

Weaker antitrust enforcement and market
concentration:
A legal-institutional theory view of the corporation
entity as a welfare-generating device

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The questions to examine

Economic policy (the case of the US)

- In 2019, the level of inequality “reached the highest point since the Census Bureau began tracking it” in the United States (Berman, 2021: 73).
- In 2018, for “the first time in the last hundred years,” the top 400 richest Americans “have paid lower [proportional] taxes than the working class” (Saez and Zucman, 2019: 22).

On the corporate level

- A lower level of IPOs, resulting in a lower number of public companies (i.e., companies open to investors).
- lower stocks of the finance capital is committed to venture financing.
- A higher level of merger and acquisitions.

The conjecture: economic inequality is an effect of economic concentration, which are caused by by more lenient antitrust legislation; this mechanism in turn generates certain effects on the firm or industry levels. A case of causality or correlation?

The legal-institutional view

- “Capitalism is fundamentally a legal ordering: the bargains at the heart of capitalism are products of law.” (Grewal, 2014: 652)
- In corporate law, the business venture is incorporated *sui juris*, it “owns itself” to protect it against the appropriation of the finance capital acquired.
- Premise: legislative rules generate possibilities for venturing and business creation and market making. Efficiency is only a second-order construct that can only emerge after legal devices have been developed and applied.

- In contrast, private ordering theory presume that little more is needed than property right legislation and its enforcement.
- Premise: Efficiency is a primary concern for both policy makers and market participants (e.g., corporate executives and investors). Legal rules should promote an “economic theory of rationality” (L. Daston) that uses efficiency as a measure and social goal.
- Legal theory objection: Efficiency optimization is neither a “legal right,” nor some indisputable policy goals (Dworkins, 1980). Instead it is a “quasi-scientific notion” (Pistor, 2020: 171) that itself needs to be justified.

- Differences between the legal-institutional and the private ordering view result in market legislation and market regulation being disputed, i.e., lobbying, regulatory capture, and similar activities are undertaken to shape how markets are monitored and created.

Reference

Dworkin, Ronald M., (1980), Is wealth a value?, *Journal of Legal Studies*, 9(2): 191-226.

Weaker antitrust enforcement in the US

- Herfindahl–Hirschman Index (HHI) has increased in many sectors of the economy in several countries. Note that some proponents mainstream economic theory advise against using HHI (see e.g., Berry, Scott Morton, and Gaynor, 2019: 48).
- Yet, higher market concentration result in higher consumer prices, and indirectly, economic concentration result in monopsony, local and regional labour markets with only one or few employers).
- Increased level of profit in industry reported, in combination with a lower share of labour compensation and lower benefits.
- These changes cannot be explained on basis of “globalization” or “technological change” (most notably digitalization) as such ad hoc hypotheses do not explain national differences.
- One factor to consider is the more lenient antitrust law enforcement after *circa* 1980:
 - A “weaker U.S. antitrust enforcement” have resulted in “a diminution of competition.” (Autor et al., 2020: 651)
 - A singular focus on “consumer welfare” rather than to preserve market competition as a device that incentivizes the market participants to optimize the use of available resources, including finance capital. This is a Chicago School of Economic Theory / Law and Economics scholarship doctrine (most notably advocated by Robert Bork).
 - Implication: High demands on the plaintiff when claiming that market prices have been manipulated in court cases.
 - Yet, there are few formal definitions of consumer welfare in various jurisdictions (Kovacic, 1990: 1449)
- *Reference*
- Berry, Steven, Scott Morton, Fiona, and Gaynor, Martin, (2019), Do increasing markups matter? Lessons from empirical industrial organization. *Journal of Economic Perspectives*, 33(3): 44-68.

Implications for the corporate entity and industry

- Lower number of public companies in the US.
- A lower number of IPOs: new business ventures are closely held.
- Less venture capital investment (relative to the total finance capital stock) committed to new business creation.
- A higher level of merger and acquisitions, i.e., cash-rich, mature companies acquire new firms (so-called *nascent competitors*) prior to their products being fully developed.
- A lower level of entrepreneurship (caused by a variety of factors, including lower market demand, higher level of debt among university graduates, or shrinking compensation for entrepreneurs over time)
- In the long run, the corporate entity is at risk to cease to operate as the foremost vehicle for business enterprising. The "post-corporate economy" (Gerald Davis). This is a question of legitimacy.

Practical and theoretical implications

- The private ordering model wherein shareholders are treated as if they were the owners of the corporate entity is premised on the idea of efficiency as being prioritised over any other legal or policy-related objective (as in the case of the “shareholder value” doctrine of agency theory). The consequences of private ordering models should be examined on the industry or sector level of the economy.
- The legal-institutional view of the corporation provides an alternative perspective as it does not assume that markets are already in place, but rather that legal devices are implemented to generate markets, which only thereafter can accomplish a certain level of efficiency (which per se is a theory-laden construct). Markets are the product rather than the antecedent of legal and regulatory reforms.
- In this view, studies of antitrust enforcement should examine the wider economic consequences of the consumer welfare doctrine, de facto supporting a shareholder value governance model, not in its description but also in its consequences.

A proposed research agenda

- What are the driving doctrines and objectives behind the private ordering model of the corporate entity? Why was corporate legislation and antitrust legislation abandoned as the primary legal devices to preserve market competition?
- What are the long term implications from weak antitrust enforcement, regarding (1) labour compensation, (2) business venturing activities, (3) the IPO rate (i.e., the proportion of public companies vs. closely held firms), (4) economic inequality, etc.?
- What policies being implemented in advanced economies can restore market demand and/or create better incentives to start businesses, or otherwise uphold market competition?

Conclusion

- Economic concentration, esp. in the top 1% and 0,1% income strata is widely observed in several advanced economies.
- Economic concentration in the market place has generated a less dynamic economy, despite the generous and unprecedented supply of finance capital.
- On balance, the most plausible explanation for the decline (at least in the US) is the weaker antitrust law enforcement, premised on the doctrine that consumer welfare (being stipulated as a singular legal objective in the area) is determined by low and stable prices and little else. This doctrine is based on economic theory that is disputed from its original formulation. Political preferences and ideologies are better predictors of antitrust doctrines than state-of-the-art economic theory.