

Book Review

The Curse of Bigness: Antitrust in the New Gilded Age.

By Tim Wu. New York,

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As the title itself suggests, this book captures complete journey of the United States antitrust law from its inception to the present age of digital economy. The author has narrated this in a lucid and captivating form replete with short stories and instances interwoven in a classic rhetoric. To make the book appealing, interesting, realistic and impactful for the readers, the author has borrowed quotes of various eminent personalities and luminaries to capture their exact thoughts. The author has in fact succeeded to a large extent in leaving the readers spellbound with his captivating thoughts over excessive concentration as not only a threat to competition but also on policy, polity and democratic process.

The author has peeked into the genesis of the oldest antitrust laws prevalent in the United States and informed us how these laws came to see the light of the day. The author, through this book, takes us to a splendid journey of antitrust law from 1890 till date and has demonstrated that how closely the political will of a country, economic factors and public sentiments were connected to the rigours with which the enforcement of antitrust law took place. The author goes on to discuss and demonstrate the effects of what happens when a nation like the United States weakens its laws meant to control the size of the industrial entities and the impact

of allowing unrestricted concentration of economic power and removing the sanctions on antitrust conduct. The author has concluded by ringing alarm against repeating the signature errors of the first gilded age in the twentieth century.

The author has initiated the discussion around concentration and antitrust by discussing the concentration of private power among a few big entities resulting in a renewed concentration of wealth and wider gap between the rich and the poor. The initial focus of the author is on the idea of Louis Brandeis, a lawyer by profession, who played a significant role in the mid-course correction of the enforcement of the antitrust laws of the United States. Louis Brandeis called this concentration as the ‘curse of bigness’ and a threat to democracy. He warned against industry having enhanced influence over elections and law-making processes than the citizens. The author opines that till the mid of the last century antitrust laws played a role in containing the excessive industrial concentration and policing monopoly conduct. However, over the span of time, the laws have shrunk to a shadow of themselves and ceased to have a decisive opinion on the concerns of monopoly.

The antitrust law once called by the US Supreme Court as “*a comprehensive charter of economic liberty aimed at preserving free and unfettered competition*” no longer prevents such concentration, rather has grown ambivalent to monopolies. The author argues that the present enforcement of the United States antitrust law is suffering from the over-reliance of the ideas propounded by Robert Bork and others at the University of Chicago over the 1970s. These ideas emphasised that antitrust law came into being to address only one form of harm – high prices to consumers and that the ‘*consumer welfare*’ approach promising greater certainty and scientific approach has in fact discarded the role the antitrust law intended to play in checking accumulation of unchecked private power and preserving economic liberty. The author quoted Robert Pitofsky, past Chairman of FTC who warned that it is “*bad history, bad policy, and bad law to exclude certain political values in interpreting the antitrust laws.*”

The author describes the early twentieth century period when the United States came under the grip of a powerful movement called the *Trust Movement*, also the era of the reorganisation of American and the world economy. Almost every major industry in the US was either already under

the control of single monopolist or was coming under such control while John D. Rockefeller's Standard Oil remained the popular monopoly, bankers such as John Pierpont Morgan merged hundreds of steel company into US Steel, created a shipping monopoly called International Mercantile Marine Co., developed rail road monopoly and also a force behind AT&T's monopoly journey.

Such monopolists of that gilded age believed in – *Social Darwinism* – elimination of the weaker through the process of survival of the fittest which will make a place for the better one. The politics also embraced this ideology in the form of *laissez-faire*. The vision of the trust movement wanted an economy to be centralised in the hands of few great persons, without any government restraint, to promote the fittest while being indifferent to the downfall/ degradation of the weak and meek.

Outrage against the trust movement arose in myriad forms like strikes by labours, farmers' Grangers movement, founding of anti-monopoly party and also paved the path for the enactment of a law, i.e. the Sherman Act of 1890. The law was named after its original propounder Senator John Sherman, an Ohio republican.

Though the law addressed varied issues apart from trust problem, as the language of the law was very broad to include every contract, combination, restraint of trade and banned the act as well as the attempt to monopolise, Senator Sherman proclaimed on the floor that no problem "*is more threatening than the inequality of condition of wealth and opportunity*".

