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Woodstock Antitrust

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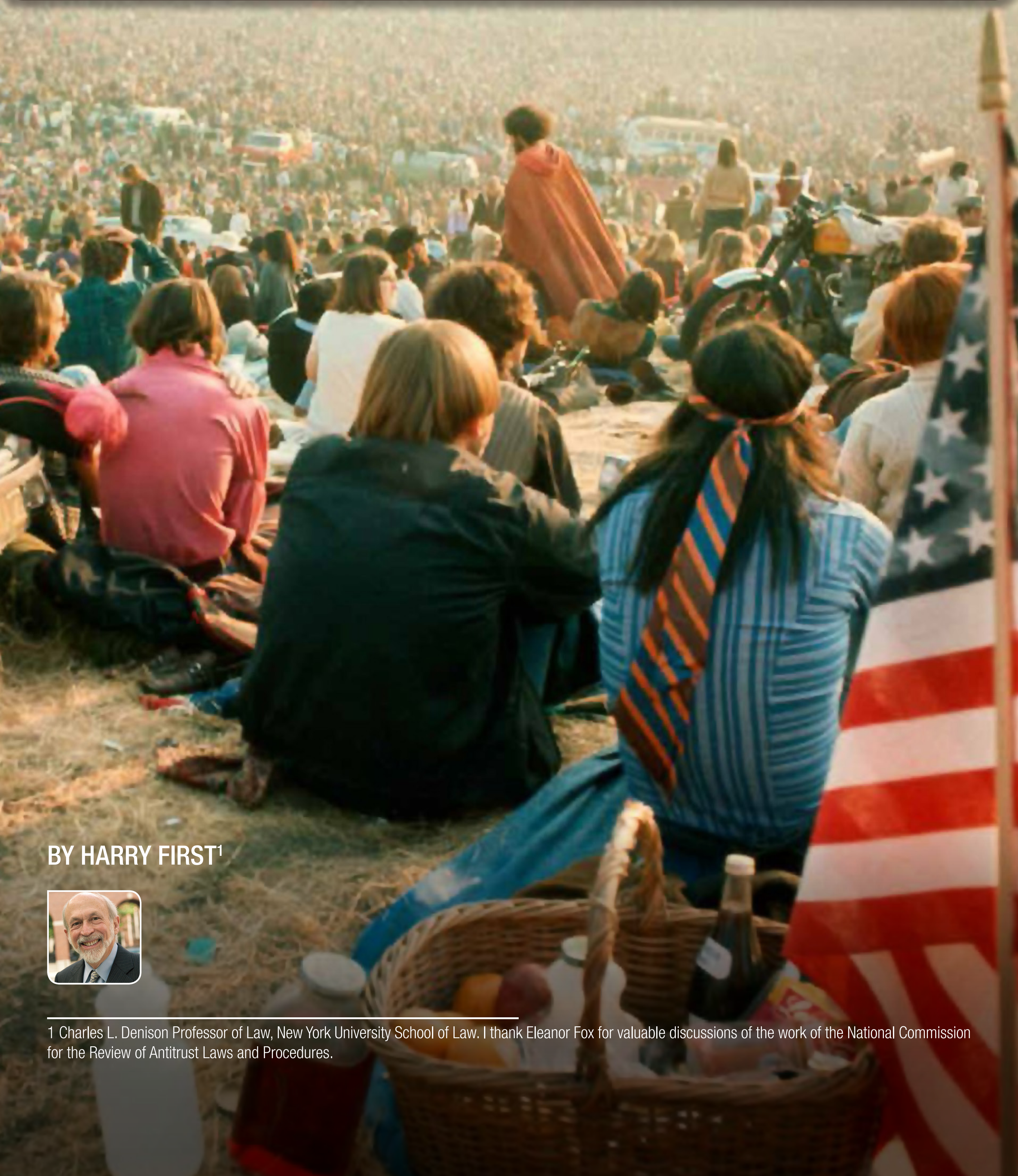
WOODSTOCK ANTITRUST



BY HARRY FIRST[1]

