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Hipster Antitrust: New Bottles, Same Old W(h)ine?

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LESS
WHINE
MORE
WINE

BY CHRISTOPHER S. YOO¹



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Antitrust appears to be in the midst of a transition into a new era. The number of jurisdictions with active enforcement programs has risen dramatically in recent years, and competition law authorities around the world are ramping up their efforts. The advent of the digital economy has supported the rise of large high-tech enterprises that now dominate lists of the ten largest companies in the world. At the same time, the populist wave that is transforming politics in countries all over the globe has provided a platform for advocates on both the left and the right who have long been skeptical about big business and large institutions to argue for more vigorous enforcement.

In the midst of these developments, a recent outcry over what is sometimes called “Neo-Brandeis” or, more often and more colorfully, “Hipster Antitrust” has come to the forefront. In short, proponents of this new movement advocate abandoning the consumer welfare standard that jurisdictions around the world have embraced as the definitive benchmark. They would abandon the efficiency-based approach that focuses on low prices, high quantities, and high quality in favor of one that focuses on the absolute size of firms, the level of industry concentration, injuries to small business, and other more amorphous goals, such as wealth redistribution, political power, and employment. The commotion has prompted Senate hearings and statements by members of Congress, extensive commentary from leading antitrust practitioners, and academic conferences devoted to the topic.

Much as every generation thinks it has invented sex, the Hipster Antitrust movement is sometimes discussed as if it represents something brand new. A brief look back at the intellectual history of antitrust reveals that the current controversy is more properly regarded as another iteration of what has become an old debate. The bottles may be new, but the wine still tastes the same.

The contours of this debate are well documented in the antitrust literature, outlined quite nicely in Michael Jacobs's 1995 historical survey. During the 1970s and 1980s, antitrust populists waged an unsuccessful war against the growing dominance of the economic approach to antitrust and attempted to preserve the Warren Court jurisprudence that regarded large firm size and industry concentration as inherently problematic without any need to analyze the impact of particular business practices on consumers. They faced a vigorous academic critique showing that large size may well be the product of economies of scale inherent in a particular industry or from being a more efficient competitor. As the consumer welfare standard became entrenched in judicial decisions, the academic literature, and agency practice and guidance documents, populist criticism “took on a frantic tone” and eventually “grudgingly acknowledged the success” of the consumer welfare approach. By the end of the 1980s, the debate between the populist and the economic approaches “ha[d] lost its drama,” and “[t]he victory of a purely economic analysis . . . could hardly seem more complete.”²

Gone were the days when big was regarded as inherently bad and when small firms were protected for their own sake. Instead, firm size was relevant only to the extent that it benefitted or harmed consumers. Herbert Hovenkamp has noted that the problem with applying standards other than consumer welfare is that the goals:

are unmeasurable and fundamentally inconsistent, although. . . their contradictions rarely exposed. Among the most problematic contradictions is the one between small business protection and consumer welfare. In a nutshell, consumers benefit from low prices, high output and high quality and variety of products and services. But when a firm or a technology is able to offer these things they invariably injure rivals, typically those who are smaller or heavily invested in older technologies. Although movement antitrust rhetoric is often opaque about specifics, its general effect is invariably to encourage higher prices or reduced output or innovation, mainly for the protection of small business or those whose technology or other investments have become obsolete. Indeed, that has been a predominant feature of movement antitrust ever since the Sherman Act was passed, and it remains a prominent feature of movement antitrust today. Indeed, some spokespersons for movement antitrust write, as Louis Brandeis did, as if low prices are the evil that antitrust law should be combatting.³

2 Jacobs, *An Essay on the Normative Foundations of Antitrust Economics*, 74 N.C. L. REV. 219, 221, 228, 236–37, 239–40 (1995). For acknowledgements by prominent populists of the dominance of the economic approach, see, e.g. Lande, *Implications of Professor Scherer's Research for the Future of Antitrust*, 29 WASHBURN L.J. 256, 258 (1990) (recognizing that “the dominant paradigm today is that the only goal of the existing antitrust laws is to increase economic efficiency”); Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140, 1140 (1981) (conceding that “[r]egard for efficiency is in the ascendancy”).