The author emphasises the role played by Louis Brandeis, an advocate, a reformer and later a Supreme Court Judge, in resisting the trust movement. The author has tried to renovate the lost tenets of Brandeisian economic vision who broadly advocated the *right to live and not merely to exist*. Brandeis believed in decentralised manageable economic entities and that the new trusts formed by combining the entire industry were not really progressive as were projected and promised, rather he felt that economy dominated by giant corporations gave rise to certain inhumanity. He once wrote about the oppressive conditions and long working hours at the new industrial firms giving rise to, "*a life so inhuman as to make our former Negro slavery infinitely preferable.*" Conditions of work such as a threat of being fired, long working hours, access to washroom, personal safety, harassment at

workplace, social security, etc., matter significantly for the human rights to live and not merely to exist. He opposed abusive consolidation campaigns, where businesses were forced to sell themselves to avoid bankruptcy or from getting ruined by a powerful competitor.

While this trust movement was gaining momentum (J.P. Morgan announcing the creation of the US Steel Trust and so forth) in clear violation of the Sherman Act, President McKinley's unannounced *laissez-faire* was the economic policy of the United States as it considered antitrust laws merely symbolic. However, the next Whitehouse descendent President Theodore Roosevelt rejected the then existing *laissez-faire*. He confronted the two greatest monopolists of that time who provided the very foundation of the trust movement – J.P. Morgan (Railroad, Steel) and John D. Rockefeller (Standard Oil).

Unlike Brandeis, President Roosevelt was considered less wary of size as a danger but what really concerned him was a threat caused by growing power of trusts over political democracy. He rightly said that *"when aggregated wealth demands what is unfair, its immense power can be met only by the still greater power of people as a whole"* and ignoring the economic misery or public outcry may give rise to extreme/anarchist revolutions. To him, the vital question was whether the government could control the trusts. He ordered a probe into the Western Railroad Trust Monopolisation. In one of his speech, President Theodore Roosevelt mentioned that *"trusts are the creatures of the State, and the State not only has the right to control them, but it is duty bound to control them wherever the need of such control is shown."* In the context of President Roosevelt, the term *"Trust Buster"* or *"Octopus Hunter"* became popular. Not to forget to mention that such battles against the giant corporations lasted for years and strained huge public resources, but ultimately the Western Railroad case went to the US Supreme Court and the merger was successfully blocked under an attempt to monopolise in violation of Section 2 of the Sherman Act. Justice William Douglas once put it *"Power that controls the economy should be in the hands of elected representatives of the people and not in the hands of an industrial oligarchy."*

The author demonstrates through anecdotes that too much concentration of economic power breeds anti-democratic political pressure and firm(s) guided by too much industrial concentration may also seek to control public means to serve its own purpose.

Roosevelt's government blocked the Western Railroad monopoly and also came heavily upon the existing ones like Standard Oil – the oil trust. President Roosevelt got the trigger to target Standard Oil's monopoly by a thoroughly done research publication titled *The History of the Standard Oil Company* which uncovered the story of its rise to power and quashing of those who posed threat to its rule. He directed the Bureau of Corporations (predecessor of the Federal Trade Commission) to investigate Standard Oil's practices. The two major points in the report were – exclusionary cartels and aggressive acquisitions. Standard Oil along with two other large refineries collectively stuck deal of lower price for themselves and ensured higher price for anyone outside the conspiracy, i.e. small and independent competitors. Small refineries sold out to Standard Oil at a loss and larger ones were brought under its trust and in just a decade its share rose from 10% to 90%. It built a monopoly and defended it for the next 30 years. In phase of the disruptive new technologies like an oil pipeline, Rockefeller ensured the ruin of new pipeline challengers by preventing them from being built up or bankrupted them or acquired them and also asserted political influence whenever required. The Justice Department of the United States (DoJ) filed detailed complaint highlighting the violation of both the sections of the Sherman Act. This withstood legal scrutiny as the Supreme Court concluded that Standard Oil was an abusive and anti-competitive trust and affirmed the remedy of breaking it up into 34 smaller companies. Out of them, Standard Oil of New York (Mobil), Standard Oil of New Jersey (Exxon) and Standard Oil of California (Chevron) remained popular and doubled their stock value within a year of breakup.

