

Mainstream Media Is (Finally) Covering Antitrust Policy. Antitrust Practitioners Should Join the Discussion.

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Antitrust is hot! Well, as hot as antitrust gets: the mainstream media has covered antitrust issues a few times recently, and policy discussions have broken out in Congress and on the campaign trail. While I disagree with many of the comments, I think it is great that such questions are being discussed by policymakers, reporters, and other real people. We antitrust practitioners should try to get out of our antitrust community periodically and join the discussion.

The first piece is the New Republic's *The Most Important 2016 Issue You Don't Know About*. The subheadline pithily captures the author's point: "Antitrust regulation may sound dull [?!?]. It's also the root of all our economic evils." The article covers a recent oversight hearing in the Senate where FTC Chairwoman Ramirez and AAG Baer faced questions from Senators Lee, Klobuchar, Grassley, Franken, Hatch, Blumenthal, and others. The article claimed unanimity from all speakers from both parties that greater antitrust enforcement was necessary—and mentioned similar positions from candidates Clinton, Sanders, and Trump.

That summary of the hearing is certainly different than others I have heard. Even some of the quotes make it seem the speakers were more interested in particular mergers, not antitrust enforcement generally. Still, if economic growth and

inequality are important policy issues during this campaign season, then what role (if any) antitrust enforcement should play is a great topic to discuss.

The second piece comes from former U.S. FTC Commissioner Josh Wright. He wrote a guest column for Forbes online urging (unsuccessfully, as it turned out) the Supreme Court to review the *McWane v. FTC* exclusive dealing case. We all know Wright can match any antitrust expert in detailed analysis of this and other antitrust topics—his dissent in *McWane* is but one example. In this piece, however, Wright helpfully gave his non-specialist audience a brief and accessible tutorial on antitrust’s history, goals, and effects on the economy.

Just as this post was being finalized, The Economist published an article lamenting persistently high profits at U.S. companies and suggesting that “the scientists of antitrust” could do more if they were not hamstrung by the law’s limited scope.

Others who can and do publish law review articles have also explained competition issues in mainstream publications. Marc Edelman regularly posts at Forbes on various aspects of sports law, including competition issues. Dan Crane has written op/eds in local papers criticizing state laws that restrict sales of cars except through dealers.

The agencies do proselytize about the benefits of competition and antitrust’s role in our economy. The FTC regularly advises state legislatures on the potential competitive effects of proposed state laws and discusses foreign regulations with enforcers abroad. In an example that goes back several years now, former AAG Christine Varney harkened back to antitrust enforcement during the Great Depression to help explain her views on monopolization enforcement.

But I think too often, all of us—agency officials, professors, practitioners—spend too much time debating angels on the head of a pin within the missals and cathedrals of the antitrust community. While those debates are important and useful (and, yes, I plan to engage in them next week during the holy days known as the ABA Antitrust Section Spring Meeting), we should also do more missionary work among the heretics, non-believers, and those who simply have not heard the good news.

So when and what to preach? Some of us are lucky enough to have the opportunity to teach antitrust law. I use my opportunity with students to discuss the real world context of the actions described in the cases. Why do companies have vertical

restraints or exclusive contracts? How are those decisions made? What good or bad reasons do companies have to merge or form joint ventures? I hope my students end up with a better understanding of how businesses operate and how antitrust rules affect their relationships with customers. (And when my students have different experiences than mine—like the student who ran two gas stations and knew all about vertical restraints imposed on retailers—then I learn something, too.)

I suggest that the agencies, in addition to their fine work before state legislatures and foreign enforcers, spend more time talking with trade associations, local chambers of commerce, and their members. Both groups could learn about the benefits of and limits on cooperation among competitors. Also helpful could be more formal workshops and informal discussions to understand how industries, both old and new, are competing today—but I also suggest more direct discussions with real business executives and fewer with professors or other “experts.” More talks in locations between the coasts might also dispel the misimpression that antitrust enforcement comes only from this year’s bogeyman: the “elite.” Finally, perhaps the agencies can engage more directly with publications outside the antitrust community, both those looking for much more antitrust enforcement (see The Economist and New Republic articles above) as well as those skeptical of all antitrust enforcement.

As to content, I suggest starting with this simple message:

Competition in business can produce both winners and losers but, overall, benefits consumers, especially through better products and lower prices. Antitrust law is the rules of that competition. When antitrust enforcement is based on evidence of consumer harm (not just theories and intuition), shows regulatory humility for what government action can accomplish, and applies clear and logical standards, businesses and consumers better understand the rules and have more confidence in the system.

So I do agree with the New Republic that the appropriate level of antitrust enforcement can lead to better economic growth and equality—I just strongly disagree on what that appropriate level should be. But more importantly, I think articles like that one are helpful to generate a discussion, maybe a better understanding—perhaps even a consensus?—among the general public on the

underpinnings of antitrust law and the proper level of enforcement. All of us in the antitrust community should participate more in that discussion—after next week.