

## Book Review: Post-Paradox Antitrust

Keith N. Hylton

**Antitrust Law: Economic Theory and Common Law Evolution**

Cambridge University Press • 2003

### Reviewed by David McGowan

Professor Keith Hylton's *Antitrust Law: Economic Theory and Common Law Evolution* is a concise study that integrates antitrust history, policy, economics, and doctrine into a cogent whole. It is a valuable book and a good read to boot.

I will provide reasons for this assessment in a moment. First, however, it is fair to ask why we need another antitrust book. There are already several excellent texts and treatises, almost all of which integrate law and economics. Professor Hylton aims to fill what he sees as a gap between textbooks, which he views as an inefficient way to study doctrine, and hornbooks, which he sees as describing doctrine without providing an adequate theoretical basis for understanding it.

Professor Hylton is right about textbooks, which are meant in part to teach students how to distill doctrine from cases, a skill practitioners already have. And while not all hornbooks are excessively doctrinal, no one has time actually to read a comprehensive multi-volume treatise straight through. There are some excellent single-volume hornbooks, but these tend to be written more to consult on specific issues, or for a student to follow for an entire semester, than to provide an integrated narrative one might actually sit down and read as a regular book. There are some books surveying antitrust law, but they have tended to mix polemics with analysis—an approach that can limit their usefulness.

Professor Hylton fills this niche admirably. His analysis is concise—the ratio of ideas to pages is superb—and though it is a survey of antitrust the book is compact enough to allow the reader to observe how the same economic and institutional pressures affect different doctrines in similar ways.

The book begins with a succinct and accessible discussion of antitrust economics, including the model of perfect competition, transaction cost economics, and the economics of information. The economics are followed by an equally succinct summary of the history and purposes of the antitrust laws. Professor Hylton reviews both the “public interest” and “public choice” explanations for the Sherman Act (the latter more persuasive, in my view), and thus introduces the political pressures that have generated many of the doctrinal conflicts the book examines. The remainder of the book contrasts the Sherman Act with the common law concerning restraints of trade, distinguishes per se analysis from the rule of reason, and then examines various forms of concerted action, monopolization and attempted monopolization, merger policy, and antitrust immunity.

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## How Institutional Constraints Affect Doctrine

Professor Hylton integrates economic analysis with doctrine and, importantly, the institutional constraints of courts and agencies. Institutional considerations are properly part of the law and economics of antitrust enforcement, but they sometimes take a back seat to the economic modeling of substantive problems or to arguments over how wealth should be distributed in society. Professor Hylton rightly perceives that one cannot understand the law without understanding the process that generates it.

That process is one of common law decision making within generous but not limitless statutory boundaries. Common law concerns, such as the need for predictability and flexibility, the relative merits of rules and standards, and the ability of courts to understand business practices, are therefore central to understanding antitrust. Professor Hylton identifies the “tension between the economic conception of the reasonableness inquiry and the administrative concerns of courts and agencies” as the “most general and frequently recurring problem in antitrust law.” He believes enforcement officials and statutory modifications pressure courts toward per se rules until the courts, in at least some cases, reach a “validity crisis.” Such a crisis occurs when the relevant doctrine can no longer be defended on economic grounds. At that point, the law turns once again toward a standard of economic reasonableness, and the per se rule is gutted or abandoned.

Professor Hylton is right about this. Opinions that change doctrine often emphasize the Court’s common law-like power to interpret the Sherman Act. And “validity” is a good term to describe an important concern relevant to the job of judging as well as to substantive antitrust doctrine.

Judges need to feel that in deciding cases they are doing something that deserves to be called “law.” In writing an antitrust opinion, a court (at least one with any discretion in what it says) will try to produce understandable doctrine that advances in a consistent manner the goals of the antitrust laws. Judges are practical people, too, and they do not like to think their rulings create economic losses. Advocates who understand these institutional points are in a better position to craft persuasive arguments than those who don’t. Because Professor Hylton understands them, and sheds light on how they affect different doctrines, his analysis is practically useful as well as academically rigorous.

With regard to the purpose of the antitrust laws, Professor Hylton’s economic critique suggests antitrust policy should try to advance economic efficiency net of the costs of administering the policy itself. Courts and agencies should not go after economically reasonable behavior. They should look into the reasonableness of behavior (or at least entertain arguments that do) unless and until the costs of inquiry exceed the gains.

## Skepticism Without Dogmatism

One of the strong points of this book is Professor Hylton’s consistent consideration of the costs of mistaken decisions. There is always a risk that a court will condemn as unlawful conduct that enhances social welfare, or fail to condemn conduct that reduces it. A court that cares about welfare will therefore care about the relative likelihood and cost (the expected cost) of each type of error. It will look for ways to assess and to minimize these costs. In part for the institutional reasons mentioned earlier, advocates who are sensitive to the importance of error costs may find ways to present courts with appealing resolutions to complex problems; this book is full of good examples of such arguments.

This approach is not novel, but that is not a deficiency in such a work. Novelty is an ambiguous virtue. Antitrust law is eye-high in economic models proving that things are possible even if

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they never seem to occur—what Judge Frank Easterbrook refers to as “existence theorems.” The intellectual value of Professor Hylton’s book, and the genuine pleasure of reading it, stems from its rigorous and evenhanded analysis as he works through the cases and the main issues that comprise antitrust law.

Professor Hylton’s analysis is skeptical of the proposition that antitrust intervention can make markets work better than they would if they were left alone, but he is not dogmatic. He emphasizes the need for a practical approach to markets, one which recognizes that the economic model of perfect competition is a model, not a description of how most markets work. Rather than presuming that a departure from the model implies the need for antitrust enforcement, Professor Hylton persuasively argues that judges and enforcement officials should ask how “a workably competitive market might respond to the failures of one of the assumptions of the model.”

