CPI's North America Column Presents:

Antitrust and Economic Liberty: A Policy Shift from the Trump Administration?

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Introduction

In both the Department of Justice (DOJ) and the Federal Trade Commission (FTC), antitrust policy appears to be increasingly associated with economic liberty.[2] Indeed, Assistant Attorney General (AAG) Makan Delrahim has stated that "[w]hen competition policy works well, it maintains economic liberty and leaves decision-making to the markets."[3] This short article discusses several different meanings of "economic liberty," and considers the possibility of a Hayek-inspired theory of negative liberty of subsidiary importance to consumer welfare as a policy paradigm for the Trump Administration. Any inclusion of negative economic liberty into antitrust law's policy goals, however, may strain to find support in either existing antitrust precedent or the Constitution—resulting in a possible tension with general rule of law principles.

What is "Economic Liberty"?

Like "consumer welfare," the term "economic liberty" admits of multiple meanings. Generally, "economic liberty" can be understood as either positive or negative. In the positive sense, "economic liberty" can connote a right of individuals and firms to meaningfully engage in economic activity.[4] The ordoliberal theory of social market economy is an example of this type of approach. For ordoliberalism, the economic power that can arise from market processes may pose a threat to the liberty of individuals to freely participate in economic society.[5] A goal of competition law, on this view, is to define and enforce rules to prevent distortions of the competitive process so as to maximize consumers' economic liberty or choice.[6] As an approach to contemporary antitrust enforcement, however, ordoliberalism is both plagued by controversial prior assumptions and its emphasis on market structure inapposite to the dynamic reality of Schumpeterian competition inherent in the New Economy.[7]

In its negative sense, "economic liberty" connotes presumptive limitations on government's ability to intervene into private economic affairs. Theories of negative economic liberty can be found across the modern history of thought, and have at times taken root in the American legal tradition. On one such view, "economic liberty" can mean "natural" or "fundamental" rights, such as those

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[2] For the DOJ, see, e.g., Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, Remarks at New York University Law School (Oct. 27, 2017) [*hereinafter* Economic Liberty and the Rule of Law]. For the FTC, see, e.g., Maureen K. Ohlhausen, U.S. Fed. Trade Comm'n, Acting Chairman, Address at George Mason Law Review's 20th Annual Antitrust Symposium (Feb. 23, 2017).

[3] Makan Delrahim, Assistant Attorney General, U.S. Dep't of Justice Antitrust Division, Address at the American Bar Association's Antitrust Fall Forum (Nov. 16, 2017) [hereinafter Antitrust and Deregulation].

[4] Positive economic liberty appears to be important to the Democratic Party's "Better Deal" Platform. *See* A Better Deal, *Cracking Down on Corporate Monopolies and the Abuse of Economic and Political Power*, 1 https://www.democraticleader.gov/wp-content/uploads/2017/07/A-Better-Deal-on-Competition-and-Costs.pdf ("A Better Deal on competition means that we will revisit our antitrust laws to ensure that the economic freedom of all Americans—consumers, workers, and small businesses—come before big corporations that are getting even bigger.").

[5] *See, e.g.*, Wörsdörfer, *On the Economic Ethics of Walter Eucken*, in 60 YEARS OF SOCIAL MARKET ECONOMY, FORMATION, DEVELOPMENT AND PERSPECTIVES OF A PEACEMAKING FORMULA 21 (Konrad Adenauer Stiftung ed., 2013), *available at* http://www.kas.de/wf/doc/kas_20040-544-2-30.pdf?100630164654.

[6] *See* Peter Behrens, *The Consumer Choice Paradigm in German Ordoliberalism and Its Impact Upon EU Competition Law*, Europa-Kolleg Hamburg, Institute for European Integration, Discussion Paper No. 1/14, at 4-5 (2014), *available at* https://www.econstor.eu/bitstream/10419/95925/1/780714202.pdf.

[7] *See* Joseph V. Coniglio, *Rejecting the Ordoliberal Standard of Consumer Choice and Making Consumer Welfare the Hallmark of an Antitrust Atlanticism*, CPI CHRONICLE (August 2017).

articulated during the period of economic substantive due process. For this approach, economic liberty—underpinned by classical theories of *laissez faire,*[8] and for which the rights of property and freedom of contract are paramount—should only be limited in cases of threats to public health, safety, and morals.[9] However, both the limited scope of permissible purposes for government intervention, and underlying theory of economics, contemplated by substantive due process theories are in tension with contemporary antitrust policy's focus on improving economic welfare in light of market failures.