3 Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, 94 NOTRE DAME L. REV. (forthcoming 2018), *draft* available at: <http://dx.doi.org/10.2139/ssrn.3097452>.

It thus comes as no surprise that during this period, the Supreme Court embraced consumer welfare as the appropriate standard under the Sherman Act.⁴ The emergence of a consensus that economic analysis should dictate the contours of antitrust did not, of course, mean the end of all controversy. As anyone who has worked with economists knows, agreement that consumer welfare is the goal of antitrust still leaves a great deal of room for differences of opinion. During the 1990s and 2000s, these disputes took place between the largely price-theoretic approach of the Chicago School and the more game-theoretic approach of the post-Chicago School. More recently, antitrust has taken a more empirical turn. It would be a mistake, however, to regard these disputes as a rehash of the old fight between the economic and populist approaches. Instead, these arguments took place within a shared commitment to consumer welfare as the proper antitrust standard. In the words of Carl Shapiro, Berkeley business professor and former Deputy Assistant Attorney General for Economics of the U.S. Department of Justice's Antitrust Division, "If 'Post-Chicago Economics' stands for the notion that . . . antitrust should move away from promoting efficiency and consumer welfare, count me out."⁵

The continuing support for the consumer welfare standard was evident at the December 13, 2017, hearings held by the Antitrust Subcommittee of the Senate Judiciary Committee on "The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?" While one of the speakers advocated abandoning the consumer welfare standard, the other three disagreed, including those who generally favor more vigorous enforcement of the antitrust laws.

Diana Moss of the American Antitrust Institute, one of the leading organizations arguing in favor of ramping up antitrust enforcement, stated that her organization "has always held the view that the antitrust laws are fundamentally durable and the consumer welfare standard is fully capable of meeting the challenges of the modern economy." She cautioned that "remaking the antitrust laws or replacing the existing consumer welfare standard would throw the enforcement agencies, private plaintiffs, and the courts into disarray." She then traced enforcement actions taken under the consumer welfare standard, concluding that "[t]hey support the notion that the standard capable of taking on the challenges we face moving forward" and that "[t]he consumer welfare standard is able to tackle the manifestation and exercise of market power in these settings." In short, any problems with antitrust lay in the vigor with which it has been enforced, not in the consumer welfare standard itself.⁶

Shapiro similarly endorsed the consumer welfare standard and rejected concluding that a firm harms consumers simply because it has obtained a dominant position. He further stated:

During the 40 years that I have been studying and practicing antitrust, there has been a broad consensus among antitrust scholars and practitioners in favor of the "consumer welfare" standard. No evidence whatsoever has been put forward calling this consensus into question. Indeed, I know of no serious antitrust experts who favor abandoning the "consumer welfare" standard, and no workable alternative has been proposed.⁷

If one moves beyond the academy to examine actual enforcement practices, the debate has followed a very similar trajectory with respect to the Federal Trade Commission's ("FTC's") Section 5 authority to prevent actors from engaging in "unfair methods of competition."⁸ From time to time, FTC Commissioners and staff have debated whether to wield this power as a standalone authority to redress conduct that does not represent a violation of the antitrust laws, even conducting hearings on the issue in 2008. Indeed, such a position draws support from a line of old

4 *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription." (internal quotation marks omitted)). For the Court's most recent pronouncement, see *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2238 (2013) ("The point of antitrust law is to encourage competitive markets to promote consumer welfare.").

5 Shapiro, *Aftermarkets and Consumer Welfare: Making Sense of Kodak*, 63 ANTITRUST L.J. 483, 484 (1995).

6 *The Consumer Welfare Standard in Antitrust: Outdated or a Harbor in a Sea of Doubt?: Hearing Before the S. Comm. on Antitrust of the S. Comm. on the Judiciary*, 115th Cong. 5–6, 8, 9 (2017) (statement of Diana Moss, President, American Antitrust Institute), available at: <https://www.judiciary.senate.gov/download/12-13-17-moss-testimony>.

