

CPI's North America Column Presents:

Antitrust and Power: The State, the Market, and the Virus

By Eleanor M. Fox¹
(New York University School of Law)

April 2020



CPI COMPETITION POLICY
INTERNATIONAL

Copyright ©2020

Competition Policy International, Inc. for more information visit CompetitionPolicyInternational.com

Abstract: In this essay Professor Fox reflects on the sometimes delicate balance between private power and state power. She posits a triangle of tensions among: 1) relying on the market with aggressive antitrust to tame and cabin business power, 2) relying on the market and opposing aggressive antitrust on the theory that business power is fanciful or fleeting and antitrust tends to protect inefficient market players, and 3) relying on the ship of state to guide or commandeer the market, which seems especially attractive in times of crisis. Fox takes the reader on a kaleidoscopic journey through antitrust history from the US Sherman Act to the contemporary crisis, noting the periods of time when one or the other of the three inflection points was in ascendancy. She invokes historic lessons of concentrated markets and the state, as when Hitler used the power of the German monopolies to carry out the tasks of fascism. She concludes with reflections on how emergency may indeed require unique exercises of government power and creation of private power, while sounding a warning cry lest the exigencies of the crisis seduce us to let down our guard and ignore the erosion of competition until it is too late.

Antitrust limits power. But when, how much, how far? And when should antitrust step aside? This essay is a notional history of shifting views about power and markets, the uses of power that we want to contain, and, sometimes, the power of government and business that we might want to support.

Government has sovereign power and may exert economic power; businesses may have economic power. Antitrust, or competition law, is designed to constrain private economic power, and in some jurisdictions, it constrains government misuses of economic power as well.

I examine three inflection points or perspectives. I shall coin the phrase “inflection perspective.” A “perspective” is not a turning point, but a gravitational pull that exists alongside others. The inflection perspective is akin to a trilemma, in which only one of three options is achievable at a given time. But it is not a trilemma because each of the three perspectives lives side by side, tugging at the borders of each other. One or another will be in ascendancy at any point in time.

What are the three inflection perspectives? They are: (1) a pervasive concern with the economic power of corporations and a strong policy goal to harness their power for the good of the people, (2) a commitment to *laissez faire* economics; keeping government out of the business of business; a belief that the free market unhampered by government (for the most part, even antitrust) will deliver the most welfare to people, and (3) (for which we stare the coronavirus in the face) industrial policy: a belief or acceptance of government’s ascendant role, which it may fulfill in the form of government/big business partnerships, removal of antitrust constraints, commands to produce, commands to price low, commands to stop competing; a skepticism that the market, even with antitrust and a social welfare net, can

deliver what the people need. In times of emergency, there is a special acceptance that government and private power may be needed. In modern times in the U.S. (and I speak here not about times of emergency), we might roughly identify the three perspectives as more or less commensurate with progressivism, libertarianism, and conservatism; although each comprises a range of beliefs and each is informed by elements of the others. For simplicity I am including populism with progressivism in inflection 1 to emphasize major concerns about business power, but will separate them later. The relationships among all three inflection perspectives are dynamic, not bounded.

I observe that the three inflection perspectives have existed throughout modern times. Today, in the time of the coronavirus, we are drawn towards the third, even unwittingly or with trepidation. I shall focus largely on U.S. history, although I also reference the European Union. I shall begin with the U.S. Sherman Act, continue to the U.S. Progressive Era and then the Great Depression and the New Deal, move on to World War II and its aftermath, proceed to the establishment of the European Communities, fast forward to the U.S. Reagan Administration, and ultimately to these days of the coronavirus pandemic. I conclude with observations both historical and in the moment.

When the Sherman Act was adopted in 1890, the country was fearful of the power of the big trusts. It was the time of muckraking and Ida Tarbell, the pioneer journalist who exposed their predations. The Rockefeller Oil Trust was exhibit A to the Sherman Act. It was graphically depicted in famous cartoons as an octopus. The Oil Trust strangled competitors, serially buying them up or stamping them out. Ultimately, and despite its many contributions to efficiency and innovation, its conduct was condemned as anticompetitive by the U.S. Supreme Court. The judicial opinion is dry and convoluted and elides the picturesque predations, for which we can read Matthew Josephson's *The Robber Barons*. The Oil Trust heyday and the passage of the Sherman Act paradigmatically coincide with the anti-power inflection perspective. Economists, preoccupied with allocative efficiency, not social justice, were against the Act.

Early development of U.S. Supreme Court antitrust jurisprudence revealed Justices of mixed perspectives. Anti-power, libertarian and conservative world views all had voice on the Court. The first Justice John Harlan was anti-power ("The conviction was universal that the country was in real danger from another kind of slavery"). Justice Holmes was libertarian ("monopoly can only arise from an act of sovereign power I am happy to know that only a minority of my brethren ... would disintegrate society as far as it could into individual atoms ..."). Several were conservative. Just before the *Standard Oil* case came before the Supreme Court, the Court shifted from an anti-power/conservative coalition to a libertarian/conservative majority, and the *Standard Oil* decision is not about bigness and power but about conduct crossing the line of intent and effect.