From a practical point of view, Professor Hylton’s measured skepticism expresses itself throughout the book in his insistence on asking why. Why do firms do what they do? Why do other firms respond as they do? How likely is it that an anticompetitive scheme would work? And, if logic implies that success is a long shot, why would a firm with its own money on the line place such a bet?

It is hard to overstate the importance of asking such questions, and this book exemplifies the gains to be had when they are asked. Such questions are particularly useful when combined with the proposition that real markets are imperfect and real firms may settle for relatively crude strategies that work because more tailored strategies may be too costly and thus less profitable. Professor Hylton reminds us that when asking whether desirable ends could be achieved by less restrictive policies, it is important to analyze the question net of information and other enforcement costs.

For example, Professor Hylton asks why a manufacturer might prefer a policy of resale price maintenance to other ways of combating retailer free-riding, such as charging different prices to retailers that provide different level of service. The problem is that goods flow from manufacturers to retailers before the retailer either does or does not provide services to customers. Retailers might break their promises, so under such a policy manufacturers would have to monitor their performance. Monitoring is costly and imperfect, so manufacturers might prefer pricing policies as an efficient way of aligning the retailers’ interests with its own.

### **The Role of Intention in Antitrust Analysis**

Professor Hylton also emphasizes the problematic role a defendant’s intention plays in antitrust analysis. Collusion is one area where the problem arises. Some analysts, notably Judge Richard Posner, favor aggressive use of the law to attack parallel behavior among competitors in an oligopoly market. Judge Posner has suggested the conspiracy requirement in such cases might be satisfied by analogy to the formation of a unilateral reward contract. On this view, a seller in an oligopoly market who raises its prices is the offeror. The other oligopolists accept the offer by raising their prices. Professor Hylton argues that this view essentially disposes of the agreement requirement. Unless the law requires that oligopolists ignore each other’s prices (and why should it do that?), circumstantial evidence of tacit collusion might also be consistent with other, lawful explanations.

Intent is also a problem with regard to exclusionary conduct in monopolization cases. Professor Hylton argues that modern cases lean toward requiring that a plaintiff alleging monopolization prove that the defendant specifically intended to monopolize a market. He recognizes this view is in tension with language in *Alcoa*, but he believes *Aspen Skiing* implies a revival of the requirement

(which he sees as implicit in early monopolization cases) even though *Aspen* itself quoted from *Alcoa*. His reason is that the defendant in *Aspen* would have won if it had established a credible efficiency justification for terminating its cooperation with the plaintiff. After *Aspen*, Professor Hylton believes the trend is toward a rule that “the plaintiff must show that the sole motivation behind the defendant’s conduct was the elimination of competition, which relieves courts of the balancing of competing explanations involved in *Alcoa*.”

Professor Hylton is right to focus on specific intent as an important issue in monopolization cases, but the judicial trend seems less clear to me than it seems to seem to him. Only credible efficiency justifications count, and credibility determinations imply a weighing process. The D.C. Circuit’s opinion in the *Microsoft* case, which considered and rejected Microsoft’s explanations for certain conduct, exemplifies this point. One may question how far removed such weighing is from the balancing Professor Hylton would, quite understandably, like to escape.

And courts continue to analyze evidence of the subjective beliefs of a firm’s employees in deciding whether conduct is likely to harm competition. Though it is risky to place much weight on bellicose rhetoric within firms, courts seem to feel it is fair to infer that an act was likely to have the effects market participants expected it to have. One can disagree with this aspect of these opinions, and one can understand and sympathize with the drift of Professor Hylton’s analysis, but it is a fair question whether courts will arrive at the conclusion to which he believes the logic of the cases leads.

Nevertheless, Professor Hylton’s analysis on this point is transparent and therefore useful. (For example, he qualifies his argument by saying we do not yet know if a trend toward a specific intent requirement for monopolization “will become a permanent feature of Section 2 case law.”) Here and elsewhere, he analyzes cases to understand them, and to see how they can be made to make sense.

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### **Marginal Benefit Analysis**

This last point provides an interesting contrast between Professor Hylton’s book and the work he seems to have used as a model, Robert Bork’s *The Antitrust Paradox*. Though intensely analytical and beautifully written, *The Antitrust Paradox* was a polemic. The rhetorical structure of the book depicted a fall from grace (the supposed “consumer welfare” origins of the Sherman Act) and a call for redemption in the form of efficiency-based antitrust policy. That is a good story, but it rests on questionable history. Professor Hylton does not have to shoulder the burden of radical reform, and his history is less influenced by such narrative demands, which makes his book more useful for placing the current law in context.

More generally, Judge Bork wrote most of his work in an era when courts seemed overtly hostile to the sort of efficiency-based antitrust policy he advocated. His criticism of the cases is correspondingly severe. As he put it in the 1993 introduction to his book, the idea was that if one could not change the law, one could at least inflict some pain on the way out. It is easy and, let’s face it, fun, to make fun of some cases. We all have our favorites. But making fun of them can lead one to miss why judges could rule as they did and how the cases fit with what preceded and followed them. Judges are not fools, even if making their decisions seem foolish is a good way to get them to change their ways.

Freed from the burden of inciting reform, Professor Hylton tries to understand the values and policy goals the opinions express and to use them to illustrate more general trends in antitrust history. In addition to asking the economic “whys,” he asks the institutional whys: Why does the doctrine change as it does? What were judges responding to in the 1960s? What do they

respond to now?

This approach enhances understanding of antitrust history and policy. Professor Hylton criticizes cases very well, but he also takes from them what is useful and explains why it would be better to discard the rest. That is the common law tradition. By adhering to it himself, Professor Hylton has written a welcome addition to the antitrust literature. ●