

What Happens Next – 8.15.2021
Fighting Dogmatism in Politics, Future of Antitrust
Josh Soven QA

Larry Bernstein:

There used to be this Chicago school of antitrust theory where all we needed to focus on was the consumer experience. And big tech can rely on that what they're offering is a superior product from the consumer standpoint and their attacks are coming from other firms who feel like they're losing the battle. Why has the Chicago school of consumer welfare losing the metric debate?

Josh Soven:

It's a really important question. So let me tweak your premise just a little bit. Some members of the Chicago school liked that approach, others didn't. But I think the key point actually is all schools today, Chicago, Harvard, et cetera, neo-Chicago, everybody agreed on what you're describing as sort of the consumer welfare standard, where the focus of antitrust was on whether prices were going up to consumers, innovation was going down, services would go down and lots of other concerns like labor and market structure and diversity, none of that was really in the mix. It was just huge consensus on this consumer welfare standard for a variety of reasons. What's going on, and I think it's largely driven by the focus on big tech, is in order to bring a successful antitrust enforcement action under the consumer welfare standard. You usually have to prove that prices are going up to a customer.

I always knew I had a winner, usually, when I worked at the Justice Department, when the documents said, look, we think we're going to raise prices, or this company we want to buy is constraining us from raising price. The government wins those cases. The challenge, if you think it's the right move to go after a lot of these technology companies, is that they're lowering prices through the floor and in some cases charging nothing.

I don't represent Amazon. I'll focus on Amazon a bit. Amazon, no question for many of the products they've sold have dropped price, a lot, and, not just in terms of nominal price, but access to products and the like. What the new guard wants to do is they need a way to go after Amazon and they can't show that prices are going up. What they've advocated is for a much broader approach, which sort of looks not just at effects on consumers, but effects on other businesses. With the intuition being that even though consumers are benefiting in the short term, they'll lose out in the long term if Amazon drives a lot of businesses out.

Let's drill down on Amazon. And on this program, What Happens Next? We've covered Amazon in all sorts of ways. And we had Brad Stone speak about his new book, Amazon Unbound. We've talked about different areas where Amazon has provided innovation, particularly in logistics. But I guess what's... The chairwoman, Lina Khan of the FTC, has spoken in her academic writings, for her opposition to Amazon. And it seems that Amazon is going to face the wrath of Khan, if you will. A little Star Trek reference there.

You can go on Amazon marketplace and they offer products by rivals of Amazon. I've always found Amazon's decision to include products from third parties from other retailers in

competition to their sales program is both revolutionary and shows strength, not weakness. You don't go to Walmart and there's a Target section in the store. What is it about Amazon that really gets in Lina Khan's craw? Why does she want to stop Amazon from growing? Why does she want to limit the ability of Amazon to manufacture clothes and sell their products or diapers on their websites? What is it about that sort of institution that bothers the progressive movement?

Josh Soven:

It's a couple of things. In the article where she became quite prominent, she writes very clearly that Amazon has produced very substantial benefits for consumers today. She doesn't dispute that. She acknowledges it. Her concern is that the company has become so important. And in her view effectively a utility for e-commerce that if Amazon is allowed to continue to expand and continue to grow and branch out into new lines of business and use its cash from its web-based services to drive the drop price on other products, that sooner or later, or medium-term what's going to happen are two things. One, you're going to drive out competitors to the point where Amazon has sufficiently little competition that they'll be able to raise price. But two, and this is also a point that Tim Wu picks up on, you're going to have a lack of economic diversity in the market. And that's a harmful thing for the economy and it's a harmful thing for democracy.

And her point is that if you look at the origins of antitrust, and like all legislative statutes, it's a bit opaque, there was a much broader set of objectives at play there than whether we get a fantastic price on a book and we get it to our delivered to our house in three hours. And that allowing Amazon to massively expand is going to damage those other interests. To your point about how one puts that into an enforcement framework, that's one of the practical issues I was talking about where it remains to be seen, whether they can pull that off. And it's also why I think there're some doubts they can pull it off, which is why people are interested in regulation.

Larry Bernstein:

Years ago, people questioned why Microsoft didn't have a Washington office so that they could be heard in the aisles of Washington. And what surprised me, this time, was that some of these large tech firms decided to play from one side of the political aisle. I'm thinking particularly of Facebook and Amazon with Bezos's decision to buy the Washington Post and use it as a platform to attack the Republicans. And in that aspect, they've angered and pissed off senior members of the Republican leadership, who would be their natural allies against enforcement actions and changes in regulations of big tech. Why do you think big tech decided to take on the Republican party, and now they find themselves being challenged from both sides? And why didn't their endorsement of Democratic party ideals ingratiate themselves with the progressive wing of the party? And why, despite that, have the progressive decided to attack big tech?

Josh Soven:

We're a little out of my field of expertise. I'll sort of qualify that I'm giving you my own take on this. Microsoft had the benefit of operating in a political environment that was much less highly charged than it is today. Many people in Redmond, in 1998, when a Democratic administration

was going after them, we're on the political left. But no one really knew about it, and it was just a different time today. Every email that someone may have written inside one of these companies is potentially available. And the model is such that politicians are much more tuned to what these companies are doing than they were to Microsoft, in part, just because their communication devices in a way that Microsoft was not.

