

Antitrust Economics and Consumer Protection Economics in Policy and Litigation:
Why the Disparity?*

“I get no respect...” – Rodney Dangerfield

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Abstract

The lag in the use of microeconomics in consumer protection policy and litigation, as compared with the use of microeconomics in antitrust/competition policy and litigation, has at least three causes: First, the former area has had a considerably shorter period for analysis and for absorption by non-economists – in policy and in litigation. Second, within the Federal Trade Commission (FTC), where this disparity is especially noticeable, the history – the origins – and culture of the agency have favored a focus on antitrust/competition issues. Third, the splintering of consumer protection responsibilities across a very large number of federal and state agencies has worked against the development of a large agglomeration of economists within one agency (with the modest exception of the 20 or so economists within the FTC’s Bureau of Economics’ Division of Consumer Protection) that otherwise could have furthered the progress of microeconomics in the consumer protection area.

This paper will expand on these themes and discuss their implications.

Keywords: consumer protection; antitrust; Federal Trade Commission (FTC); history of thought

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I. Introduction.

Why has the use of economics in consumer protection policy and litigation lagged behind the use of economics in antitrust/competition policy and litigation?¹ Is consumer protection simply the Rodney Dangerfield of microeconomics?

This paper will argue that a more nuanced view is needed. Specifically, we will argue that this lag can be attributed to at least three factors: First, the history of rigorous economic analysis of competition issues is substantially longer than is the comparable history of the economic analysis of consumer protection issues. This longer history has surely made policy makers, as well as litigating lawyers, more comfortable with embedding the relevant economics ideas in policy and litigation in the competition area.

Second, the Federal Trade Commission (FTC), where both antitrust and consumer protection missions are present, had its origins in antitrust and business regulation, with consumer protection's becoming part of the mission of the agency substantially later in its history. The history and the culture of the agency has clearly favored its antitrust mission.

Third, antitrust enforcement is primarily the domain of the U.S. Department of Justice's (DOJ) Antitrust Division and of the FTC. That concentration has encouraged a substantial agglomeration of economists in the two agencies, which in turn has encouraged the promotion of sound economic analysis in the development of policy and litigation. In contrast, consumer protection responsibilities are spread much more broadly across a number of federal agencies, as well as having a substantial component at the level of the 50 states and the District of Columbia. This splintered responsibility has not served well the cause of promoting consumer protection

¹ This question was raised by Janis Pappalardo in her introduction to the WEAI session that was noted above. She is currently the Assistant Director for Consumer Protection, Bureau of Economics, FTC.

economics, since it has discouraged – except at the FTC – the agglomeration of economists that would be more likely to promote good economic analysis.

The remainder of this essay will expand on these themes and discuss their implications.

II. A Brief Comparative History of Thought.

This section will offer a brief comparative history of thought with regard to competition economics and consumer protection economics.

A. Competition Economics.

An understanding of competition economics extends back over 240 years – to at least Adam Smith’s The Wealth of Nations (1776). Consider the following insight about monopoly:

“The monopolists, by keeping the market constantly understocked, by never fully supplying the effectual demand, sell their commodities much above the natural price, and raise their emoluments, whether they consist in wages or profit, greatly above their natural rate” (Smith, 1776, Book I, Ch. VII).

Or consider Smith’s insight about collusion:

“People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices” (Smith, 1776, Book I, Ch. X)

Of course, Smith’s insights were wholly word-based. No derivatives or equations are to be found in his treatise. Nevertheless, both insights would hold up reasonably well in any modern-day conversation in the halls of the FTC or the DOJ.

A more formal (mathematical) approach – including an attempt to address oligopoly – was offered in the first half of the 19th century: Cournot’s (1838) homogeneous-product model of multi-firm rivalry, where each firm chooses to maximize its profits through a decision as to the quantity it wants to produce and sell, while assuming that its rival(s) hold their quantities unchanged. If we let n represent the number of firms that are competing in this homogeneous-

product market, then: When $n = 1$, Cournot's model yields the monopoly (price and quantity) outcome; when $n = \infty$, the model yields the perfectly competitive outcome; and as n becomes smaller, the outcomes progressively approach the monopoly outcome.

Because of its basic insights and ready tractability (and its ready adaptability to situations where firms have cost differences and/or sell differentiated products), the Cournot oligopoly model remains – 180 years later! – as a “work-horse” model for many oligopoly analyses.