Another side of this curse is associated with the growing corporate power because as a business grows big, the focus shifts from efficiency to the ability to gather and use economic and political power to maintain its position and keep competition at bay. One such method is to invest in moats, i.e. barriers, in the form of control of scarce resources, long-term exclusive/preferential contracts, licenses from the governments, etc. Growth of firms through mergers increases concentration which also makes coordination easy so that few majors can together extract a cost from the society, they also have incentive to invest in joint moats, kind of walled city to protect them from would-be invaders. The giant firms have great incentive to invest in the political process to obtain favourable passage of laws to fortify such moats.

The author is of the view that private checks on bigness may and do fail but breaking up of a monopoly by the government has been proved to be a boon in disguise. Consider government antitrust intervention in Standard Oil, AT&T and IBM which provided momentum to the oil industry, telecommunications and computing. The government's war against trusts continued in the next few regimes in the United States and strengthened the US antitrust law by enacting Clayton Act, forming Federal Trade Commission (FTC) and empowering it to bring suits against unfair methods of competition.

The author moves further to the post-world war era of the 1950s and 1960s and quotes Daniel Crane, an antitrust scholar, *"the post-war currents of democracy-enhancing antitrust ideology arose in the United States and Europe in reaction to the role that concentrated economic power played in stimulating the rise of fascism."* As also a report of Secretary of War concluded: *"Germany, under the Nazi set up, built up a great series of industrial monopolies, soon got control of Germany, brought Hitler to power and forced virtually the whole world into war."* Concerns about excessive corporate concentration guided the Congress in the United States to further strengthen antitrust laws by bringing in a new anti-merger Act – the Celler Kefauver Act and provided new tools to proactively prevent the formation of giant corporations in advance.

However, a new intellectual opposition to the active antitrust enforcement was finding its place in the University of Chicago through professor Aaron Director and his student Robert Bork. Director criticised Supreme Court case laws of being counterproductive in terms of *consumer welfare* and was of the view that it can be demonstrated in a measurable way usually evident through lower prices. He endorsed the view that the goal of competition might be to only protect weaker and less efficient companies from efficient ones which can lower price for consumers. His school of thought gained prominence among his students and colleagues such as John McGee, Robert Bork, etc. For them, antitrust was unnecessary and that problem where existed would work themselves out in due course and in this manner, the *laissez-faire* policy has reincarnated. He also insisted upon the thought that courts shall be guided exclusively by consumer welfare which meant that in antitrust litigation, the plaintiff/ government had to prove that alleged behaviour could lead to higher prices for the consumers.

The author opines that radically narrow reading of the Sherman Act by Bork ignored the broader concern that had long mandated its existence and enforcement, i.e. a democratic choice of economic structure and a check on the power of monopolies. With the rise and triumph of Chicago School, also joined by Harvard School later, the antitrust enforcement weakened as per the author. The author highlights the instances of cable, airlines, pharmaceutical, chemical industry, global beer industry to indicate growing concentration and stated that enforcer felt powerless to stop the ongoing concentration in the age of widely accepted Chicago School and Harvard School.

In the early stages of the technology world, the enforcer believed that it was fast and dynamic and no position lasted longer. In cyberspace if a firm managed to get temporary dominance, it was believed that it will be overturned by other in a short span of time like Myspace – the social media pioneer, first was everywhere and later nowhere. The new firms of the 2000s, Google for access to information, Amazon to buy books for cheap, Facebook for building a global community, which did not charge a high price and in some instance did not charge at all but even after a decade, these firms did not disappear contrary to the belief that technology firms did not last longer rather the author demonstrates the journey of these tech giants which are built upon the numerous takeovers of every nearby challenger. Facebook first acquiring Myspace in America later WhatsApp and then Instagram; Google's notable acquisition of YouTube; Amazon taking over Zappos, Diaper.com and Soap.com. The author indicates that these firm strengthened and build monopoly through a range of acquisitions, Facebook (67), Amazon (91) and Google (214). The author emphasises on a need to relook at the tech giants which claim themselves to be in existence only for consumers – connecting them (with the world), enriching them (with lots of information) and serving them (round the clock). The author has endeavoured to demonstrate that by application of antitrust laws keeping consumer welfare as the only touchstone for assessment of complex business transactions develops a tendency to get trapped in a narrow zone where the cause of competition is merely an eyewash.

