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Against Goals

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AGAINST GOALS

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INTRODUCTION

This Essay argues that the U.S. debate on the goals of antitrust tends to obscure a much more critical and consequential debate. The Essay begins with a historical description of goals; it proceeds to question the question: What are the goals? It then identifies the real debate.

I. A LITTLE HISTORY

There is a backstory about the goals debate. It is about what the goals of U.S. antitrust law were and have been through time.

U.S. antitrust was born in 1890 out of a concern for the power and exploitations of the new, large, and powerful business organizations called trusts. Congress wanted to rein in the power of the trusts, but it did not legislate how to do so. Rather, it deliberately left this task for the courts to develop on a case-by-case basis. As soon as the first antitrust cases reached the Supreme Court of the United States, a war of philosophies emerged. The first Justice John Marshall Harlan took up the cudgels against powerful giants of business. Justice Edward White, and soon also Justice Oliver Wendell Holmes Jr., took up the cudgels freedom of business from government regulation. Much later, Justice William O. Douglas would stand in the shoes of Justice Harlan I, and later again, Justice Holmes's skepticism about business power and disdain for intervention to contain it would resonate in opinions of Justice Antonin Scalia.

At various times in the evolution of the antitrust laws, the courts were more or less conservative or aggressive. Judicial conservatism, evidenced, for example, in weak law on tying and exclusive dealing, produced the Clayton Act of 1914.[1] In the 1940s, public alarm that economic concentration could play into the hands of another Hitler produced the Celler-Kefauver Amendment of 1950,[2] strengthening the merger law. In the 1960s, the Supreme Court faithfully applied the intent of Congress as

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1. Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12–27 (2006)).

2. Celler-Kefauver Amendment to the Clayton Act, ch. 1184, 64 Stat. 1125 (1950) (codified as amended at 15 U.S.C. § 18 (2006)).

expressed in the legislative history that animated the Celler-Kefauver Amendment.

In the mid-1970s, as trade barriers fell, foreign competition surged, and international opportunities emerged, the country grew restless under the thumb of pervasive prohibitory law. Moreover, the constituency of the Supreme Court changed and the new Justices were more attuned to the perspective of Justices Edward White and Holmes than to that of the first Justice Harlan. They were more pro-business, supportive of freedom from legal constraints, and trusting that businesses would be driven by the winds of competition to follow efficient and competitive paths.

When Ronald Reagan ran for the Presidency of the United States in 1980, he won on a mandate to shrink regulation—to get government off the back of business. His first Assistant Attorney General in Charge of Antitrust (AAG) was charged with constructing a reduced paradigm for antitrust, and AAG William Baxter fulfilled this charge brilliantly. In 1980, American antitrust law *had no* "paradigm" in the sense of loss or gain that could be calculated. Antitrust was guided by principles. It was *for* diversity and access to markets; it was *against* high concentration and abuses of power. Powerful firms were assumed to have incentives to use their power.

AAG Baxter introduced a new perspective and a paradigm. He did so most powerfully through merger guidelines.[3] The perspective was that business acts are usually efficient (welfare increasing) and should be presumed so. The paradigm was that mergers and conduct are not anticompetitive in the eyes of the antitrust law unless they reduce consumer surplus.[4] This was revolutionary. Antitrust analysis had been inductive, not deductive, and surely not reductive. Professor Louis Schwartz, a revered antitrust teacher and scholar, wrote that Chicago school had been "smuggl[ed]" into antitrust.[5]

Why the new paradigm? The Reagan Antitrust Division had been given the charge to cut back antitrust. What was the surest, cleanest way to cut back antitrust dramatically while not denying its existence? The new paradigm fit this bill precisely. A total welfare paradigm, which would count producer gain from exploitation equally with consumer loss, would have shrunk the law even more. But in the early 1980s it was beyond the range of credibility; it would not have met the requirement of acknowledging the existence of the antitrust laws.

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3. *See* Eleanor M. Fox, *The New Merger Guidelines—A Blueprint for Microeconomic Analysis*, 27 ANTITRUST BUL. 519 (1982).

4. For a treatment of the above history and evolution, see Eleanor M. Fox, *The Modernization of Antitrust: A New Equilibrium*, 66 CORNELL L. REV. 1140 (1981). For a brief modern account of the history of U.S. antitrust, see DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 319–25 (2012) (depicting American antitrust as a virtuous circle reflecting political and economic inclusiveness and accountability).

5. Louis B. Schwartz, *The New Merger Guidelines: Guide to Governmental Discretion and Private Counseling or Propaganda for Revision of the Antitrust Laws?*, 71 CALIF. L. REV. 575, 576–77 (1983).

From the early 1980s forward, U.S. antitrust law developed under a model that is euphemistically called "maximizing consumer welfare." But in an important sense, this modern goal is not to *maximize* consumer welfare even if consumer surplus is the sole focus. U.S. antitrust law is not designed to make consumers as well off as possible, as Justice Scalia took pains to state in *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*.[6] The operational goal (not accepted by all jurists) is to let business be free of antitrust unless its acts will decrease aggregate consumer surplus, and then again, unless the acts are a response to the market or a way to produce or invent new or better goods or services. This is not an indefensible modus operandi. In some circumstances it may make sense as a guiding light for applications of U.S. antitrust law in this millennium. But it is not *the* goal of antitrust unless the concept of "goal" reads ninety years out of antitrust history.

