast combinations to control production and trade and to break down competition. These combinations already defy or control powerful transportation corporations and reach State authorities. … Congress alone can deal with them, and if we are unwilling or unable there will soon be a trust for every product and a master to fix the price for every necessity of life.[7]

Over more than a century of experimentation, antitrust law has considered and rejected most of the current populist proposals in favor of its modern focus on harm to competition and the consumer welfare standard. But was it right to do so? That is an important question. It deserves a serious answer. The conversation stalls, however, when we discover that the answer depends in part on which definition of the "consumer welfare" standard we are using; depends on which version of "harm to competition" we mean. How can we have an intelligent conversation about the pros and cons of current antitrust policy when that policy defies concise and coherent summary at every turn?

The brevity of this essay should dispel any hope that answers to these difficult questions are forthcoming here. Rather, the following pages detail the perhaps surprising difficulty of pinning down the content of our foundational antitrust objectives — preventing harm to competition and harm to consumer welfare. Viewed in the most constructive light, this essay outlines the complexities that advocates of traditional antitrust will need to face in seeking a meaningful dialogue about the merits of proposed antitrust reforms and critiques of existing standards.

4 E.g. Lina Khan & Sandeep Vaheesan, *Market Power and Inequality: The Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol'y Rev. 235 (2017).

5 E.g. Lance Lambert, *Here's How They Play Monopoly in America, and Who Wins*, Bloomberg Business, April 5, 2017, https://www.bloomberg.com/news/articles/2017-04-05/here-s-how-they-play-monopoly-in-america-and-who-wins ("Market concentration in the U.S. has reached a three-decade high, while the government has opened fewer antitrust cases.").

6 E.g. Elizabeth Warren, *Here's How We Can Break Up Big Tech*, Medium Business, March 8, 2019, https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c.

7 21 Cong. Rec. 2460 (1890).

II. HARM TO COMPETITION

Suppose you are being held hostage by a niche-movie serial killer and the only way to save your life is to get a room full of antitrust practitioners to agree on something. First of all, it's been nice knowing you. Second, your best bet is probably to propose some version of the following claim: antitrust law is about preventing harm to competition. The spirit of that statement is captured in *Brown Shoe*'s famous admonition: "It is competition, not competitors, which [antitrust] protects."[8] (We can politely agree to ignore the next few sentences of the opinion.[9])

Selective memory aside, the general acceptance of this proposition belies a difficult question: what does harm to competition actually entail? Anthropomorphizing competition as something that can be harmed is a bad start. People can be injured; all that competition can be is modulated. And nothing about the modulation of trade or competitive interaction is good or bad in the abstract. Assigning the label of "harm" or "injury" to a given modulation thus requires some basis upon which we are separating the desirable modulation from the undesirable.

Early antitrust cases struggled with this problem. After a brief experiment in treating every restraint of trade as an illegal injury to competition,[10] the Supreme Court retreated to a flexible position in *Chicago Board of Trade*:

> [T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. ... The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.[11]

Of course, this merely rephrases the problem. The question now becomes what distinguishes a restraint that regulates or promotes competition from one that suppresses or even destroys it? Unhelpful and conclusory glosses in other early cases included the blessing of restraints that merely secure "fair opportunity" to compete when "engendered by an honest desire for gain,"[12] or that serve "lawful" and "legitimate" business ends,[13] as opposed to those abhorrent acts that "unduly restrict competition."[14] Throughout many of the early cases, there also lurked a still-persistent tendency to seek to define harm to competition on the dubious basis of the subjective mental states of the responsible actors.

The ambiguity of these early efforts to define harm to competition reflects the difficulty of the task. For all the ink that has been spilled over the legislative intent behind the antitrust laws, the truth remains that Congress never purported to draw a clear line between legal contracts and illegal harm to competition. In the same speech quoted above, Senator Sherman admitted to this punt:

> [I]t is difficult to define in legal language the precise line between lawful and unlawful combinations. This must be left for the courts to determine in each particular case. All that we, as lawmakers, can do is to declare general principles, and we can be assured that the courts will apply them as to carry out the meaning of the law.... This bill is only an honest effort to declare a rule of action.[15]

Perhaps it was wise of Congress to leave to the courts the task of saying, in effect, what harm to competition entails. By most accounts, years of judicial efforts to build this framework have been a success. U.S. antitrust law is among our county's most popular exports. But years of judicial efforts have not distilled a legal standard that is easy to communicate to anyone not already steeped in the field.

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8 *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

9 *Id.* ("But we cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.").

10 E.g. *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); *United States v. Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

11 *Board of Trade of The City of Chicago v. United States*, 246 U.S. 231, 238 (1918).

12 *F.T.C. v. Sinclair Ref. Co.*, 261 U.S. 463, 476 (1923).