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I. INTRODUCTION

Some years ago I was at a conference giving a paper that I co-wrote with Peter Carstensen. The topic of the paper was *Topco*. In the paper we argued that the Supreme Court in fact decided the case correctly, even if the opinion was written in broader strokes than we might have liked. The Court got it right because it saw that Topco was a cartel of retail grocery chains trying to use its private label to keep each member out of the other's backyard. The exclusive territorial scheme Topco embraced was not necessary to produce a private label, as Topco tried to argue, but it did act as a mechanism to allocate territories among potentially competing grocery chains.[2]

Topco, of course, is one of the Chicago School's "noiriest" *bête noires*, topped only by *Von's*, and our paper drew some criticism from conference participants. The criticism I remember most, however, was a statement by one of the participants that the paper reflected "Woodstock antitrust." I responded that I took this as a compliment, not a criticism, and that I embraced the label. Of course, the comment was not made as a compliment, but as an epithet to brand the paper as extreme.

So, too, with "hipster antitrust," an epithet now being used to brand some of the recent critiques of current antitrust as extreme, unmoored from correct antitrust doctrine and approaches. Perhaps not coincidentally, both labels connect antitrust to a broader social moment, each of its time. In this sense, both labels are indicative of those unusual times when antitrust comes out of the legal and technical shadows to have broader political and social salience. Most times antitrust stays quietly in the shadows.

I leave to others the task of defining hipster antitrust, let alone defending or criticizing it. What I would like to do is to describe Woodstock antitrust. I offer this vision not only to evoke that particular time, and remind us what was on the table then in terms of antitrust, but, dare I say, to suggest that we take a new look at some of those proposals. Hipster antitrust may turn out to be tamer by comparison.

II. SMALL IS BEAUTIFUL

When did Woodstock antitrust flourish? I would date it from 1969 to 1979, 1969 for the date of Woodstock itself, but also for the filing of five cases by the Justice Department challenging conglomerate mergers. I give Woodstock antitrust a decade's run, ending when the National Commission for the Review of Antitrust Laws and Procedures ("NCRALP") submitted its Report. The Report recommended that Congress "undertake an inquiry" into strengthening the Sherman Act to deal with "persistent monopoly power" by adopting a "no fault" approach to Section 2 liability, but it did not fully endorse the proposal and nothing ever came of the recommendation.[3] Ronald Reagan was elected in 1980, and antitrust went in a different direction.

Much of what went on in antitrust during the Woodstock decade was aimed at corporate size. And, in defiance of today's view of political leanings, much of it was done in Republican administrations (six of the ten years). Imagine a Republican Attorney General today saying what John Mitchell said in 1969: "I believe that the future vitality of our free economy may be in danger because of the increasing threat of economic concentration by corporate mergers. . . . The danger that this super-concentration poses to our economic, political and social structure cannot be overestimated."[4]

What united the frolickers at Woodstock and the bond lawyer turned Attorney General? If there were anything that could link the two it would be a fear that powerful institutions — government and business — had grown too large and threatened personal freedom. This wasn't necessarily the freedom to get a better deal as a consumer, but the freedom to make personal choices not controlled by big institutions. Paraphrasing the words of a popular book of the time, small was beautiful.[5]

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2 Carstensen & First, *Rambling Through Economic Theory: Topco's Closer Look,* in Antitrust Stories 171-203 (Fox & Crane, eds., 2007).

3 Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures viii-ix (1979).

4 See Speech to Georgia Bar Ass'n, ATRR No. 413, pp A-2, X-9 June 10, 1969.

5 See Schumacher, *Small Is Beautiful: A Study of Economics As If People Mattered* (1973).

III. NO-FAULT MONOPOLIZATION

High on the list of Woodstock antitrust's effort to deal with corporate size and power was an attempt to use Section 2 to reach durable monopoly power, not just bits and pieces of conduct that might contribute to the maintenance of a monopolist's position. There was a frustration with targeting particular acts, which led to endless trials and would most likely end only with stopping those acts themselves. If monopoly in itself was bad, why not deal with that more directly?

