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Edward J. Janger

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SYMPOSIUM: CONSUMER WELFARE, MARKET STRUCTURE AND POLITICAL POWER

Edward J. Janger

Since the middle of the last century, two competing visions have dominated the fields of antitrust and consumer protection: neo-liberal and progressive. The neo-liberals view antitrust and consumer protection as existing only in service of competitive markets; the welfare of consumers is measured by price theory and consumer protection, in any form other than notice, is viewed as paternalistic. The progressives take a more holistic view: they see antitrust as concerned with the competition but also with the market structure; similarly, they see consumer protection as considering the realities of consumer behavior and the possibility of predatory behavior in addition to information asymmetry. Finally, the progressives see both consumer welfare and market structure as intimately intertwined with the health of democracy.

The neo-classical approach is associated with Robert Bork and the Law and Economics Movement.[1] The progressive strand is older, identified with Brandeis and early 20th Century social reform.[2] As a matter of chronology the Brandeisian view dominated into the 1970s, but from 1980, until recently, the Borkian law and economics approach has been in ascendancy in Congress, the academy, and in the courts.

Technological change and events in the broader economy have caused the politics and the academic focus to shift. The financial crisis of 2008-09 drew attention to how pathologies of consumer credit markets could create systemic risk, even (indeed especially) in markets that appeared to be competitive.[3] Internet platforms and so-called "fintech" have reshaped our ideas about market power and its interrelationship with political power. This symposium, held at Brooklyn Law School in September of 2020, provided an opportunity to look deeply at the effect technology has had on consumer transactions, at the politics of antitrust, and at the institutions that regulate and respond to these changes in the marketplace.

The Articles in this symposium can be divided in to three groups. The first set of Articles look at the effect of financial technology and internet platforms on consumer transactions. These Articles highlight the limits of consumer protection available to purchasers of cars and other consumer goods over internet platforms. The second group looks to antitrust law and considers how both income inequality and technology have changed the

1. ROBERT H. BORK, THE ANTITRUST PARADOX (Basic Books, Inc., 1st ed. 1978).

2. LOUIS D. BRANDEIS, OTHER PEOPLES' MONEY AND HOW THE BANKERS USE IT (Isha Books, 2013) (1914).

3. Edward J. Janger & Susan Block-Lieb, *Consumer Credit and Competition: The Puzzle of Competitive Credit Markets*, 6 EUR. COMPETITION J. 68 (2010).

political economy of antitrust. While all of the Articles look at the politics of lawmaking and the institutions of enforcement, the last Article by Anne Fleming takes a historical look at the institutional question of enforcement through litigation.

First, Pamela Foohey considers the financing of cars. Automobiles are a necessity for most Americans. Most car buyers finance their purchase. The financing of cars has long been a subject of concern, but Foohey explores how modern technological innovations have made this problem worse. Ride share platforms like Uber capitalize on the need of their drivers to finance the cars they use under oppressive terms. Meanwhile other platforms like ZipCar capitalize on consumers short term needs for cars. Foohey finds that these developments have only served to increase the imbalance of power between consumers who need cars and the lenders who finance them. She concludes that neither antitrust, consumer financial protection nor bankruptcy law can solve the problem, but that instead what is required is a more comprehensive look at the ways in which America facilitates transportation.

Next, Edward Janger and Aaron Twerski consider consumer sales intermediated through internet platforms like Amazon. They show how Amazon structures transactions on the Amazon Marketplace to avoid both warranty and tort liability for personal injuries caused by defective products sold on their site. They argue that because they do not take title, they are not a "merchant" that makes the implied warranty of merchantability, and not a "seller" for the purpose of liability under section 402A of the Second Restatement of Torts. Twerski and Janger explain why the substance (rather than form) of the transaction should cause courts to treat Amazon to both a warrantor and a distributor of the products sold on their site. Far from being revolutionary, this would simply put Amazon in the same position as brick-and-mortar sellers and their online counterparts.

Spencer Weber Waller and Jacob Morse consider the long political history of antitrust law and how the shifting political landscape has transformed the substance and enforcement of antitrust laws. They trace antitrust from its inception after the civil war, through its peak political salience at the turn of the last century, and then decline in importance in the wake of the Reagan revolution. Finally, they describe how a new focus on income inequality, the economic and political effects of internet platforms, and the increased attention to competition law in the European Union have combined to return antitrust to political salience. Frank Pasquale then looks directly at how the emergence of internet platforms has shifted the way we think about markets, and hence about how to protect them.

Frank Pasquale and Jacqueline Green look closely at this renewed salience of antitrust and find two distinct threads, one authoritarian and the other democratizing. On the one hand, the Trump administration was observed to be using antitrust enforcement as a cudgel to punish its political enemies. At the same time, new attention is being paid to the democratizing

potential of antitrust law. This neo-Brandeisian strand is concerned with the political power accumulated by internet platforms such as Facebook and Google. This approach recognizes that competition policy serves multiple goals determined through "Legal regularity, politics, and expertise."

Finally, Anne Fleming takes a historical look at the longstanding obstacles to consumer protection litigation. She examines a brief flowering of class actions under state law. Aggregate litigation has long been recognized as a method to give consumer interests legal recourse and the ability to pursue legal theories to protect the victims of small dollar harms. Fleming finds that its quick rise and fall mirrors the flowering and subsequent tethering of class action litigation at the federal level. In both cases powerful economic interests were able to limit the ability of courts to provide a forum for consumer interests.

No introduction to this symposium would be complete without noting Professor Fleming's sudden and untimely passing. Her paper is being published posthumously with the permission of her family, and it is with gratitude that we dedicate this volume to her. Anne was a brilliant young scholar whose work on the history of consumer finance was endlessly illuminating. We all miss her tremendously.