7 *Id.* at 3–4 (statement of Carl Shapiro, Transamerica Professor of Business Strategy, Walter A. Haas School of Business, University of California at Berkeley), available at: <https://www.judiciary.senate.gov/download/12-13-17-shapiro-testimony>.

8 15 U.S.C. § 45(a)(1).

U.S. Supreme Court cases, some of which are acknowledged to be wrongly decided even by advocates of more expansive Section 5 authority,⁹ as well as passing mentions in more recent decisions as well.¹⁰

To say that the FTC's Section 5 authority is not confined to the strict contours of antitrust law as laid out in the Sherman Act is not to say it is unbounded. A trilogy of cases from the 1980s and a 1994 case in which the courts rejected the FTC's efforts to exercise its standalone Section 5 power stand as a cautionary note.¹¹ The court's discussion in the *Ethyl* case, in which the FTC attempted to reach consciously parallel pricing that in the absence of an agreement, is instructive. Given that "the term, 'unfair' is an elusive concept, often dependent upon the eye of the beholder," the court noted the Supreme Court's warning in that "appropriate standards must be adopted and applied to protect a respondent against abuse of power." Without such standards, "the door would be open to arbitrary or capricious administration of § 5." Consequently, "the Commission owes a duty to define the conditions under which conduct" constitutes unfair competition under Section 5 "so that businesses will have an inkling as to what they can lawfully do rather than be left in a state of compete unpredictability." Thus, even though Section 5 authority is not limited to the metes and bounds of the Sherman Act, courts have not authorized treating it as a roving authority in the hands of the FTC. Instead, it is limited to "conduct which, although not a violation of the letter of the antitrust laws, is close to a violation or is contrary to their spirit."¹²

The admonitions of the *Ethyl* court resonate to this day. The need for limiting principles has led those who support expanding Section 5 authority beyond the strict letter of the antitrust law to insist that it be applied in a manner consistent with the economic approach. A classic example is Robert Lande's statement at the FTC's 2008 workshop on Section 5 that "if the Commission tried to have an expansive reading of Section 5. . . , but did not do so in a way that was clear and was bounded, then the Supreme Court would today restrict Section 5. . . to the other antitrust laws. And this would especially happen if the Commission interpreted Section 5 in a way that was non-economic."¹³

Herbert Hovenkamp's article on *The Federal Trade Commission and the Sherman Act* provides another apt illustration of this point. While he supports the limited use of Section 5 to reach practices that fall outside of traditional antitrust, he insists that the condemned practice "really be 'anticompetitive' in a meaningful sense. That is, there must be a basis for thinking that the practice either does or will lead to reduced output and higher consumer prices or lower quality in the affected market." Thus, he supports the use of Section 5 to reach cartel-like behavior, such as conscious parallelism, that has clear negative implications for consumer welfare despite the fact that it lacks the agreement necessary to violate Section 1 of the Sherman Act and the market power needed to violate Section 2 of the Sherman Act. He cautions, however, against using Section 5 to attack monopoly in its incipiency in the absence of a dangerous probability of economic harm, penalizing companies simply because they are large will likely benefit "small independent retailers, . . . not consumers." He also raises concerns about using the Section 5 power to mimic the European doctrine of abuse of a dominance, arguing that such cases should be limited to situations in which "the harm to completion [is] apparent." He closes by reminding us that Section 5 "must not be interpreted to undermine competition goals, which are high output of high quality products and low prices."¹⁴ His support for applying the Section 5 power thus clearly falls within the consumer welfare paradigm and should not be regarded as an endorsement of a return to the approach that penalized firms simply for being large.