The idea of no-fault (or no-conduct) monopolization began to gather steam in 1969 with its endorsement from Donald Turner, who argued that a firm should be held to have unlawfully monopolized a market "simply by obtaining and retaining monopoly power over a substantial enough period of time to indicate that its power is relatively impervious to competitive erosion."[6] Oliver Williamson in 1972 began a Harvard Law Review article by stating that "[a]ntitrust policy has long been plagued by the problem of continued dominance of an industry by a single firm which has obtained its position by lawful means."[7] He saw this as a form of market failure, leading not only to resource misallocation and output reduction, but also to providing "an excuse for bigness in other spheres of economic and political activity–to the possible detriment of the public." He argued for "government intervention to upset this condition."[8]

In 1976 Senator Philip Hart introduced a no-fault bill embodying Turner's approach. Titled the "Monopolization Reform Act of 1976," Hart's bill would have removed the defense of "superior product, business acumen, or historic accident" in government monopolization cases but would have allowed a defense to divestiture where divestiture would result in the "loss of substantial economies of scale."[9] Hart introduced the bill with this: "I think it can be said that we must soon decide if we are going to continue the slide toward bigger and bigger firms and more Government control or give competition one more try."

The Areeda-Turner treatise in 1978 continued to press the argument for dealing with "monopoly status" rather than expending effort in examining the business history of persistent monopolies to look for examples of exclusionary behavior: "The evils of monopoly are largely independent of the manner in which it is achieved or maintained. Even innocently obtained monopoly can and likely will produce monopoly pricing."[10] John Flynn subsequently pressed NCRALP to consider a no-conduct proposal as part of its review of the antitrust law and procedure. Flynn argued the need for efficient government structural monopolization litigation that could focus on the heart of the matter – the existence of monopoly power – and not get bogged down in a lengthy trial of every aspect of the history of the defendant's industry and all of the defendant's actions. "The central issue in such cases," Flynn argued, "should be that posed by Senator Hart: 'Does the defendant have a degree of economic power which should no longer be accepted in a competitive economy?'"[11]

Flynn gave a number of examples of government monopolization cases that were "plagued" by massive litigation, but the one that was front and center at the time was the *IBM* litigation, a case that spanned the Woodstock era. Brought in 1969 and eventually settled in 1982, Robert Bork polemically dubbed it "the Antitrust Division's Vietnam," the perfect way to tar what Bork saw as a misguided government effort.

But Flynn's argument was not that such cases were wrongly brought. It was that monopoly power should be all that the government need prove where monopoly was persistent. In fact, the litigation effort masked the more difficult problem in such cases — remedy. Pointing out that "inadequate attention" had been paid to remedy, Flynn argued that the result was "frequent failures to achieve structural remedies for a structural violation, occasional reliance upon complex behavioral decrees requiring ongoing judicial and enforcement agency supervision, and the outbreak of renewed litigation seeking further relief."[12] No, Flynn was not talking about the yet-to-come *Microsoft* litigation, but he did put his finger on a Woodstockian problem that resonates in today's efforts against dominant firms: How do you repair things and make changes that will really matter?

6 Turner, *The Scope of Antitrust and other Economic Regulatory Policies,* 82 Harv. L. Rev. 1207, 1217 (1969). He would have excepted a firm whose size was attributable to scale economies or whose power was attributable to unexpired patents, id.

7 Williamson, *Dominant Firms and the Monopoly Problem: Market Failure Considerations,* 85 Harv. L. Rev. 1512 (1972).

8 Id. 1514-15.

9 S. 3429, 94th Cong., 2d Sess. (1976), reprinted [§4; remove the *prima facie* effect under CL5].

10 3 Areeda & Turner, Antitrust Law ¶ 614 at 35 (1978).

