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Abstract: I criticize two features of the new book by Richard Markovits. One is the notion that ethics or moral judgments should be part of our analysis of antitrust. The other is the notion that market definition is incoherent.

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* William Fairfield Warren Distinguished Professor, Boston University; Professor of Law, Boston University School of Law; knhylton@bu.edu.
I will start this comment with a short story. I attended a highly-ranked law school, but I remember being disappointed often with the quality of analysis offered by many of the law professors when asked questions that did not draw directly from the law casebook. I had assumed, back then, that it may have been because law school tenure standards are, notoriously, generally lower than in many other academic departments, and this was the natural result of a relatively low tenure hurdle.¹ This is not to say that all of the law professors were vulnerable to this criticism, there were exceptions to be sure, but many were. I have come to realize, after many years as a law professor, that there is also a feedback effect. The low tenure hurdle itself positively injures law professors. Relative to their counterparts in some other academic departments (e.g., economics), they are often shielded from serious criticism of their opinions. They submit their papers to journals edited by their own students. They are treated gingerly by their colleagues. The problem only gets worse as you move up in the law school rankings. The experience shows that the worst you can do to a fellow scholar is to refrain from criticism, to heap praise upon him. As a general rule, I try to avoid heaping praise on any scholar for his or her ideas. Ideas are strangers, not friends, to paraphrase Mill, and the long term health of the academy depends on scholars feeling free – if you will forgive the violence of this metaphor – to shoot ideas down.

To be sure, you can take this idea too far. You can criticize in a way that it is in no sense constructive. But it would be even more harmful to prohibit all criticism because of this risk. It is in this spirit that I will discuss Richard Markovits’s new book, Welfare Economics and Antitrust.

I want to criticize two features of the Markovits book. One is the notion that ethics or moral judgments should be part of our analysis of antitrust. The other is the notion that market definition is incoherent.

Let’s start with the problem of ethics. Admittedly, Markovits is correct in intimating that almost every academic issue comes down to normative ethics. The Western academic tradition is one of questioning arguments and opinions, on the basis of normative ethics. In other words, it is not enough to simply learn an art to be an excellent practitioner. The Western tradition has been to go a step further and ask whether the way in which the art is being practiced is socially optimal, or whether the environment in which it is being practiced is ideal. This sets up an obvious

¹ The existence of a relatively low tenure hurdle is only part of the problem, as Cornel West suggested in his critique of legal scholarship. See Cornel West, CLS and a Liberal Critic, 97 Yale L.J. 757, 768 (1988) (“Indeed, much of both the intellectual creativity and theoretical mediocrity of CLS thinkers is due, in large part, to the self-taught character of these thinkers. This character is accentuated by the process by which law students become law professors – a process that provides little time for serious and sustained reflection and research prior to appointment.”).
conflict between Western and Eastern academic traditions that we see being played out in our universities today, but that is a topic beyond the scope of this comment.

The language of economics, and concepts such as consumer surplus, have been associated historically with a move away from discussing government regulation as a matter of ethical values. Adam Smith is an important transitional figure in this regard. Before Smith, it would not be too much of an exaggeration to say, regulation was a question of values. After Smith, regulation became a matter of economic judgment. This has been a change for the better, as now most developed economies are far less likely to impose harsh command and control regulations on businesses – to the point of taking over segments of the economy – than in the time before Smith.

For this reason, I do not think it is a step forward to devote a chapter to the moral basis for choosing among methods of evaluating antitrust policy. It is not that I do not think that this is a potentially interesting question. I am not aware of much research, for example, into the implications of a Rawlsian social welfare function for antitrust policy. Perhaps such a welfare function would generate specific implications that could be distinguished from the standard consumer (or total) welfare approach. For example, perhaps a Rawlsian would put different weights on consumer and producer surplus, and thus be willing to sacrifice $2 of producer surplus for $1 of consumer surplus. I suspect the resulting economic formulae might be more complicated under the Rawlsian social welfare function than under the standard utilitarian wealth-maximization framework, but it may be interesting to see precisely how much more complicated they are. I do not deny that such speculative research might be educational, though I think that in order to be educational it should be executed to the same level of modeling sophistication that is observed in modern economic analysis generally.

However, a study of the moral bases for antitrust regulation that does not generate specific practicable formulae – such as, for example, a prescription to sacrifice $2 of producer surplus in order to recapture $1 of consumer surplus – would risk taking us back into the relatively nonrigorous, speculative, pre-Adam Smith approaches to thinking about the regulation of markets. The open space would be populated by people who do not aim to think as rigorously about the matter as does Markovits. There are, for example, scholars who have complained

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4 See Keith N. Hylton, The Law and Economics of Monopolization Standards, at 95, in Antitrust Law and Economics 82 (Keith N. Hylton ed., 2010).
about the lack of “interdisciplinarity” of antitrust, and by this they mean that antitrust relies too heavily on economics rather than on subjects such as psychology, sociology, moral philosophy, or even feminist theory. It would not be an improvement in antitrust analysis to permit more open moral speculation to lead to such greater interdisciplinarity. Of course, if it were put to a vote within the typical law faculty, a majority probably would reject economic analysis and replace it with a “law and political economy” or “law and moral philosophy” approach to antitrust.

The utilitarian-economic framework on which modern antitrust analysis relies has provided a scientific basis for favoring competitive markets. The First Welfare Theorem holds that a perfectly competitive equilibrium is efficient. This provides a basis for keeping government intervention to a minimum in a competitive environment. To justify government intervention in such an environment, one must show the existence of some market failure that generates inefficiency. Many scholars would push further and add that the inefficiency should be sufficiently great that it justifies the expensive machinery of government. This provides a scientific basis for the modern approach to antitrust.