Of course, strongly negative conceptions of economic liberty are not in themselves inconsistent with a utilitarian and technocratic theory of antitrust policy. Here, the Chicago School constitutes both case and point. While its emphasis on making economic welfare the singular goal of antitrust law was distinctly utilitarian, it also gave antitrust law a technocratic role to correct market failures.[10] However, particularly in the area of exclusionary conduct, strong presumptions in favor of market self-correction have been seen as making Chicagoan antitrust policy, in effect, consistent with the strong negative rights of property and freedom of contract that one might associate with a conservative-libertarian approach.[11] As such, the Chicago School is a good example of an antitrust policy that is compatible with both a strongly negative conception of economic liberty and the utilitarian goal of economic welfare.

Another theory of negative economic liberty may be considered a more recent entrant into American law and economics. On this approach, economic liberty can be understood as primarily grounded neither in natural rights nor general market self-correction, but the decentralized nature of knowledge in economic society. The origins of this theory can be found in Friedrich Hayek's famous formulation of the "knowledge problem."[12] For Hayek, economic knowledge cannot be centralized within governmental bodies in the way a technocratic and utilitarian antitrust policy may often seem to require. Such knowledge is, rather, dispersed among individuals in society. By extension, antitrust law and enforcement should reflect a healthy skepticism of governmental bodies achieving the evidentiary foundations needed to justify intervention into market processes and improve economic welfare relative to what would obtain if no intervention occurred.

Antitrust Policy and the Rule of Law

While it is too soon to conclude what role, if any, economic liberty will play for antitrust officials in the Trump administration, AAG Delrahim's speeches thus far provide a basis for some initial reflections. First, "economic liberty" might be interpreted as (at least largely) negative in nature. As noted by AAG Delrahim, "antitrust employs law enforcement principles to maximize economic liberty subject to minimal government imposition."[13] Second, and importantly, economic liberty will unlikely reflect any form of economic substantive due process. Rather, "antitrust law has an inherent equilibrium—wary of infringing on economic liberty, but willing to intervene to correct market failures."[14] Third, economic liberty and consumer welfare will likely be understood as jointly

[8] *See* Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. 379, 411-15 (1988).
[9] HERBERT HOVENKAMP, THE OPENING OF AMERICAN LAW: NEOCLASSICAL LEGAL THOUGHT, 1870-1970 243-51 (2014).
[10] *See* Daniel A. Crane, *Technocracy and Antitrust*, 86 TEX. L. REV. 1159, 1160 ("Since the Chicago School revolution in the 1970s, federal antitrust enforcement has become considerably less democratic and more technocratic.").
[11] *See* ROBERT PITOFSKY, HOW THE CHICAGO SCHOOL OVERSHOT THE MARK: THE EFFECT OF CONSERVATIVE ECONOMIC ANALYSIS ON U.S. ANTITRUST (2008).
[12] *See* Friedrich A. Hayek, *The Use of Knowledge in Society*, 4 AMERICAN ECONOMIC REVIEW 519 (1945).
[13] Economic Liberty and the Rule of Law, at 6.
[14] *Id.* at 5.

important and consistent values.[15] Fourth, AAG Delrahim has quoted approvingly Judge Bork's view that consumer welfare is the *single* goal of the antitrust laws, suggesting that consumer welfare will remain the operative legal standard.[16]

If the antitrust laws are to remain a consumer welfare prescription, however, the question arises as to just what role economic liberty might play. Here too, the words of AAG Delrahim may provide some useful context:

> "The economic liberty approach to industrial organization is also good economic policy. F.A. Hayek won the 1974 Nobel Prize in economics for his work on the problems of central planning and the benefits of a decentralized free market system. The price system of the free market, he explained, operates as a mechanism for communicating disaggregated information."[17]

While retaining a consumer welfare standard, antitrust law could incorporate a Hayek-inspired theory of economic liberty when enforcing particular antitrust rules. Considered with AAG Delrahim's remarks on remedies, the Antitrust Division's challenge to the AT&T-Time Warner merger may be seen as providing an illustrative example of this type of approach: while the merger's effect would be measured using a consumer welfare standard,[18] a structural remedy may be preferable to a consent decree when taking into account economic liberty.[19]

Incorporating economic liberty into antitrust policy should be supported by precedent and conform to the rule of law.[20] By famously characterizing the Sherman Act as a "comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade," Justice Black's opinion in *Northern Pacific Railway v. United States*[21] may be a useful starting point. However, the theory of economic liberty put forward by Justice Black appears to have been primarily positive in nature—even one that contemplated antitrust as a vehicle for "the preservation of our democratic political and social institutions."[22] Indeed, in condemning Northern Pacific's tying arrangement, Justice Black saw the unlawfulness of tying in terms of "deny[ing] competitors free access to the market" in a way that resulted in "buyers [being] forced to forego their free choice between competing products."[23] As such, Justice Black's opinion seems to invoke a notion of positive economic liberty similar to ordoliberalism, rather than one sounding in either consumer welfare or the knowledge problem.