It is also worth remembering that in the same treatise Cournot developed (mathematically) the model of two monopolists that supply complementary goods (copper and zinc) to downstream buyers (who produce brass) – which is formally equivalent to the problem of two (vertically related) successive monopolists. This model too has become a “work-horse” for understanding complementary and vertical relationships among firms, including the problem of “double marginalization”. The overlap with antitrust has come primarily in the analysis of vertical mergers and of vertical restraints; see, for example, White (1989).

The next major contribution was by Bertrand (1883), who approached the same oligopoly problem but changed the set-up so that each profit-maximizing firm decides on its price (while assuming that all of its rivals hold their prices unchanged). Again, when $n = 1$, the monopoly outcome is achieved. But with the Bertrand assumption, as few as two firms could yield the perfectly competitive outcome.²

Like its Cournot counterpart, the Bertrand model – because price competition seems to be a more realistic description of perceived competitive processes among firms (and also because

² This assumes an absence of fixed costs and assumes constant marginal costs that are the same for both firms. If one of the firms has lower (but constant) marginal costs than the other firms, then the Bertrand model yields “limit pricing” by the lowest-cost firm as its outcome. Variants on this limit-pricing idea can be found in Bain (1949; 1956), Modigliani (1958), and Sylos-Labini (1962).

the Bertrand model can be adapted to a differentiated-product context) – remains as a work-horse oligopoly model in the 21st century as well.

Marshall's Principles of Economics (1890) devoted a chapter (Book V, Chapter XIV) to "The Theory of Monopolies". The discussion is largely in words, with some geometry; there is no formal math. Nevertheless, Marshall's text had a strong influence on the development of microeconomics thinking – e.g., by Pigou (1920) – that had important implications for antitrust.

In the late 1920s and the 1930s Chamberlin (1929; 1933) and Robinson (1933) further expanded oligopoly theories and formally introduced the notion of (non-oligopolistic) competition among large numbers of firms that produce imperfect substitutes. Chamberlin termed this "monopolistic competition"; Robinson termed it "imperfect competition".

In sum, by the early 1930s there was already an important body of work – stretching back over 150 years – that encompassed the heart of antitrust: monopoly; collusion; oligopoly; competition. Of course, during the subsequent 80 years there has continued to be important intellectual developments in this area of "industrial organization" (IO). It is noteworthy that George Stigler, who began his work in IO in the late 1930s, won a Nobel Prize in Economics in 1982 (13 years after the prize was first established). Subsequent winners of the Nobel Prize whose works are closely associated with IO include John Nash (1994), Thomas Schelling (2005), Oliver Williamson (2009), and Jean Tirole (2014).

The important point is that there is a long intellectual tradition and extensive development in this area. As a reflection of this development and tradition, in addition to the Nobel Prizes, there have been three volumes of the Elsevier Handbook of Industrial Organization,³ and at least four other handbooks (published by three other presses) that include

³ See Schmalensee and Willig (1989a; 1989b) and Armstrong and Porter (2007).

the words “antitrust” and “economics” in their titles.⁴ As a further reflection, the involvement of economists in antitrust cases appears to stretch back to the second decade of the 20th century;⁵ and this involvement increased noticeably in the 1970s and afterward.⁶

B. Consumer Protection Economics.

Consumer protection has had a longstanding place in public policy concerns. For example, Jesus’s reported driving of the merchants and the money changers from the central Temple in Jerusalem appears to have been motivated – at least in part – by his belief that they had turned the Temple into “a den of thieves”.⁷ As another example: “Gresham’s Law” – a 16th century⁸ understanding that “bad money drives out good” – is clearly a form of adverse selection; and, as is often true of an adverse selection process, not only is there the end result of the lower-quality product’s having driven the higher-quality product out of the market, but there is also the intervening process whereby the poorly informed transactors are defrauded. In the U.S., concerns about the adulteration of food and drugs led to the Pure Food and Drug Act of 1906 and the creation of the federal agency that eventually became the U.S. Food and Drug Administration (FDA).

Nevertheless, despite this longstanding policy concern, organized intellectual thinking in economics about consumer protection issues – with the possible exception of the discussions of

⁴ See Buccrossi (2008); Elhauge (2012); and Blair and Sokol (2015a; 2015b).

⁵ An economist testified on behalf of the U.S. Department of Justice in its (ultimately futile) monopolization suit against U.S. Steel; see *U.S. v. U.S. Steel Corp.*, 251 U.S. 417 (1920).