Taking cues from the past antitrust enforcement experience in the United States, the author reinforces that foundational laws of democrats around

the world were all created with the idea that power should be limited so that no person/institution could enjoy unaccountable power.

It is worthwhile to discuss the modes suggested by the author through which the global antitrust authorities can evade themselves from repeating the errors and omissions of the past century and promote competition in times to come. At the outset, as per the author, adequate weightage must be given to the fact that a given transaction may result in the elimination of a future competitor or potential competition. In other words, the author calls for tougher standards for merger review, at least in case of giant mergers. The author rightly argues that the failure to adequately consider the aspect of the post-merger state of lessening/elimination of competition, has to a large extent, contributed to the formation of the present-day digital giants like Google, Facebook and Amazon. Further, the author points out that merger review is a quasi-judicial administrative process, which needs to be more transparent rather than secretive.

Further, the author makes another pertinent observation which deserves attention is the role of structural remedies in merger reviews, which are currently invoked in extreme and rare circumstances. He asserts that structural remedies should be used more frequently and aggressively while reviewing mega/giant mergers in case there is a potential of lessening or elimination of competition post-merger. The two clear reasons for the same are: firstly, a large business constitutes of various sub-units organised on the basis of functions or territory or products or services, etc., and it is not impossible to spin off or break up a large corporation which can foster competition and innovation. Sometimes large corporates internally organise their functions for better growth and management (break up of Standard Oil is a classic example here which fostered competition as well as business growth). The author suggests that the simplest way to break the power of a conglomerate is to break the conglomerate. For instance, had Facebook not been allowed to take over WhatsApp and Instagram, the state of competition in social media space would have been different than the present one like greater privacy protection, less concentration of power, protecting democracy from manipulation, etc. Secondly, structural remedies are easy to administer rather than behavioural remedies, as the author aptly asserts that expertise of the antitrust authorities lies in investigation and enforcement rather than compliance and monitoring.

In addition to the above, the author also suggests market investigations as a useful tool in antitrust enforcement. Citing the example of market investigation by the UK competition authority among major airports, the author emphasises that market investigation can be used to assess the state of competition in a particular sector, experiencing a persistent dominance or lacking convincing competition. The author is of the view that market forces may not always be able to remedy the market situation and appropriate intervention by the agency is critical to protect the process of competition.

It is emphasised by the author that while examining conduct, the court should see that whether the conduct under examination promotes competition or suppresses or destroys it. The author calls for the using the test of “protection of competition” with focus on the protection of the ‘process’, in contrast with maximisation of an abstract value called consumer welfare.

Opinion

The views strongly expressed by the author in this book, citing the experiences of the previous century, hold a lot of relevance in the present times when the whole world is amazed at the rise of the digital giant corporations and the threats that follow from such unprecedented concentrated power. Globally, the antitrust authorities have been relooking at their quiver to find mechanism(s) to deal with issues and contain the concentrated power of the digital giants. The author has rightly asserted that concentration of power in the hands of a few giant corporations is not only a threat to the process of competition but to the process of democracy. It is indicated that the rise in economic concentration has been an outcome of the paradigm shift of antitrust goals from ‘prevention of concentration and democracy concern’ to ‘consumer welfare’. The author has repeatedly emphasised throughout the book that the goal which can be inferred from congressional records behind the Sherman or Clayton or Anti-Merger Act was preserving competition by making a choice between competition and monopoly, and did not even contain the words such as allocative efficiency or consumer welfare which have crept into the present day’s anti-trust analysis.

It is felt that such radical and thought-provoking views on the concentrated power of digital behemoths have rung the bells worldwide. It is also known that the United States Department of Justice has launched a wide-ranging review of the “GAFA” – Google, Amazon, Facebook, and Apple in 2019.¹

The book is written in an easy to comprehend and coherent manner that it succeeds in making a place for itself in the ‘must read’ list of everyone apart from those closely connected with antitrust in some manner or the other.

- Jyotsna Yadav
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¹ <https://www.technologyreview.com/2019/09/09/238574/50-us-states-have-launched-an-antitrust-investigation-of-google/> accessed on 05.09.2020.