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[15] Antitrust and Deregulation, at 4 ("This focus on economic liberty and consumer welfare serves our most cherished values.").
[16] *Id.*
[17] *Id.*
[18] *See* Complaint, United States v. AT&T et al., No. 1:17-cv-02511 (D.D.C 2017), *available at* https://www.justice.gov/atr/case-document/file/1012916/download. In light of the prior discussion on positive liberty, it may also be worth noting the DOJ's mention of the merger's negative effect on "greater choice for consumers." *Id.* at 2.
[19] *Cf.* Antitrust and Deregulation, at 9 ("Decrees should avoid taking pricing decisions away from the markets, and should be simple and administrable by the DOJ. We have a duty to American consumers to preserve economic liberty and protect the competitive process, and we will not accept remedies that risk failing to do so.").
[20] I have argued previously in this Column that, consistent with its "open-textured" nature, the standards and rules used to enforce the Sherman Act should derive principally from precedent, and certainly not from abstract and contestable concepts of economic fairness or justice. *See* Joseph V. Coniglio, *How the 'New Brandeis Movement' Already Overshoots the Mark: Sketching an Alternative Theory for Understanding the Sherman Act as a Consumer Welfare Prescription*, CPI NORTH AMERICA COLUMN (Oct. 2017).
[21] 356 U.S. 1, 4 (1958).
[22] *Id*. As such, Justice Black's language might even be construed as implicating a *non*-economic theory of liberty.
[23] *Id.* at 6.

One might also consider whether the Constitution provides a basis for including economic liberty into antitrust policy. Here, it is worth noting AAG Delrahim's remark that "[p]romoting the general welfare and securing liberty…those are values enshrined in the Constitution itself. Antitrust is not merely a technocratic exercise, in fact it is an ingenious body of law supporting sound economics that serves our most important values."[24] As articulated by one commentator,[25] a constitutional theory of antitrust might begin by recognizing the Sherman Act as the "Magna Carta of free enterprise,"[26] and find that some forms of antitrust intervention violate basic constitutional norms of economic liberty.[27] Such a theory, however, would face several challenges. First, as a matter of precedent, even *Trinko* may be inconsistent with such a theory of antitrust enforcement.[28] Most importantly, however, it is debatable whether the Constitution embodies any theory of negative economic liberty from which a corresponding theory of antitrust enforcement could claim inspiration.[29]

Conclusion

For the past forty years, a consensus has existed that antitrust law is a technocratic exercise with the single goal of consumer welfare exhibiting only marginal differences in enforcement between Republican and Democratic administrations.[30] Protecting economic liberty by incorporating Hayek-inspired theories of the knowledge problem into enforcement of a consumer welfare standard could represent a notable shift in antitrust policy. In so doing, however, antitrust enforcement may approach a point of tension with rule of law principles given both modern antitrust's singular focus on consumer welfare,[31] as well as difficulties with formulating a supporting "constitutional" theory of antitrust law.

[24] Economic Liberty and the Rule of Law, at 5.
[25] *See* Thomas B. Nachbar, *The Antitrust Constitution*, 99 IOWA L. REV. 57 (2013).
[26] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).
[27] Nachbar, *supra* note 25, at 114 ("[T]he antitrust laws are a part of a larger constitutional structure that polices such improper restrictions on liberty.").
[28] Daniel A. Crane, *"The Magna Carta of Free Enterprise" Really?*, 99 IOWA LAW REVIEW BULLETIN 17, 19 (2013) ("*Trinko* is best understood as an opinion that reflects the cobbling together of an uneasy coalition of free-market and technocratic Justices who managed to agree on a outcome given the alignment of institutional and substantive considerations.").
[29] *See* Herbert Hovenkamp, *Inventing the Classical Constitution*, 101 IOWA L. REV. 1 (2015). *But see* RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION (2014); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT (2014). Expounding upon this debate is obviously very far beyond the scope of this short article. However, it is worth noting that even if a classical liberal constitution was well founded, in as much as it is to be understood in terms of natural rights, it may not entail an antitrust regime that is even generally coextensive with a theory of negative economic liberty rooted in Hayek, who rejected natural rights.
[30] *See* Daniel A. Crane, *Has the Obama Administration Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (2012).
[31] *See* Daniel A. Crane, *The Tempting of Antitrust: Robert Bork and the Goals of Antitrust Policy*, 79 ANTITRUST L.J. 835, 847 (2014) (noting that the Sherman Act's design as a "consumer welfare prescription" attributed to Judge Bork in *Reiter v. Sonotone* was subsequently quoted 29 times in federal antitrust decisions).