ANTITRUST: TRACING INEQUALITY – FROM THE UNITED STATES TO SOUTH AFRICA

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I. INTRODUCTION

Antitrust cannot *produce* equality. If the goal of a nation is greater equality for its citizens, the policy makers would not turn to antitrust law as a first best tool.[2] But a notion of equality in antitrust, particularly equality of opportunity, can be constructive[3] as well as morally important; and whether or not it can be, it has been.

This essay traces key points in time at which antitrust jurisprudence and equality of opportunity have been linked. The essay begins with the adoption of the U.S. Sherman Act in 1890, and moves to the equality-leaning jurisprudence of the 1960s, the European Union jurisprudence of openness and access, developing countries' special needs, the UNCTAD nations' adoption of "equitable principles," and, finally, this new era, with its rise in inequality and accompanying claims for greater equity,[4] with focus on a current South Africa project for greater inclusiveness.

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1 Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. The author thanks Harry First for his helpful comments.

2 They might, however, regard access to markets without barriers as one first best tool. See Ohlhausen, Death By A Thousand Haircuts: Economic Liberty and Occupational Licensure Reform, Heritage Foundation (July 26, 2017), https://www.ftc.gov/system/files/documents/public_statements/1234173/ohlhausen_-_heritage_foundation_licensure-econ-liberty_7-26-17.pdf. Markets are not everything. See Sen, Development as Freedom (1999). Moreover, other elements must be in place for markets to work as a vehicle for empowerment. These include access to food, medicine, health care, education and training, and capital. See the United Nations Sustainable Development Goals, http://www.un.org/sustainabledevelopment/sustainable-development-goals/.

3 Current interpretations of U.S. antitrust law lean in favor of the *incumbent*'s freedom and incentives. An equality-leaning antitrust would weigh *outsiders*' freedom and incentives. There is a good deal of room in U.S. antitrust law to be equality-leaning in a manner that is efficiency-promoting. See Fox, The Efficiency Paradox, and other chapters in How the Chicago School Overshot the Mark: The Effect of Conservative Economic Analysis on U.S. Antitrust Law (R. Pitofsky ed. 2008).

4 More equality is one kind of equity. Most often, when one speaks of more equity, the reference is to more equity (or equality) for the outsider. In applications of competition law, this normally refers to more equality of opportunity, or a clearer path to competition on the merits; a right not to be closed off by power and leverage.

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II. EARLY THREADS OF EQUALITY

I observe that equity for the outsider – or economic opportunity – runs through almost all nations' competition laws at some point in time, whether in preambles to their statutes or in case law.

I begin with passage of the Sherman Act in 1890. The congress that passed the Sherman Act was responding to an unrest among the people, not least the farmers, in the wake of the Industrial Revolution, and the rapid growth of giant business. The people were distressed by "unjustified power, especially one that raised obstacles to equality of opportunity."[5] The language of the Sherman Act is sketchy; Congress handed to the courts the task to interpret it. The courts proceeded to do so, and themes of inequality arose in the first antitrust cases[6] and they continue to this day. The height of explicit equality values in U.S. antitrust, usually in the form of equality of opportunity and rights to contest markets on merits, peaked in the 1960s and early 1970s, especially in opinions by Justice William O. Douglas.[7]

The turn of the tide came with the Reagan administration in 1981, when the U.S. Supreme Court, now with a new majority, shifted antitrust to an efficiency paradigm, usually called consumer welfare. It was common cause at the time, and for a quarter of a century thereafter, that equity undercut efficiency.

Meanwhile, across the ocean, in 1957, six European nations adopted The Treaty of Rome establishing the European Economic Community, trying to assure peace through economic integration in post-war Europe. The Treaty itself contains the competition law. The Treaty privileges free movement. The competition law does not focus on the equity/efficiency debate but Court of Justice judgments did and do include a concern for market access for outsiders. EU law condemns "distortions of competition" and advantages achieved by leverage or privilege, not by merits.[8]

Even as European law was beginning to take root, developing countries raised a point of inequity to an international level. They were concerned that multinational enterprises were expanding into their countries and suppressing the local firms by restraints that often were illegal under U.S. law (for example, prohibiting local partners from exporting to the United States). Developing countries generally liked the U.S. antitrust jurisprudence of the 1960s because it was sympathetic to outsiders and powerless firms. Under the aegis of UNCTAD, to constrain multinational enterprises, they sought antitrust rules for the world. This motivation led to negotiations in the 1970s for a set of equitable principles to be agreed by nations. Ironically, the negotiations culminated in 1980 just as U.S. antitrust law was shifting from equity values (not excluding concern for consumers) to efficiency. The "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices"[9] was adopted by most of the trading nations of the world in 1980. The Set was adopted as a voluntary code (no mandatory rules). Its prohibitions were qualified by a general rule of reason, thus making the Set flexible to adapt to a more economic future.[10]

Beginning with the fall of the Berlin Wall at the end of 1989, scores of countries began to adopt market systems, and they adopted competition laws to control the market power that would foreseeably result. These newcomers to the competition

5 Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 59 (1965).