11 Statement of John J. Flynn, 48 Antitrust L.J. 845, 853 1979.

12 Id.

Flynn's arguments to the Commission did get no-conduct monopolization on its agenda. There was a series of relatively restrained recommendations relating to "improvements" in structural relief, as well as a recommendation that "appropriate Congressional committees" should examine how to strengthen the Sherman Act to deal with "persistent monopoly power."[13] The text of the Report rehearsed the arguments over no-conduct monopolization at some length, but the Report was clearer with regard to structural relief in general: "[T]he Commission concludes that structural relief should be the preferred remedy whenever a violation of Sherman Act Section 2 or Clayton Act Section 7 has been found."[14]

IV. CONCENTRATION AND THE OLIGOPOLY PROBLEM

Concern for concentrated economic power extended beyond durable monopolies. The even more intractable problem for antitrust was oligopoly, particularly tight oligopoly that achieved monopoly-like results without overt collusion. Turner in 1962 had tried to thread the needle between "pure oligopoly" pricing, which he felt Section 1 couldn't reach, and other settings for oligopoly pricing that he thought Section 1 could reach (such as the industry-wide use of a particular pricing system).[15] However useful this effort could be for individual cases, it could not really tackle oligopoly as a structural matter. These efforts were left to Woodstock antitrust.

One legislative approach was the Industrial Reorganization Act that Senator Hart introduced in successive Congresses between 1972 and 1975.[16] This proposal would have made it unlawful for any corporation "or two or more corporations" to possess monopoly power "in any line of commerce in any section of the country." How would monopoly power be proved? The bill provided for a "rebuttable presumption" of monopoly power in three circumstances: 1) for a single firm, if the average rate of return on net worth after taxes exceeded 15 percent over 5 of the 7 years preceding the filing of suit (take that Apple!); 2) if there had been no substantial price competition among two or more corporations "in any line of commerce in any section of the country" for 3 of the 5 years preceding the filing of suit (take that airlines!); or 3) if four or fewer companies have at least 50 percent of sales "in any line of commerce in any section of the country" in 3 of the 5 years preceding filing of suit (take that Facebook and Google for online advertising!).

The proposed Act was brief when it came to the substantive standards for liability — it did not explain how a defendant could rebut the presumption of monopoly power, for example — but it was fulsome in its enforcement provisions. Fulsome and ambitious. Prosecutions for violations of the Act, and orders for reorganizing companies found to be in violation, would be adjudicated before a new "Industrial Reorganization Court" composed of 15 Article III judges appointed by the President with Senate confirmation.[17] Prosecutions would be brought by a new "Industrial Reorganization Commission," to last 15 years, after which its duties would transfer to the FTC. This Commission would not only have the power to enforce the Act but also a mandate to study a group of eight industries (including, for example, "electronic computing and communication equipment" and "chemicals and drugs") and develop a plan of reorganization for each without regard to whether any of the corporations in those industries were violating the Act. The Commission was to report the status of each study and plan to Congress every other year, with appropriate legislative recommendations.[18]

A deconcentration effort of the type proposed in the Industrial Reorganization Act was always going to be a heavy lift, of course. Perhaps litigation under current law would be more tractable? The FTC gave it a go in two shared monopoly cases brought during this period, one in 1972 against the six leading ready-to-eat cereal manufacturers, the other in 1973 against the eight major gasoline refiners in the United States. Both cases sought to attack the two industries in structural terms. The cereal makers, the Commission alleged, "have maintained, and now maintain a highly concentrated, noncompetitive market structure" resulting in a $100 million "monopoly overcharge" in 1970 on sales of $740 million.[19] The oil companies, the Commission alleged, had "maintained and reinforced a noncompetitive market structure," pursuing a "common course of action" to "abuse and exploit" their ownership and control of crude oil, thereby forcing "American consumers" to pay "substantially higher prices"

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13 NCRALP Report at vi-viii.

14 Id. at 119. For a vigorous defense of a no-conduct approach in appropriate cases, see Separate Views of Commissioner Fox, id. at 339-47.

15 Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal,* 75 Harv. L. Rev. 655, 673 (1962).

16 See S. 1167, 93d Cong., 1st Sess. (1973).

17 Id. § 271.

18 See id. § 203 (a) (4).

19 *In the Matter of Kellogg Co.*, 99 FTC 8 (1982).

for gasoline than they would have in a competitively structured market.[20] Neither case proved particularly tractable, though, and both ended up being dismissed once the Reagan administration came to power.