13 *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899) ("[N]o conventional restraint of trade can be enforced unless the covenant embodying it is merely ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the full enjoyment of the legitimate fruits of the contract.").

14 *United States v. Am. Tobacco Co.*, 221 U.S. 106, 179 (1911).

15 21 Cong. Rec. 2460 (1890).

To a lay person, apparent contradictions and equivocations abound. For example, is it "harm to competition" if a firm so underprices its rivals that it drives them out of business? Sometimes, but not always.[16] What about outright acquisition of rivals: is it harm to competition if a firm acquires a direct rival, suffocating all competition between the two firms? Sometimes, but not always.[17] Is it harm to competition to enter an agreement with competitors that affects price? Sometimes but not always.[18] Is it harm to competition to agree not to compete at all along some dimension of trade? Sometimes, but not always.[19]

The point is not that competitive nuances should be ignored; nor that these equivocations about the meaning of "harm to competition" are wrong or misguided. The point is simply that the actual content of antitrust's goal of preventing "harm to competition" turns out to be quite technical and complicated when you sit down to try to explain it. Indeed, "competition" is not even the thing that antitrust law protects. It is primarily harm to something called "interbrand competition" that draws antitrust's attention.[20] And this is to say nothing of further nuances relating to the mode of competition: price vs non-price competition, static vs dynamic competition, competition in brand positioning, in quality, in innovation, and so on.

Antitrust insiders do not feel these complexities acutely in our day to day affairs. The field has largely sidestepped the problem by adopting the shorthand terminology of consumer harm — and the consumer welfare standard — as the core content of what harm to competition entails. This focus on consumer welfare is helpful and clarifying. Unfortunately, it too masks more knotty technicalities and equivocations than one might expect.

III. HARM TO CONSUMERS

To be clear, the consumer welfare focus is one of modern antitrust's greatest strengths. Like most antitrust insiders, I constantly rely on consumer welfare arguments when trying to explain and analyze antitrust cases. With that said, I think we all must admit that a good part of the clarifying power of the consumer welfare standard actually comes from the false sense of simplicity that it gives to modern antitrust practice.

Consumer welfare is in many ways a head fake. It is not always, and/or not exactly, about consumers. It also contains policy ambiguities that remain unanswered to this day. In every respect, consumer welfare is a far more technical and complicated concept than meets the eye.

Part of the head fake is a well-known secret. While outsiders and early students of antitrust law often perceive antitrust to be focused solely on preventing harm to consumers, insiders know that it isn't so simple. This is not to diminish the excellent basis for confusion. Ever since the Supreme Court decided *Reiter v. Sonotone*, there has been an easy cite for the proposition that "Congress designed the Sherman Act as a 'consumer welfare prescription.'"[21] To all the world, this would seem an unambiguous statement of antitrust's motivating principle.

But this is antitrust, and nothing in antitrust is simple. The sole authority that *Reiter* relies upon for the phrase "consumer welfare prescription" is Robert Bork's *Antitrust Paradox*. And Bork famously used the language of "consumer welfare" to label a concept closer in spirit to what economists would call "total welfare," an objective no more focused on consumers than on any other interest in the economy.[22] With no clear answer on how to interpret this passage in *Reiter*,[23] internal debates about whether antitrust should focus on consumer welfare or total welfare continue to this day.

16 E.g. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222–27 (1993) (sharply restricting the conditions under which exclusionary pricing is illegal).

17 E.g. *Int'l Shoe Co. v. Fed. Trade Comm'n.*, 280 U.S. 291, 297–98 (1930) ("Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden.").

18 E.g. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) ("Not all arrangements among actual or potential competitors that have an impact on price are … unreasonable restraints.").

19 E.g. *California Dental Ass'n v. F.T.C.*, 526 U.S. 756, 771 (1999) ("[I]t seems to us that the CDA's advertising restrictions might plausibly be thought to have a net procompetitive effect … on competition….").

20 E.g. *State Oil Co. v. Khan*, 522 U.S. 3, 15 (1997).

21 *Reiter v. Sonotone Corp.*, 442 U.S. 330, 342–43 (1979).

22 Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 66, 97–101 (1978).

23 Salop, *supra* note 3, at 347 ("[I]t is unclear if the Court even understood that Judge Bork was effectively re-defining the term 'consumer welfare' to mean something very different.").

Surprisingly, however, these debates have not marshaled any serious efforts to revisit or undermine the "consumer welfare prescription" which Congress apparently laid out. Instead, today's antitrust paradox is that while everyone ostensibly agrees that antitrust is about consumer welfare, the same term — "consumer welfare" — is tacitly allowed to mean different things to different people at different times. Again, nothing in antitrust is simple.