6 See, for example, the opinion of Justice John Marshall Harlan (the first), concurring and dissenting in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911): The nation was happily rid of human slavery "but the conviction was universal that the country was in danger of another kind of slavery … the slavery that would result from aggregations of capital in the hands of a few individuals and corporations … controlling the entire business of the country …." Justice Harlan was highlighting the inequality of wealth and power.

7 E.g. *FTC v. Consolidated Foods Corp.*, 380 U.S. 593 (1965) (prohibiting a merger that distorted access to markets on the merits). See also *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962): certain arrangements may act as a "clog on competition …[and] "deprive … rivals of a fair opportunity to compete." Id. at 324. The possible negative effects of antitrust intervention were not sufficiently appreciated in the 1960s; but appreciation of economics does not mean no room for equity. See note 3 supra and notes 13-16 and 24 infra.

8 E.g. *Commission v. DEI (Greek Lignite)*, Case C-553/12P, ECLI:EU:C:2014:2083; *TeliaSonera Sverige*, C-52/09, EU:C:2011:83.

9 http://unctad.org/en/PublicationsLibrary/a35r63_UNCPP_en.pdf.

10 The Set, renamed "the Set of Principles and Rules on Competition" (The "UN Set"), is reaffirmed by the nations every five years.

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law family were generally societies in which inequalities of wealth and power loomed large. The controlling powers – the State and friends of the State – held privileges and access to all of the best economic opportunities. If markets were to be created and to work, outsiders would have to have a clearer path to economic opportunity and success. Equity to the outsider coincided with the quest for efficiency. Many of these antitrust laws recognize the value of access to markets on the merits. A critical mass include some equity goals in the preamble to their laws.[11]

Developing countries adopted competition laws by the scores after the fall of the Berlin Wall. For many, the impetus was the International Monetary Fund and the World Bank, which required adoption of a list of basic laws including antitrust as conditionality for loans that the countries needed. For developing countries, the equity dimension of competition law is clear. Most of the countries had been colonized. Also, most were emerging from backgrounds of deep state control, with privileges lavished upon state-owned firms and on a few privileged families that owned most of the business in the country. For creation of markets and competition, the law had to be sympathetic to the excluded masses, who needed both incentives and opportunity, where both had been denied in the past.

Of all preambles and statements of purpose in competition laws, South Africa's law is one of the most explicit in insisting on equality as a value.[12] This was natural in view of South Africa's apartheid past. The New South Africa was devoted to overturning the culture that allowed the indignities of the past. Thus, South Africa included, in virtually all of its post-apartheid statutory laws, the mission to include the historically disadvantaged population.

III. EQUALITY AND THE NEW MILLENNIUM IMPERATIVE

We come to the new millennium. New research shows that the old shibboleth – equity reduces efficiency – was wrong as a generalization.[13] Moreover, on the heels of globalization, data show that inequality of wealth has increased around the world, and is constantly increasing.[14] Those who are well off or well enabled get an increasingly larger share of the pie going forward.[15] In some circumstances, including where barriers are high and the economy has been captured by vested interests, the society cannot get more efficiency without more equity.[16]

11 For example, the Latvian Competition Law (2001) states among purposes: "to protect, maintain and develop free, fair and equal competition in the interests of the public …. (Sec. 2). The Barbados Fair Competition Act (2002) states among purposes: "to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the marketplace." (Preamble). The Namibia Competition Act (2003) states among purposes to "ensure that small undertakings have an equitable opportunity to participate in the Namibian economy; and promote a greater spread of ownership, in particular to increase ownership stakes of historically disadvantaged persons." (Sec. 2)

It is not just developing and transitional countries that include equity goals in their statutes. Canada presents a typical example of equity recitals. The Canadian statute states:

Purpose of Act

1.1 The purpose of this Act is to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada**, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy** and in order to provide consumers with competitive prices and product choices. R.S., 1985, c. 19 (2nd Supp.), s. 19. (emphasis added)

12 The Preamble states that the Act requires that the economy must be open etc.
" IN ORDER TO –
provide all South Africans equal opportunity to participate fairly in the national economy; …."
The Purposes section of the Act includes:
"(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

13 See Ostry, Berg & Tsangarides, Redistribution, Inequality, and Growth, IMF Staff Discussion Note, February 2014. See Lagarde, Managing Director, IMF, "Lifting the Small Boats," June 17, 2015: "My key message tonight is this: reducing excessive inequality – by lifting the 'small boats' – is not just morally and politically correct, but it is good economics."

14 See Rising inequality threatens world economy, says WEF (Jan. 2017) https://www.theguardian.com/business/2017/jan/11/inequality-world-economy-wef-brexit-donald-trump-world-economic-forum-risk-report; OECD Divided We Stand: Why Inequality Keeps Rising (Dec. 2011), http://www.oecd.org/els/soc/dividedwestandwhyinequalitykeepsrising.htm.