⁶ This is chronicled in White (2010a; 2010b). Kwoka and White (2019, and earlier editions) have provided seven editions of antitrust case studies that have been written by economists who were involved in major antitrust cases.

⁷ Jesus may have also believed that the Temple simply wasn’t an appropriate place for commerce. But the “den of thieves” description also conveys a sense of fraud; but, unless Jesus believed that there was collusion among the (apparently multiple) merchants and/or among the money changers, his concern wouldn’t have been about the absence of competition.

⁸ Apparently there were earlier references to this process (Selgin 2003); see also Macleod ((1858, pp. 476-478); Giffen (1891); Fetter (1932); and Selgin (1996).

Gresham's Law⁹ – only began to develop in the early 1970s: It was then that the first formal discussions – by Akerlof (1970), Spence (1973), and Rothschild and Stiglitz (1976)¹⁰ – of “asymmetric information” appeared, which provided a more rigorous structure for understanding the consumer fraud and consumer protection issues that can arise in the context of asymmetric information.¹¹ These articles spawned a large body of literature – theoretical¹² and empirical – that greatly expanded the scope and understanding of asymmetric information issues and the concomitant consumer protection issues.

Another strand of intellectual development in economics – again, relatively recent – that has enhanced the understanding of consumer protection has been the area of “behavioral economics”: the study of individuals’ empirical behavioral regularities that apparently have psychological bases that aren’t readily fit into the standard economics paradigm of utility maximization (and that also can’t readily be explained by asymmetric information phenomena). Here, starting in the 1970s, insights from Daniel Kahneman,¹³ who (though he is a psychologist by training) shared the Nobel Prize in Economics (with Vernon Smith – see below) in 2002, and Richard Thaler¹⁴ (who received the Nobel Prize in Economics in 2017) have been important.

Arguably, a third branch of economics – the economic analysis of tort law, and the consequent analyses of issues such as strict liability versus negligence standards – also has had

⁹ But these discussions appear to have been focused solely on Gresham's Law and not on the larger issues of asymmetric information and the latter's implications for consumer protection.

¹⁰ For which (along with their other intellectual achievements) Akerlof, Spence, and Stiglitz shared the Nobel Prize in Economics in 2001.

¹¹ The general concepts of “adverse selection” and “moral hazard”, which flowed from the asymmetric information literature, had been understood – and named – in the insurance business as early as the 19th century; see Baker (1996; 2003); Pearson (2002); and Rowell and Connelly (2012).

¹² Including important articles by Oliver Hart and Bengt Holmstrom, who shared the Nobel Prize in Economics in 2016.

¹³ Kahneman did much of his important work in this area with another psychologist: Amos Tversky; see Kahneman and Tversky (1973; 1974; 1979)

¹⁴ See Thaler (1991; 1993; 2015)

consequences for consumer protection issues. Here the analysis started a little earlier – in the 1960s and 1970s;¹⁵ but, again, this is much later than the beginnings of thought about IO issues.

Finally, the field of “experimental economics” – and, again, a relatively recent development – has added the ability to provide “in the lab” experiments that can help understand consumer protection issues and that can provide the forum for testing proposed remedies. Here, Vernon Smith (who began experiments in the 1950s and who began publishing about them in the 1960s¹⁶) has been a major influence; he shared the Nobel Prize in Economics with Daniel Kahneman in 2002.

C. A summing up.

As this brief summary shows, the major developments in organized intellectual thinking in fields that are related to consumer protection economics have occurred substantially later in time than was true for the developments in competition economics. It is surely no accident that a Nobel Prize in Economics was awarded to George Stigler – a prominent IO economist – 19 years before the Nobel Prizes to George Akerlof, Michael Spence, and Joseph Stiglitz for their work on asymmetric information. Further, it is striking – and telling – that there appear to be no published economics handbooks that focus on consumer protection.¹⁷

In sum, the longer tradition in the development of competition economics (and in closely related fields, such as “industrial organization” and applied game theory) – and the

¹⁵ A good case could be made for demarcating the beginning with Ronald Coase’s article “The Problem of Social Cost” (1960) – for which (along with other intellectual achievements, many of them in IO) he won the Nobel Prize in Economics in 1991. Also, the two journals that have been important vehicles for this line of research (as well as for research in law and economics more generally) – the Journal of Law and Economics, and the Journal of Legal Studies – began publication in 1958 and 1973, respectively.

¹⁶ See Smith (1962).