Of course, some degree of government activity must be allowed, and the First Welfare Theorem implicitly assumes this basic degree of government. Property rights must be recognized and protected, otherwise a competitive market could not exist. Competition must stay within bounds that respect rights to property and physical safety. The First Welfare Theorem is not a scientific ground for the abolition of all government.

Once we step away from this utilitarian-economic framework, and the scientific work that supports it, and assert for ourselves a position in the metatheory clouds looking down upon the economic framework, the basis for making references to the First Welfare Theorem largely evaporates. There are many different moral frameworks from which to draw specific theories of regulation. The utilitarian-economic framework is just one of many, and we can question the psychological grounds on which we should choose the economic framework.

In this metatheory cloud, just about any level or degree of government intervention becomes morally defensible. It opens the door, naturally, to a much broader group of theorists of various

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6 On the new “law and political economy” perspective, see generally id.
7 Questions such as this are raised by empirical efforts to determine the size of some particular inefficiencies. See, for example, Arnold Harberger’s estimation of the welfare costs from monopolization in the American economy, Arnold C. Harberger, Monopoly and Resource Allocation, 44 American Economic Review: Papers and Proceedings (1954), pp. 77-87. The relatively low estimate that Harberger reached, 1/10 of one percent, points immediately to questions about the priorities of government.
stripes to opine on optimal antitrust policy, and to have their opinions given equal weight, by courts and administrative agencies, to those expressed under the economic framework. All of this may sound harmless, and maybe desirable, until we get to the practical endpoint. At that stage it will soon be clear that antitrust policy has fallen under the control of interest groups, not theorists. The interest group that is able to command the most resources will be able to fund a theoretical perspective that advances their interests most effectively. The interest group will almost always be able to find a theoretical platform that seems to appeal to some moral principle. We are observing one endpoint of this process today as the Federal Trade Commission has recently abandoned the consumer welfare test in favor of other ad hoc tests for evaluating mergers or allegedly anticompetitive conduct.8 Mergers in the grocery store industry have generated demands from members of Congress for the antitrust agencies to block them because of an asserted tendency to create “food deserts”.9 From these demands for ad hoc welfare tests will emerge a derivative demand for the creation of theories, other than the utilitarian-economic framework, for the evaluation of mergers and other economic transactions.

The second criticism I have is of the argument that market definitions are incoherent.10 There is a part or kernel of this argument that is valid, and can be traced back at least to Landes and Posner,11 though they did not make the incoherence argument. However, the critique of market definition that follows from their work is actually a critique of the notion of a relevant market for antitrust analysis, and it is not a claim of incoherence. The critique runs roughly as follows: in a sophisticated analysis of market power in relevant markets, it should not matter precisely how you have defined the relevant market. If you define it too narrowly, you will observe large substitution elasticities within that market, offsetting the implications of a narrow scope. If you define it too broadly, you will observe small substitution elasticities, offsetting the implications of a broad scope. Hence, the definition of a relevant market for antitrust purposes is, if done with sufficient rigor, a matter of indifference.12 You could choose the market definition randomly, and because you could choose randomly, there is nothing essentially “right” about any particular definition of the relevant market for antitrust analysis.

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10 In this contention, Markovits aligns himself with Louis Kaplow, Market Definition: Impossible and Counterproductive, 79 Antitrust L.J. 361 (2013).
This argument does not imply that the definition of a relevant market serves no useful purpose for antitrust analysis or that it is incoherent. The definition of a relevant market often serves a purpose similar to that of the duty inquiry in tort law. In both cases – market definition and duty – the court is often trying to determine whether the particular violation complained of is deserving of punishment given the broader goals of the law. In the torts context, courts typically ask whether, in view of the negligence of the actor, it is still socially desirable to punish the actor who was engaged in conduct that society prefers to encourage. For example, courts have relieved rescuers of a duty to take reasonable care for their own safety in the course of a rescue attempt. Courts have relieved actors of a duty to take reasonable care with respect to trespassers on their property. In the same sense, the question of market definition in antitrust invites courts to take a hard look at the plaintiff’s definition of the market especially when the defendant’s activity may be of the sort that society would prefer not to discourage. Alternatively, a court will take a hard look at the plaintiff’s definition of the market when there is reason to doubt that the anticompetitive effects of the defendant’s conduct are sufficient to justify the intervention of antitrust courts or enforcement agencies.

It more or less follows that I do not believe that market definitions are incoherent. The term incoherent strikes me right away as too strong to apply to a concept such as market definition. Obviously, a market can be defined in a mathematical model of the economy – and there would be nothing incoherent about such a definition. The incoherence argument has to do with the actual definition of a market in the real world, where market boundaries often have an arbitrary feel. However, I do not think that the difficulty of defining the boundary of some markets in the real world makes the concept of a market incoherent. Take, for example, the U.S. v. Microsoft case, where the court accepted a market defined as intel-compatible operating systems, excluding Apple’s operating system. The court’s market definition in Microsoft seemed obviously too narrow. However, it does not appear to be a case in which market definition is an incoherent exercise. Even if the market were defined more broadly to include Apple, the broader definition by itself would not have changed the court’s analysis. And, unfortunately for observers who would prefer to replace market definition with evidence of price effects, there were no upward price effects in the Microsoft case – Microsoft sold its operating system at a relatively low price in order to earn revenue from its desktop applications.

In the end, I think there is a fair empirical question whether market definition is an issue that generates so much expenditure in litigation that society might be better off if the whole issue were scrapped. But that is not the same thing as saying that the process of market definition is

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incoherent. The difference between these questions is the difference between an essential flaw and an empirical critique. Market definition in antitrust litigation may be, on an empirical basis, socially undesirable, but that would have to be demonstrated by showing that its costs outweigh its benefits.