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Biden's Corporate Dilemma II: Future of American Capitalism

By Adam Garfinkle

SYNOPSIS

American media appears to have missed by far the biggest story of the still-young Biden administration: The commencement of the most portentous debate over American capitalism in more than a century.

COMMENTARY

BEYOND ITS politics, the core of President Joe Biden's 9 July Executive Order on Promoting Competition in the American Economy is about the rule of law — antitrust law — to be specific. How appropriate, really, for what Samuel Huntington once aptly described as a Tudor republic, a republic of law and parties.

Since the first signal US antitrust legislation passed the Sherman Antitrust Act of 1890, Congress and the courts have struggled to adjust the antitrust regulatory framework to changes in the American political economy. Episodes of activism surfaced mainly when plutocratic abuses burst into political salience, as they famously did around the turn of last century.

Serious Policy Debate On Economy

Such a moment has again arrived; it is a special one that combines heightened perceptions of corporate abuse, associated mostly with Big Tech in the public mind, with a sense of persisting economic doldrums for average income-cohort families.

Discontent over sub-meritocracy wage growth stagnation, "cost disease", consequent inequality growth and stunted social mobility now dominates serious policy debate over the American political economy. Anti-competitive corporate behaviours and either

feeble or counterproductive administrative-state efforts to combat them are presumed to be a key source of the problem.

While the angst is well distributed, its political voice resides mainly within the Democratic Party. That voice has taken a particular shape, with a notably sharp edge, in the still-young Biden administration.

The history of American antitrust illustrates a bias at the heart of the evolved regulatory framework that the courts have relied on consistently for guidance: “pro-consumer welfare”. But the pro-consumer bias, which boils down to the utilitarian judgement that low prices are good, is a pragmatic bias, not a conceptually coherent legal principle.

Big Tech: Good or Bad for Consumers?

The gap between the two shows when, for example, Google and Amazon deploy their big-data information clout and platform dominance to squelch competition; but Google provides many services for free thanks to the offsetting power of its advertising revenue flow, while Amazon sells a lot of stuff for cost or less to gain market share at the expense of aspirant competitors.

So are these Big Tech giants good for consumers or bad? Good in the short-term but perhaps not so good in the longer term? Tough call.

A pro-consumer bias in antitrust made sense when basic scarcity was real enough and a developmentalist-inflected culture put its highest premium on the growth of material possessions. Note, however, that the pro-consumer bias has seen high wage levels as objectively problematic because they make goods and services more expensive.

As bizarre as it sounds now, that is why the courts’ first main target set after passage of the Sherman Antitrust Act consisted not of corporate cartels or even mergers but of attempts at union organising.

American culture is now far from the end of the 19th century. Remedies for the protection of labour, notably the right to collective bargaining, have been developed outside the antitrust framework. But American courts have remained reluctant to slap the Big Tech (or Big Pharma or Big Ag....) companies down for their anti-competitive strategems.

For example, in late June a Federal court threw out a suit brought by the Federal Trade Commission (FTC) and some state attorneys-general against Facebook, claiming that the FTC had failed to show that Facebook acted as a monopoly.

New Legal School of Thought?

The courts seem to lag ever further behind technology-driven shifts in market structures that exacerbate threats to fair competition, and new pro-egalitarian cultural norms that make the consequences of those shifts less tolerable. One result is that a new legal school of thought now explicitly questions the pro-consumer bias ensconced in US antitrust jurisprudence.

The Neo-Brandeisian school, named after Justice Louis Brandeis's famous antipathy to monopolistic impulses, doubts that lots of people continuously acquiring more low-cost stuff is really the best, or only legally valid, measure of a healthfully competitive capitalist economy.

It credits recent studies showing how industry consolidation simultaneously depresses working-class wage levels and helps engender higher costs in key sectors, the two effects taken together engendering a onerous middle class "squeeze" and growing inequality.

For Neo-Brandeisians the ethical implications of market structures override any broad-brush or statistical measure of supposedly objective economic efficiency; their detractors see ideology over science at work and raise the spectre of stealth politicisation of antitrust law. At base, the burgeoning debate is equal parts political and philosophical; as such it is dead serious and it's here to stay, for a while at least.

Anti-Merger, Anti-Low-Cost

The *enfant terrible* of the Neo-Brandeisian surge, sometimes called "hipster antitrust" by detractors, is none other than the current FTC chair who stood by the president's side on 9 July: Lina Khan. Khan, a 32-year old Pakistani-born, Yale-trained lawyer, electrified the antitrust legal fraternity four years ago with an essay in the *Yale Law Review*.

Several of Khan's senior colleagues today in the Biden administration's economic policy offices share her views which, to simplify, are generically anti-merger and anti-low-cost, regardless of economic sector.

The tempest caused by Ms. Khan's 2017 arguments has since become a howling storm with the Neo-Brandeisians' sudden rise to government tenure. A fuselage of criticism against them has recently emerged from nearly every American conservative organisation one can name. Most of it smells like stale cordite. But the criticism is notably broader than that.

The long-reigning dean of American antitrust law is acknowledged to be Professor Herbert Hovenkamp of the University of Pennsylvania's Wharton School and Law School. Hovenkamp, who served in both the Clinton and Obama administrations, is hardly kneejerk pro-corporate.

For example, he recently argued that the FTC's dismissed case against Facebook shows the inadequacy of current law in the case of the tech giants, and suggested that the FTC file an amended brief.

American Capitalism At Stake?

But Hovenkamp was no fan of Ms. Khan's essay. He commented in 2018 that her arguments are "technically undisciplined, untestable, and even incoherent". Nor is he enamoured of the Neo-Brandeisian school which, if it gets its way, he believes will hurt more than help poorer, marginalised communities and thus in due course constitute political suicide for the Democrats.

What matters for now isn't just who is right on the scholarly or policy merits. What matters is that President Biden's 9 July EO, read closely and put in political context, reveals the launching into a new orbit of a critical debate over antitrust law.

The implications for the future of American governance at its political-economic core can barely be overstated. The ultimate viability of American capitalism, with its huge global significance pulled in train, is at stake.

This, not details over American airline giants nicking passengers with hidden baggage fees, or how much less prescription meds may soon cost, marks the true significance of that EO. Alas, the great institutions and sages of American journalism have so far missed it almost completely.

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