¹⁷ This was ascertained first by entering the words “handbook”, “consumer protection”, and “economics” into a Google search box; and second, by searching the websites of the three main publishers of handbooks in economics: Elsevier; Oxford University Press; and Edward Elgar.

concomitantly shorter period of development in the field of consumer protection economics (and its related fields) – have surely played a role in the greater influence of economics in antitrust policy and litigation.

III. The History and Culture of the FTC.

There have been a number of histories of the FTC; see, for example, Scherer (1990); Winerman (2003; 2005); and Kovacic (2009). It is clear from these histories that at the time of the agency's origins, the intent of the FTC Act of 1914 was to establish an agency that was focused on mergers and business regulation issues. Indeed, the original language of Section 5 of the Act, which establishes the broad powers of the Commission, prohibited “unfair methods of competition”, which clearly had a business regulation orientation. In an important sense, this initial orientation of the agency surely reflected that already-developed body of intellectual thought with respect to competition issues (as did the passage of the Sherman Act in 1890). It was only with the passage of the Wheeler-Lea Act in 1938 that the language of Section 5 was broadened to encompass also “unfair or deceptive acts or practices in commerce” and thereby explicitly bring in consumer protection issues.

Of course, that addition was 80 years ago. Nevertheless, the history and the culture of an organization matter. Those FTC histories make clear that antitrust/competition continued to be considered to be more important – at least through the times when those histories were written.

Similarly, two histories explicitly of economics and economists at the FTC – FTC (2003) and Pautler (2015) – make clear that economists' involvement in consumer protection activities at the FTC came later than for antitrust/competition activities and the economists' involvement has been more limited. Although the history of economists' involvement in FTC matters extends

back to the agency's beginnings, apparently only in the late 1960s did the economists in the Bureau of Economics (BE) begin to become involved in consumer protection matters; and only in 1978 was there a separate Division of Consumer Protection (DCP) established within BE. As of 2015, of the approximately 80 Ph.D. economists that were employed by BE, about 20 were in the DCP.

In addition, the first appointment of a Director of BE – in essence, the Chief Economist of the FTC – who had primarily a consumer protection background rather than an IO background occurred only in 2015 with the appointment Dr. Ginger Z. Jin.¹⁸

Again, history and culture matter. This is an additional reason why economics and economists play a lesser role in consumer protection matters than in antitrust matters at the FTC.

IV. The Splintering of Responsibility for Consumer Protection across Government.

Government antitrust activity is largely centered on the DOJ and the FTC.¹⁹ This concentration of activity has encouraged both agencies to build large staffs of Ph.D.-level economists. At each of the agencies, the number of antitrust-oriented staff economists is currently around 60. Having large staffs of economists has surely helped further the advance of economics thinking in the antitrust area.²⁰

¹⁸ For the IO tradition of the previous BE Directors, see Pautler (2015).

¹⁹ But other federal agencies do have some competition-policy responsibilities: notably, the Federal Reserve for bank mergers; the Surface Transportation Board (STB) for railroad mergers and railroad pricing more generally; and the Federal Communications Commission (FCC) for telecommunications mergers that involve wireline or cellular telephone companies or cable companies. Also, the 50 states (plus the District of Columbia) all have antitrust laws, and their attorneys general occasionally bring their own cases or join the DOJ in bringing cases. For discussions of state-level antitrust activities, see, for example, Feinberg and Reynolds (2010); Feinberg and Husted (2013); Feinberg (2014); and Feinberg et al. (2015).

²⁰ See the discussion, for example, in White (2010a; 2010b).

By contrast, the responsibility for consumer protection is spread across a wide swath of specialty federal agencies. Although the FTC retains broad responsibility in this area, the other agencies with consumer protection responsibilities include:²¹

- Bureau of Alcohol, Tobacco, and Firearms (BATF)
- Commodities Futures Trading Commission (CFTC)
- Consumer Finance Protection Bureau (CFPB)
- Consumer Product Safety Commission (CPSC)
- Employee Benefits Security Administration (EBSA)²²
- Employment Standards Administration (ESA)
- Equal Employment Opportunity Commission (EEOC)
- Federal Aviation Administration (FAA)
- Federal Communications Commission (FCC)
- Federal Deposit Insurance Corporation (FDIC)
- Federal Housing Administration (FHA)
- Federal Reserve System (FRS)
- Food and Drug Administration (FDA)
- Mine Safety and Health Administration (MSHA)
- National Credit Union Administration (NCUA)
- National Highway Traffic Safety Administration (NHTSA)
- Office of the Comptroller of the Currency (OCC)
- Office of Safety and Health Administration (OSHA)
- Pension Benefit Guaranty Corporation (PBGC)