15 See Piketty, Capital in the Twenty First Century (2014).

16 See Levy & Walton, eds., No Growth without Equity? Inequality, Interests, and Competition in Mexico (2009).

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Meanwhile in South Africa, "equality" is higher on the list of rights in the Constitution's Bill of Rights than even freedoms of religion and expression.[17] Yet the cruelly shut out majority[18] have not moved up into the economic mainstream in significant numbers, and ownership of business is nowhere nearly evenly spread across the population.

The recent observations and data on inequality have caused rethinking.[19] In the United States the Democratic Party has announced a project, "A Better Deal," which would include "crack[ing] down on monopolies and the concentration of economic power that has led to higher prices for consumers, workers, and small business …."[20] Bills have been introduced into Congress that would prohibit mergers that significantly increase concentration, and prohibit mega-mergers unless the parties establish that the effect of the merger "will not be to materially lessen competition or tend to create a monopoly or monopsony." Principals of approved mergers would be required to supply, for five years, data that would allow the agencies to assess the merger's actual impact.[21]

In South Africa, the problem is of an even graver cast. The post-apartheid radical economic transformation hoped for has not occurred. President Jacob Zuma, and later Minister of Economic Development Ebrahim Patel, announced earlier this year that the competition law will be amended to "address the need to have a more inclusive economy and to de-concentrate the high levels of ownership and control …."[22] Minister Patel stated that key amendments will require consideration of concentration, structural impediments to entry and expansion, and ownership profile in merger and conduct cases, and that the competition authority will need to be empowered to consider these problems proactively or on complaint of parties unable to overcome the entrenched barriers, and to impose structural remedies indicated by market inquiries. "The proposed amendments could potentially seek to incentivise firms to develop relationships and adopt strategies that would alter market structure; reduce concentrations by encouraging entry of historically disadvantaged South Africans (particularly those who own SMMEs); reduce barriers to entry; and expand ownership to ensure that more enjoy substantive economic citizenship."[23]

South African reformers propose to make the economy both more inclusive and more dynamic. No trade-off is seen between equity and efficiency;[24] rather, the policy makers foresee synergy.

The challenge is great. Efficiency and equity *can* work together. In the view of South African policy makers, they not only can; they must; and if reform can unleash the energies of the left out majority, they will.

17 Constitution of the Republic of South Africa 1996, Chapter 2: Bill of Rights. The Bill of Rights also guarantees access to health care, food, and shelter. The Constitutional guarantees would appropriately inform what constitutes antitrust harm and what are appropriate remedies at least in the areas of explicit Constitutional rights. See Ngcobo, former Chief Justice of the Constitutional Court of South Africa, Does Competition Law and Policy Have a Role in Promoting Social and Economic Rights?, April 2015, Johannesburg, on file with author.

18 See, for a personal account of the treatment of black South Africans under apartheid, Ditkang Moseneke, former Deputy Chief Justice of the Constitutional Court of South Africa, My Own Liberator: A Memoir (2016).

19 See, e.g. Furman & Orszag, Beyond Antitrust: The Role of Competition Policy in Promoting Inclusive Growth, Chicago, Sept. 16, 2016, https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160916_searle_conference_competition_furman_cea.pdf. See also, A Lapse in Concentration: A dearth of competition among firms helps explain wage inequality and a lot of other ills, The Economist, Special Report, Deregulation and Competition, Sept. 29, 2016.

20 https://democrats.senate.gov/abetterdeal/#.WbRHr6JWV_k.

21 Merger Enforcement Improvements Act, S. 1811 (115th Cong. 1st Sess.), Sept. 14, 2017; Bill to amend the Clayton Act to modify the standard for an unlawful acquisition, S. 1812 (115th Cong. 1st Sess.), Sept. 14, 2017.

22 Breaking up South Africa's Cartels, PressReader, March 9, 2017, quoting address by President Jacob Zuma, https://www.pressreader.com/south-africa/finweek-english-edition/20170309/281517930903870.

23 Patel: Structural features diminish effective competition, limit inclusivity of growth, fin24, Sept. 1, 2017, http://www.fin24.com/Economy/patel-structural-features-diminish-effective-competition-limit-inclusivity-of-growth-20170831.

24 Efficiency can be an elusive concept. Giving more access to outsiders might produce more robust markets (market efficiency) than giving more freedom to incumbents. The best balance might depend on the current posture of the law and the market realities of the particular economy. See Fox, The Efficiency Paradox, supra note 3. In the cases surveyed in The Efficiency Paradox, an equity-leaning competition law would have given a different answer to every question before the Court, and the outsider-preferring answer was, in this author's view, likely to have engendered more efficient and inventive markets.

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IV. CONCLUSION

The form of equality most salient to competition law is equality of opportunity. This essay has traced equality as an antitrust value, which it has been for as long as antitrust laws have existed. But antitrust has fallen short of its promise. Foreshadowed by Gabriel Kolko, there has been yet another "Triumph of Conservatism."[25] Will equity now get its edge?

25 Gabriel Kolko, The Triumph of Conservatism: A Reinterpretation of American History, 1900-1916 (1962) (big business, not reformers, shaped the antitrust legislation).

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