Another way to deal with oligopoly and increasing concentration was to use merger law to stop such growth before it occurred, the avowed goal of the 1950 Amendments to Section 7 of the Clayton Act. This approach bracketed the Woodstock decade.

As mentioned above, the Woodstock decade began with the Justice Department's attack on the major conglomerate firms of the time. Five Section 7 suits were filed, three against ITT, one against LTV, and one against Northwest Industries.[21] These cases tried to push beyond conventional theories focused on same-market effects to theories examining strategic behavior across markets (for example, reciprocity); but they also advanced the view the mergers violated Section 7 because of a resulting increase in "aggregate concentration" (the concentration of productive assets generally in the hands of fewer firms), which, the Justice Department urged, would lead to a "lessening of competition" in numerous (but undesignated) lines of commerce in the economy. The cases met an untimely death, though, killed by Richard Nixon on the eve of Supreme Court review when he ordered the Justice Department to withdraw a pending appeal and settle the cases.

The decade ended with one last effort to stop merger growth, Senator Edward Kennedy's "Small and Independent Business Protection Act."[22] This proposal would have banned large-firm mergers where each firm had sales or assets exceeding $2 billion (roughly $7 billion in 2018 dollars) and would have made presumptively illegal any merger where both firms had sales or assets exceeding $350 million (roughly $1.3 billion in 2018 dollars) or where one firm had sales or assets exceeding $350 million and the other firm had 20 percent of sales "in any significant market" in the year preceding the acquisition. Unlike Hart's Industrial Reorganization Act, Kennedy's bill provided that the presumption might be rebutted on a showing that the transaction would have the "preponderant effect" of "substantially enhancing competition" or would result "in substantial efficiencies."[23] But there was no rebuttal for mergers where both parties had assets or sales exceeding $2 billion, a figure that would have covered approximately 300 U.S. corporations.

V. FAIRNESS

One target of Woodstock antitrust was the Sperry & Hutchinson Company, seller of S&H green stamps. Trading stamps were a big deal in the 1960s — 400 billion stamps issued in 1964 on $40 billion in retail sales — and S&H was the largest of the trading stamp companies, with annual gross receipts of over $300 million and 40 percent of the market. The essence of the Commission's case against S&H was that S&H had unfairly placed restrictions on stamp redemption and had suppressed the efforts of independent stamp exchanges that had grown up to allow stamp holders greater freedom to get value from their stamps.

The FTC's prosecution resulted in a 1972 Supreme Court decision giving the Commission broad power to proceed against practices it judged unfair: "[T]he Federal Trade Commission does not arrogate excessive power to itself if, in measuring a practice against the elusive, but congressionally mandated standard of fairness, it, like a court of equity, considers public values beyond simply those enshrined in the letter or encompassed in the spirit of the antitrust laws."[24]

The Commission's opinion, however, hadn't asserted the sweeping power to advance "public values" that the Supreme Court said it could. Rather, the Commission had focused on freedom of choice — the freedom of consumers to dispose of stamps as they wanted and the freedom of merchants to offer to redeem stamps for goods. The Commission had lots of specific examples of S&H's efforts to suppress freedom of choice. Military personnel left the United States and wanted to sell their stamps, but couldn't. Some consumers didn't have cars and couldn't easily get to a redemption center, but S&H allowed mail redemption only if you lived more than twenty-five miles from a center. Some consumers preferred

20 *In the Matter of Exxon Corp.*, 98 FTC 453 (1981).

21 See *United States v. International Telephone & Telegraph Corp. (Grinnell)*, 324 F.Supp. 19 (D.Conn. 1970), appeal dismissed 404 U.S. 801 (1971); *United States v. International Telephone and Telegraph Corp. (Canteen)*, 1971 Trade Cas. ¶ 73,619 (N.D. Il1.1971); *United States v. International Telephone & Telegraph Corp. (Hartford),* 1971 Trade Cas. ¶ 73,666 (D.Conn.1971); *United States v. Ling–Temco–Vought, Inc.*, 315 F.Supp. 1301 (W.D.Pa. 1970) (consent judgment entered); *United States v. Northwest Industries, Inc.*, 301 F.Supp. 1066 (N.D.Ill.1969) (denying preliminary injunction).