²¹ This is an incomplete list. For example, the Aviation Consumer Protection Division (within the U.S. Department of Transportation) is responsible for consumer problems vis-à-vis the airlines; and the Office of Fair Housing and Equal Opportunity (within the U.S. Department of Housing and Urban Development) is responsible for consumer problems with respect to housing and mortgage lending discrimination. There are surely other, similar, consumer protection offices and bureaus that are embedded within the major cabinet departments of the U.S. Government. For an overview, see Waller et al. (2011).

²² Agencies such as EBSA, ESA, MSHA, OSHA, and PBGC are focused on employment issues and thus might be considered to be involved in worker-protection issues rather than consumer-protection issues. However, to the extent that both sets of issues involve asymmetric information and/or behavioral economics issues, there is surely a great deal of commonality in the underlying relevant underlying analysis.

- Securities and Exchange Commission (SEC)

In addition the 50 states and the District Columbia have the sole regulatory responsibilities for insurance companies (and the concomitant consumer protection issues) and share with federal regulators responsibility for bank regulation; and the attorneys general of these 51 entities play an active role in consumer protection activities generally.

As a thought experiment: Suppose that all of these consumer protection activities were consolidated within a single agency – say, the FTC. (This thought experiment requires a substantial suspension of disbelief, since the specific institutional expertises that are related to these disparate agencies and areas might well be difficult to “corral” and manage within a single agency. Still...) The FTC’s need for attorneys – and for economists – to work on these cases and to develop policy in this overall area would expand greatly. Would anyone doubt that the role/importance of economists and economics in this area would also expand greatly?

V. Conclusion.

Consumer protection is not the Rodney Dangerfield of microeconomics. There have been and continue to be interesting and important developments in consumer protection economics.²³

However, it is understandable that the use of microeconomics for policy development and litigation in the area of consumer protection has lagged behind microeconomics’ use in antitrust:

²³ One venue where some of these developments have been reported on a regular basis (starting in 2002) has been the annual essays that the successive Directors of BE (plus co-authors from BE) have contributed to the Review of Industrial Organization’s annual special issue on “Antitrust and Regulatory Update”, which typically appears as the December issue of the Review; see, for example, Carlson et al. (2017). See also Ippolito and Scheffman (1984); FTC (2003, pp. 134-170); and Pautler (2015, pp. 16-19).

First, the intellectual development of microeconomics as applied to antitrust/competition issues has a considerably longer historical lineage as compared to its application to consumer protection issues. Second, with respect to the relative status of the two branches of microeconomics at the FTC, the history of the FTC shows that competition issues were embedded at the origins of the agency and that its consumer protection mission was a substantially later addition. The history and the culture of an organization matter. Third, the splintering of consumer protection responsibilities among a very large number of federal and state agencies – far beyond just the FTC – has meant that there has not been the all-in-one-agency agglomeration of lawyers and economists that likely would otherwise have encouraged the expanded use of microeconomics in this area.

If this analysis is correct, there are at least two implications: First, elapsed time matters. Consequently, with even more time, the role of microeconomics in consumer protection matters is likely to increase – both in absolute terms and in comparative (with antitrust) terms.

Second, although there is probably little that the consumer protection staff at the FTC can do directly with respect to that widespread splintering of consumer protection responsibilities that was documented above, there are “second-best” actions with respect to the splintering that the staff can take: The FTC has had a long-standing tradition of “advocacy”:²⁴ of advocating pro-competition and pro-consumer policy and legal positions before other federal agencies as well as before state agencies and in amicus briefs in appellate cases. Although consumer protection has been represented in these advocacy activities, the dominant theme has been competition advocacy²⁵ – which, of course, echoes the dominant culture within the FTC more

²⁴ See, for example, Pautler (2015, pp. 82-93). The DOJ has a similar competition advocacy program.

²⁵ See Pautler (2015, pp. 82-93).

generally. It behooves the economists in BE's Division of Consumer Protection – in conjunction, of course, with the attorneys in the FTC's Bureau of Consumer Protection (BCP) – to rethink and expand their efforts to search out opportunities for consumer protection advocacy before other agencies and in amicus briefs.

The expected additional social value from such expanded advocacy in consumer protection areas would surely exceed the additional costs.

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