

Synopsis:

This book sets out to re-assess current antitrust doctrine in light of its implicitly accepted, but rarely stated, justifications. Currently, the standard view is that antitrust is aimed at economic efficiency and the protection of consumers. These goals are so often seen as complementary and justifying the same policies, that in most cases they appear in unison – as if they were one and the same. What debate exists regarding them is relegated to the presumed-rare situations where total welfare (efficiency) and protection of consumers (fairness) part ways. Indeed, this distinction is used to classify antitrust scholarship (sometimes to the point of being considered of different 'schools'): whether fairness concerns should be allowed to trump efficiency, justifying enforcement even where this would be socially costly.

The argument set forth in the book is thus intensely confrontational. Fairness is analyzed according to first principles, focusing on where it points not to more intervention – but to less. Most antitrust scholars and practitioners accept as given that efficiency is a worthy social benefit, implicitly assuming that efficiency-enhancing antitrust intervention is morally appropriate. Since the main beneficiaries of antitrust are consumers, protecting consumers and promoting social efficiency seem to be a wonderful combination. Where debates exist regarding efficiency versus fairness, the latter is commonly assumed to point to more protection of consumers, and more intervention in cases where efficiency analysis did not warrant legal action.

I hope to establish that we are missing a great deal of the picture. That while most (hopefully all) antitrust scholars and policy makers truly believe they are engaged in a morally worthy state enterprise, our standard picture relies on only two of three legs, and thus our actions are morally wobbly. We, as a society, are putting our voice behind antitrust intervention believing that it is both a good idea (efficiency-wise) and the right thing (morally) to do. And we have been ignoring part of the equation.

We consider both society and consumers, but we do not seriously consider the rights of monopolists or firms whose conduct is limited by antitrust. We intervene on behalf of one party, but treat the other as if its business practice is merely a tool to promote the welfare of others. In a way, we are saying "make money, but only if you share it".

Those versed in efficiency analysis might object to this characterization, as the monopolistic firm's profit is considered a component of aggregate welfare, but that picture is also incomplete. Within efficiency terms all members of society are measured alike and included in the social welfare function. This, though, is insufficient, as it comprises *society's* gain and not the individual rights perspective. Were all economic activity conducted according to the standards reigning in antitrust, efficient governmental taking of property would be possible without

compensation, and all contracts would be subject to a test of aggregate, rather than personal, utility maximization.

Obviously, this is not the dominant view regarding private property, but in antitrust it reigns supreme. When considering the moral aspect of antitrust policy, we have a one-sided view. I believe that underlying the broad appeal and social acceptance of antitrust is the assumption that antitrust is morally worthy, and its aims are not merely efficient, but right. We want, as a society, to use our power wisely and avoid harming the innocent. In the context of antitrust, monopolists as such (as well as those wishing to coordinate their actions in search of market power) are implicitly assumed to deserve no such protection.

In popular cartoons, monopolists appear as the fat pig in a suit, smoking a cigar with a dollar sign painted on it. In the discussion of cartels, this translates to the ubiquitous vision of "agreements in a smoke-filled room". This book sets out to assess the grounds for this worldview and the current near-consensus in antitrust, showing that implicit assumptions and misunderstandings play a key role. Those arguing for a technocratic antitrust, of economic and not moral nature, do so for laudable reasons, and have strong institutional support. Yet I hope to show that this view ignores the biases and value-laden content of antitrust. Those arguing for a moral antitrust, promoting fairness as well as efficiency, ignore key components of true moral justification – and thus their results are biased. The economic outlook, on the other hand, ignores important social values, which inform and affect aggregate welfare. The process of competition, and not just its economic effects, was a major component of early antitrust jurisprudence and rallied many supporters for enactment of statutes thought to limit economic power and threats to democracy from powerful business concerns. Antitrust protects competition not merely for its potential in fostering economic growth, but for its ability to constrain excessive political influence. If these values matter to modern democracies, they enter in the social welfare function as a public good worthy of protection.

While probably controversial, this book is not meant to be political. The current paradigm of antitrust is that the conservative right argues for less state intervention, while the liberal left argues for more. This usually translates into the standard debate between efficiency and fairness, with economic analysis of antitrust intervention showing when costs may exceed benefits, and fairness analysis claiming consumers deserve more protection even where efficiency is debatable. This book thus explores common ground in an uncommon way, assessing all potential arguments and counter-arguments regarding the justification of antitrust as a social tool. Both fairness and efficiency matter in antitrust, but fairness encompasses more than is commonly assumed and demands of us more respect for the rights of *all* affected.

This book aims at establishing the case for a new form of constitutional review, and moral outlook, regarding antitrust. Given the enormous amount of resources invested in antitrust enforcement (on behalf of state agencies, as well as firms, plaintiffs and defendants alike), and given the moral indignation expressed by people from all walks of life regarding the subject, it is worth assessing in detail. By going back to first principles, I hope to show that the *process* of assessing our collective judgment matters greatly, and not just the end-result.

After reviewing current and historical arguments within antitrust, I present a balancing test designed to draw out the different implications of proposed policy on consumers and monopolists alike. Balancing – since both sides have strong arguments supporting them, and simple answers are not easy to come by. It is the *criteria* for decision-making that I seek, rather than the end-results themselves. The balancing called for is important not only due to its effect on antitrust policy as such, but also due to its effect on those doing the balancing – by stepping into the shoes of "the other" we allow ourselves to rise above prejudices instilled in us by the outlook our society has implicitly adopted – in this case, the prejudice against monopolists.

<http://www.pbookshop.com>