Sometimes "consumer welfare" does indeed mean what it sounds like: a primary interest in preventing things like higher prices for consumers. An example of this understanding of consumer welfare is the efficiency pass-through requirement in the 2010 Horizontal Merger Guidelines, which predicates the availability of a merger efficiency defense on the condition that consumers not pay higher prices as the result of a merger.[24] Similar reasoning is evident in the Supreme Court's analysis in *Brooke Group*, where a reasonable prospect of recoupment is required before below-cost pricing can be found illegal because "unsuccessful predation is in general a boon to consumers."[25]

Other times, the terminology of "consumer welfare" is used where the real concern is not consumers at all, but allocative efficiency and total welfare. The hallmark of this use of consumer welfare language is the actual identification of anticompetitive conduct with reduced output.[26] A recent example is the opinion in *Ohio v. American Express*, in which the Supreme Court majority stated that "[harm] to consumers in the relevant market" was the basic test of illegality,[27] but then quietly defined "anticompetitive prices" to include only those prices raised "profitably *by restricting output*."[28] Harm to consumers, in this approach, is not what the consumer welfare standard is about. Consumer harm is merely a corollary and convenient proxy for the real focus on conduct that restricts output and thus reduces allocative efficiency and total welfare.[29]

This ambiguity in the meaning of the consumer welfare standard is known and increasingly accepted. Recent scholarship shrugs it off as benign if not desirable. Perhaps it is. But it adds yet another wrinkle to the already difficult task of explaining modern antitrust to a lay person. And the wrinkles don't stop there.

Beneath the surface of the consumer welfare label lurk unresolved policy decisions. There isn't space here to do them justice, but examples include the following. In monopsony and oligopsony theories, is it harm to the immediate consumer or the final consumer that matters? How is harm to consumers defined for practices — like many types of price discrimination — that benefit one group of consumers while harming another group? Must injury to competitors always result in harm to consumers to state an antitrust violation? (The answer should depend on how close to total welfare one defines the "consumer welfare standard.")[30] Does consumer harm result from an activity that reduces output but also results in higher quality goods or services? What if the activity lowers the price of some products, while simultaneously eliminating other products, thus restricting consumer choice?

These types of complexities and ambiguities are familiar to antitrust specialists. They have persisted for decades and, apart from complicating specific cases and investigations, they have not seriously derailed the enterprise. But ambiguities they remain. As such, they represent continuing obstacles to the communication of modern antitrust policy to lay people. In a world where all ideas must be reduced to soundbites, the meaning of antitrust's consumer welfare standard is hopelessly opaque.

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24 U.S. Dep't of Justice & Fed. Trade Comm'n, 2010 Horizontal Merger Guidelines § 10 ¶ 6 ("The Agencies will not challenge a merger if cognizable efficiencies are of a character and magnitude such that the merger is not likely to be anticompetitive in any relevant market.").

25 *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993); see also *id.* (noting that, without recoupment, "consumer welfare is enhanced").

26 E.g. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988) (defining "conduct that is manifestly anticompetitive" as conduct "that would always or almost always tend to restrict competition and decrease output.").

27 *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018).

28 *Id.* at 2288 (emphasis in original) (citing Philip Areeda & Herbert Hovenkamp, Fundamentals of Antitrust Law § 5.01 (4th ed. 2017)).

29 See Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals*, 81 Fordham L. Rev. 2471, 2477 (2013) ("[A]ntitrust policy in the United States follows a consumer welfare approach in that it condemns restraints that actually result in monopoly output reductions ...."); *id.* at 2474 ("[T]he economic analysis from the dominant Harvard and Chicago schools of antitrust is consistently concerned with [total] welfare....").

30 See Salop, *supra* note 3, at 343 (discussing this point); see also Richard A. Posner, Antitrust Law 13–15(2d ed. 2001) (discussing rent seeking inefficiencies when firms use certain activities to gain market power as a justification for antitrust law).

IV. WHAT DOES ANTITRUST PREVENT?

I want to emphasize that I am not denigrating the goals of preventing harm to competition or protecting consumer welfare in this essay. Few evolutions in the law of antitrust have done more to improve, clarify, and rationalize this area of law than the adoption of these standards. But those very real benefits do not diminish the costs of these standards — the complexity and technicality that they import to antitrust practice. These are unyielding terms of art. And that it not innocuous.

Even if current antitrust law were the finest approach to competition policy ever invented, its ultimate sticking power would still rest on the persuasiveness of this claim to a generalist audience (citizens, voters, the affected population). Antitrust amorphisms like "harm to competition" and the protection of "consumer welfare" work fine within the highly technical and specialized confines of the antitrust bar, but flounder at the point where outsiders are exposed to antitrust policy. It takes concerted effort to give an honest answer to the simple question: "What does antitrust prevent?" At this point in the history of our field, that's a problem.

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