9 See *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239 (1972); *FTC v. Brown Shoe Co.*, 384 U.S. 316, 322 (1966); *Atl. Ref. Co. v. FTC*, 381 U.S. 357, 367 (1965); *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 394-95 (1953); *FTC v. Cement Inst.*, 333 U.S. 683, 708 (1948); *Fashion Originators' Guild of Am. v. FTC*, 312 U.S. 457, 463, 466 (1941). For the concession that certain cases were wrongly decided, see Daoudou, *Section 5, the FTC and Its Critics: Just Who Are the Radicals Here*, COMPETITION: J. ANTITRUST & UNFAIR COMPETITION L. SEC. ST. BAR CAL., Fall 2011, at 1, 15–16 & n.85.

10 See *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 762 n.3 (1999); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986).

11 *E.I. du Pont de Nemours & Co. v. FTC*, 729 F.2d 128, 139 (2d Cir. 1984) (*Ethyl*); *Boise Cascade Corp. v. FTC*, 637 F.2d 573, 582 (9th Cir. 1980); *Official Airline Guides, Inc. v. FTC*, 630 F.2d 920, 927 (2d Cir. 1980); *FTC v. Abbott Laboratories*, 853 F. Supp. 526, 535-36 (D.D.C. 1994).

12 *Ethyl*, 729 F.2d at 136–37, 138, 139; accord *FTC v. Brown Shoe Co.*, 384 U.S. 316, 321 (1966) (noting that the FTC's Section 5 authority "is particular well established with regard to *trade practices which conflict with the basic policies* of the Sherman and Clayton Acts even though such practices may not actually violate these laws" (emphasis added)).

13 Transcript, Fed. Trade Comm'n Workshop, Section 5 of the FTC Act as a Competition Statute 87 (Oct. 17, 2008), <http://www.ftc.gov/bc/workshops/section5/transcript.pdf>.

14 Hovenkamp, *The Federal Trade Commission and the Sherman Act*, 62 FLA. L. REV. 871, 878, 879–82, 884, 893 (2010).

The *Ethyl* court's admonitions about the importance of clearer guidance to giving companies that are potentially subject to Section 5 are reflected in a recent speech and law review article published by then Commissioner and now Acting Chairman Maureen Ohlhausen. She reviews uncertainty surrounding the FTC's past efforts to implement Section 5's mandate against unfair trade practices and proposes a framework for providing public guidance regarding the agency's enforcement policy with respect to standalone Section 5 cases.¹⁵

In short, to experienced observers of antitrust, the current uproar about hipster antitrust has the familiar ring of a debate that both sides thought had been long settled. The new bottles do not hide the fact that the wine is the same, and the same vinegary flavor that led to its rejection a generation ago remains. Although complaining about large companies has always had a certain appeal in some quarters and may have new appeal in others, mere slogans and epithets do not represent an adequate substitute for reasoned analysis. This is particularly true in the digital economy, which has yielded specular economic growth and value and in which the need for large investments in R&D and other features of the market may necessitate the existence of large firms if consumers are to enjoy these benefits. Moreover, the classic nirvana fallacy reminds us how easy it is to point out the flaws of one approach while foregoing any close examination of the proffered alternative, which no doubt suffers from flaws of its own that may be even greater. The absence of a coherent alternative to the consumer welfare standard thus limits the seriousness with which complaints about it are taken. All of these considerations are framed by the backdrop that vague standards open the door to political manipulation and abuse and that enforcement authorities around the world typically watch U.S. antitrust law closely and often take cues from how it develops. They underscore the importance of avoiding the seduction of basing legal changes on mere demagoguery and insisting that any reforms be based on a solid analytical foundation.

¹⁵ Ohlhausen, *Section 5 of the FTC Act: Principles of Navigation*, 2 J. ANTITRUST ENFORCEMENT 1 (2014); Ohlhausen, Commissioner, Fed. Trade Comm'n, Remarks at the U.S. Chamber of Commerce: Section 5: Principles of Navigation (July 25, 2013), available at: <https://www.ftc.gov/public-statements/2013/07/section-5-principles-navigation>.