II. WHAT IS THE VITAL QUESTION?

The typical framing of the debate on the goals of U.S. antitrust law is misleading. The answer to the question, "What are the goals?" is typically given in terms of what the respondent—invariably an inside player who has already formed a normative view—believes the operational guiding principle should be. Typically, respondents to the question are not trying to *derive* the goals as disinterested students of history and political science but to argue for their view of good policy. This is fine; people should argue for what they believe is good policy; but then, should the question be posed differently?

III. WHAT IS THE DEBATE REALLY ABOUT?

The debate on goals is a stand-in for a different conversation. In fact, most participants in the American goals debate substantially agree on a vital answer to the overarching question: What do you, and what should we, as a country, want from markets and antitrust?[7]

Here is the answer, on which there is substantial consensus[8]: We want our markets to be robust. We want our businesses to be efficient, effective, lithe, inventive, and adaptable to change. We want an environment that will create incentives for businesses to strive the hardest they can in these directions. If businesses successfully do so, they will deliver to buyers and ultimate consumers what they need, want, and are able to pay for, including

6. 540 U.S. 398, 415 (2004).

7. Note that no one in the typical American debate among insiders (antitrust lawyers and economists) proposes to use antitrust to protect inefficient firms, small business, jobs, local suppliers, or national champions.

8. Consider all of the essays in this Symposium. For example, compare John B. Kirkwood, *The Essence of Antitrust: Protecting Consumers and Small Suppliers from Anticompetitive Conduct*, 81 FORDHAM L. REV. 2425 (2013), with Joshua D. Wright & Douglas H. Ginsburg, *The Goals of Antitrust: Welfare Trumps Choice*, 81 FORDHAM L. REV. 2405 (2013).

the range of choice they desire; entrepreneurs are likely to have economic opportunity; American business is likely to be competitive in the world; the economy is likely to be strong and grow; and the people in general are likely to be better off.

Let us call this objective "robust markets," and let us consider the general objective of antitrust to proscribe acts that significantly undermine robust markets.

The question, then, is how to reach the objective of "robust markets" or, more precisely, how antitrust can be used to do so. The core debate is how to design and apply antitrust principles so that robust markets are likely to result or be preserved, not what are the goals of antitrust.

There is wide agreement on a second proposition: we do not want to, nor could we if we desired, engineer the results. The answer must lie in safeguarding an environment that creates the right incentives, the right mix of business freedom, and prohibitory rules and standards.

At this point, consensus ends. Experts and stakeholders are divided. On what do they disagree? On perspective and on assumptions.

On perspective. The big choice is between outcome orientation, on the one hand, and concern for process as well as outcome, on the other. Do we value the process of rivalry, relatively open access, and contestability of markets by entrepreneurs and firms without market power? Or should we limit antitrust condemnation to acts that provably lessen output? It is not true, as charged, that concern with preserving rivalry and access is functionally equivalent to protecting inefficient competitors. Inquiries and analysis can assure against protectionism. One excellent example of this core debate can be found in the Chicago sports stadium case.[9] Another example is the European Union *Microsoft* interoperability case as compared with U.S. law on the strong right to refuse to deal.[10]

On assumptions. The big choice is between embracing or not embracing the free-market assumptions apparently favored by a critical mass of current Supreme Court Justices: markets work well; the forces of competition or potential competition are strong; businesses act in the interests of consumers; government (antitrust) intervention is generally clumsy, inefficient, and misinformed; and "free" markets will almost always cure a market problem faster and better than antitrust intervention.

Perspective and assumptions—not goals—make the difference.[11]

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9. *See* Fishman v. Estate of Wirtz, 807 F.2d 520, 563–85 (7th Cir. 1986) (Easterbrook, J., dissenting).

10. *See* Eleanor M. Fox, *The EC* Microsoft *Case and Duty to Deal: The Transatlantic Divide*, *in* MICROSOFT ON TRIAL: LEGAL AND ECONOMIC ANALYSIS OF A TRANSATLANTIC ANTITRUST CASE 274 (Luca Rubini ed., 2010). A stunning difference in perspective emerges from comparing Case T-201/04, Microsoft v. Comm'n, 2007 E.C.R. II-3601, with *Trinko*, 540 U.S. 398.

11. *See* Eleanor M. Fox, *The Efficiency Paradox*, *in* HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST 77 (Robert Pitofsky ed., Oxford Univ. Press 2008).

CONCLUSION

The goals debate is not only (usually) unhinged to history and political economy but it has obscured the real debate, which is about how to achieve robust markets.

The exercise of debating goals of U.S. antitrust, while provocative and interesting, obscures the two data points that actually drive the debate on most applications of antitrust law—perspective and assumptions.

It may be more productive to state the goals or essence of American antitrust at a level of generality, as did the Antitrust Modernization Commission in its 2007 Report—antitrust is for competition and consumers[12]—and to proceed to examine particular categories of conduct and to debate what the rules and standards should be. This enterprise is no less contentious, but it is more straightforward and pragmatic. Moreover, it quickly reveals what the core debate is about: perspective and assumptions, not goals.

12. ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 2–3 (2007).