22 S. 600, 96th Cong., 1st Sess. (March 8, 1979).

23 Id. § 3 (a).

24 *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244 (1972).

using their stamps at stores that would accept them instead of cash so that they could get goods they preferred. But S&H wouldn't allow it, even when food stores wanted to provide food for the needy who lacked cash but had stamps.

Unfairness it was, but unfairness that could be cured by competition, specifically, the competition that independent stamp exchanges provided to S&H's closed system of redemption centers. As to these small companies, the Commission wrote that S&H had "monopoly power" over them in the sense that they couldn't stay in business if they couldn't deal in S&H stamps. S&H's actions "tended to eliminate the operations of a whole class of businessmen" who had been providing a "useful and valuable function." Who says antitrust doesn't protect small business?

VI. ECHOES OF WOODSTOCK

Today's efforts to expand antitrust's reach in some ways seem pale in comparison to Woodstock antitrust. The proposed "Merger Enforcement Improvement Act of 2017" would have provided more post-merger information to the federal agencies regarding the effects of merger remedies and would have studied the possible impact of institutional investor cross-ownership of competing companies in concentrated industries, worthy goals but hardly revolutionary. The "Consolidation Prevention and Competition Promotion Act of 2017" would have gone substantially further than current law in prohibiting large mergers and mergers that increase competition, taking an approach similar to Kennedy's 1979 proposal, although fewer companies would have been covered. Apart from those two proposals, though, and unlike Woodstock antitrust, the effort to expand antitrust has taken place almost exclusively as an opposition movement, not one embraced by enforcement agencies or legislators.

But my goal in describing Woodstock antitrust is not to draw invidious comparisons to current efforts, or even to argue that Woodstock antitrust was a great success. Indeed, the concrete efforts described above did not change antitrust law and ended up falling of their own weight. No statutory changes and no deconcentration measures were enacted, shared monopoly prosecutions and attacks on conglomerate mergers were abandoned, no-conduct monopolization was forgotten.[25]

And yet, Woodstock antitrust echoes today. Freedom is still a North-star for antitrust policy, and the Supreme Court still quotes *Topco*'s parallel between the Bill of Rights' protection of personal freedoms and antitrust law's preservation of economic freedom.[26] The findings of the proposed Industrial Reorganization Act that competition "preserves a democratic society" and an "opportunity for a more equitable distribution of wealth" are echoed in the findings of 2017's proposed Consolidation Prevention and Competition Promotion Act that competition "reduces economic inequality" and that undue concentration undermines "the health of democracy in the United States."

In addition to Woodstock's emphasis on freedom, I take three other messages from the echoes of Woodstock. First is the importance of remedy to any plan for improving antitrust. No-fault reminds us of this issue. Second is the importance of distributional goals. Monopolies and tight oligopolies were condemned for overcharges, and overcharges can have distributional consequences, harming those marginalized by price increases.[27] Even if a deconcentration program is no more likely today than it was in the Woodstock decade, antitrust can still make a difference if we pay more attention to exploitation and excessive pricing. Third is the importance of politics to antitrust. Changing political winds wrecked many of the efforts of the Woodstock decade, from the ITT prosecutions to the FTC's shared monopoly cases. Efforts to redirect antitrust today won't succeed without political connection. Say what you will about Hipster antitrust, it has connected to broader political concerns, and that is for the good.

A slogan of the Woodstock decade was "Power to the People." It still works for antitrust, "Right On."

25 For a thorough discussion and critique of many of the efforts of this period, see Kovacic, *Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration,* 74 Iowa L. Rev. 1105 (1989).

26 See *N.C. State Bd. of Dental Exam'rs v. FTC,* 135 S. Ct. 1101, 1109 (2015).

27 See Van Loo, *Consumer Law as Tax Alternative,* __ N.C.L. Rev. __ (2018), https://ssrn.com/abstract=3090800, at 6 (estimating that "removing overcharge [throughout the economy] would reduce the top households' share of income from 20% closer to 15%").