Any form of sort of mens rea, or cognizable political strategy, to benefit one party or the other. Each of the executives were grilled in front of the House Judiciary Committee on this topic, and they honestly said, we've got nothing to do with this. Bezos bought the Post, but I don't think that's part of a political strategy for his company.

But the reality is that they are now caught up in this discussion where certainly the Republican party clearly is concerned about their views and how they might run their companies with respect to politics. And, I suspect, just as Microsoft over time developed a more comprehensive strategy to think about messaging on these topics that's what these other companies are going to do. In the work I've done, I have not seen an effort to swing the companies one way or another. I think, part of what's going on is they've largely, the people doing the work, are keeping their heads down and just kind of working on their stuff. And they got caught up in a political dynamic that they did not anticipate.

Larry Bernstein:

We had David Weil on the show a few weeks ago. David currently runs a department at Brandeis, and he has been nominated, I believe, to go back to the same job he had in the Obama administration, which was in the Department of Labor. Wage and Hour Wage division. Weil is opposed to the gig economy and doesn't like the fact that technology companies like Uber and others don't directly hire employees. This is true of Amazon logistics as well. That they use third parties who use Amazon trucks to deliver goods. Or an Uber example, they're independent contractors. And this limits the ability of the government to force Amazon or Uber to enforce labor rules. I recognize this is a little bit out of the antitrust area, but in some ways it reflects sort of an antagonism towards technology and big tech and the gig economy?

Josh Soven:

It's one of the reasons why, whatever your intentions and your views about regulation, it's going to be challenging to do. For example, Ms. Khan, Mr. Wu, lots of other people, have really criticized the use of the antitrust laws because they don't think they've protected labor enough that big companies are now exercising upstream market power, and that's reducing wages and the like. My view is that it's really challenging to try and use regulation to affect what are macroeconomic issues in the labor markets. And that a lot of what's stressing people out about new relationships with labor, I mean, take Uber, which we don't represent, is not the product of too little competition, but too much, or more. And that as the markets have become more and more competitive, businesses aren't doing this in order to exercise market power, they're doing this in order to stay financially viable.

And that makes regulation just a challenging thing to do. The gig economy is here to stay. I mean, it is massive. The reason it exists and is growing is it is massively popular with consumers

and consumer spend constitutes a huge percentage of GDP. So that's not to say there really aren't important things you can do in the labor markets. And those are getting debated in part, in the three and a half trillion-dollar bill you mentioned, but whether you can use antitrust regulation to, on a systematic basis, affect labor regulations I have my doubts. Where antitrust has worked in the labor markets, even a very discreet set of circumstances where you have local markets, the proverbial two mill town, there you can figure out something to do. But holding back the tide of the gig economy, for good or bad, it's here and we're going to need to figure out how to deal with it.

Larry Bernstein:

I want to go back to the first principles and how America got caught up in antitrust. Josh and I took a class at Penn together on American economic history. And we read a book together by Gabriel Kolko, about the origins of antitrust policy in Theodore Roosevelt's administration. And one of the cases we looked at was Standard Oil. And in Standard Oil, it had tremendous market power. And the reason that they were so successful is they kept cutting prices and taking other people out of business. In the Chicago School of consumer welfare, they were constantly lowering prices, which is generally considered a good. I think what upset the political establishment at that time was market power. Standard Oil was becoming a very, very powerful company and had to be broken up. It wasn't so much about price. And when I contrast that with the European experience, it seems like in Europe, they're constantly trying to get larger companies more power, and then use these large firms as a means of affecting employment patterns and gaining more job security. Europe and the US have two different frameworks. How do you think about the European versus the American experience in the theory of antitrust, and how that will affect how these economies develop over time?

Josh Soven:

One of my jobs, when I worked for the Chair of the Federal Trade Commission, was to spend about a third of my time in Europe working and coordinating with their competition agencies. And the upshot is the psychological culture is different. A lot of the rules sound the same, and obviously the microeconomic models are the same, but they think about it differently. And which it doesn't make it better or worse, it's just different. And one of the realities, one of the differences, is there is a much more symbiotic relationship, coordinated relationship between large companies and the governments in Europe. And they work together and they talk a lot, and they're at times even extensions of the government in terms of various issues that are timely here today, including labor conditions, and market structure, and small businesses, and the like.

The US culture, left, right and center, doesn't work that way at all. Those lines of communication aren't there and those working relationships aren't there. And it's one of the reasons that now that we have these various sorts of powerful economic, political forces hitting us, that everyone said, oh, we don't have a system to deal with this sort of in coordinated fashion. We really got to put the foot on the gas of antitrust and fix these things. And we feel

better trying to do that then in sort of a collaborative joint venture way. The cultures are just different.

Larry Bernstein:

Josh, as I before, we try to end each show on a note of optimism. What are you optimistic about as it relates to antitrust?

Josh Soven:

Yeah. I mean, to go back to my bias, sort of as a practitioner, and a little bit less of a theologian. I've been stunned that, and to their credit, that the Federal Trade Commission and the Justice Department have been able to work as effectively as they have when they are not there. I may disagree with some of the things they're doing, and I agree with some of the things they're doing, but a really under reported story in DC is these government offices are empty. We're not sticking 800,000 people on the Metro and filling them up. And by and large, they've been able to operate pretty seamlessly without much disruption. It's getting the occasional chatter about various delays and the like. But things are working as they are. I'm not sure what that means for the future, but I do think the government gets a lot of credit for keeping the lights on and the trains running in ways that don't get a lot of attention.