Several years later, the Progressive Movement, and in particular Louis Brandeis, re-elevated the anti-power, distrust-in-bigness theme, and, with new legislation, this perspective became the ascendant prong of the trilogy in antitrust jurisprudence. But then came the Great Depression of 1929 and the early 1930s. Poverty and economic emergency gripped the country. The ranks of those without resources to stay alive soared. People and businesses looked to government to save them. So government entered the market. It allowed cartels to help businesses bootstrap themselves back to prosperity. Mistakes were made in the means and methods of pausing competition and trusting government and business cooperation. Major aspects of President Franklin Roosevelt's New Deal, for all of its lasting importance in resetting the social compact to help the people, were an economic failure. The key New Deal legislation – the National Industrial Recovery Act – was declared unconstitutional in 1935. Justice Brandeis reportedly remarked: “This is the end of this business of centralization, and I want you to go back and tell the president that we're not going to let this government centralize everything” (in Harry Hopkins' papers). The country pivoted to inflection perspective 1.

In 1939, World War II was declared. In Germany, Hitler worked hand in glove with the huge German monopolies, while, in Russia, Communism suppressed all freedoms, and dominant popular sentiment in the U.S. shifted to a fight against economic concentration to assure that America would not tip towards tyranny, whether fascist or communist. Congress had recently formed the Temporary National Economic Committee (“TNEC”). The TNEC held two years of hearings and produced a report of many volumes on *The Causes and Consequences of Industrial Concentration*. The hearings produced draft bills to contain economic concentration, in the name of freedoms and liberty. One of those bills was the Celler Kefauver Amendment to the merger law, enacted in 1950.

Meanwhile, in Germany, ahead of the war, the Freiburg School developed ordoliberalism. The ordoliberal philosophy was anti-Nazi and anti-central planning. Its adherents believed in a market economy guided by an economic and legal order, called an economic constitution. Ordoliberalism was seen as a check on both fascism and socialism. Its philosophy parallels the Celler and Kefauver motivations. Ordoliberalism has influence to this day, mapping on to inflection perspective 1. In Europe, when the war ended, foresightful thinkers led by Robert Schuman and Jean Monnet understood that the political hostilities of Europe could not be contained unless the peoples of the countries worked together, traded together, and shared a community. The European Economic Communities were born in the 1950s. The Treaties included competition law; it was a necessary tool to build and sustain a common market. The development of the competition law of the European Communities was deeply influenced by ordoliberalism.

In the U.S., the Celler Kefauver Amendment was tested by the Supreme Court in the 1960s, first by *Brown Shoe* in 1962, and many times after. The Court applied the fear-of-

concentrated-economic-power node, as Congress intended. But, in its many decisions, and in its ardor to contain power, the Court showed little concern for claims of efficiency. Through the next decade, by most accounts, it overextended the prohibitions of antitrust. Meanwhile the country was moving into a new trading era. Through the Uruguay Round, trade barriers were dramatically lowered. Cheaper and better products poured into the U.S., especially from Germany and Japan. Business called for the government to get off its back and reduce restrictions of all sorts. People wanted less government regulation. By the end of the 1970s, Chicago School economics and its implicit political economy (trust the market, not the government) found traction. Now was the opening in antitrust for Chicago School economics, which “proved” that less government was efficient and good for business and economic welfare. It was also the opening for Ronald Reagan, who, in 1980, ran for President of the U.S. on a shrink-government ticket and won. The late 1970s’ shift in the juridical foundations for antitrust analysis was consolidated. Inflection perspective 2 ascended.

Perspective 2 took a tight grip. The world financial crisis of 2007-08 restored the industrial policy node, albeit for a short term. Government intervened. Again, mistakes were made, as in the notorious UK authorization of the merger of big banks Lloyds and HBOS, which only dragged both further down. The *laissez faire* node quickly regained footing. It flourished. Mergers marched through the agencies’ gates, including the acquisition sprees of ventilator producers Medtronic and Covidien, concentrating the production of medical supplies critical to people dying of respiratory infection. Moreover, data began to link increasing business concentration with increasing inequality. There was and is a growing feeling among ordinary people (i.e. not the elite and not the technocrats) that the deck is stacked against them. A piece of this picture is the big tech/big data giants, who found footing and soared. At first non-transparently and later, as exposed by the Ida Tarbells of the tech age, they acquired power (through innovation but also network effects, data grabs, deception and abuse) and began to exercise their power over multitudinous facets of our lives, triggering (with other forces such as unconscionably high prices for life-saving drugs) a backlash against big business and high concentration. The populist front guard of inflection perspective 1, in the form of the New Brandeis movement, took a center stage. It insists that antitrust is much more than microeconomic rationality; that antitrust is an intertwined mixture of social, political and economic policy with a human face. The movement stresses diversity as a value, and it embraces competition as the safeguard of liberal values against power, both political and economic. The neo-Brandeisians call for breaking up big tech and aggressively controlling business power. On these points – the goals of antitrust and the remedies for concentrated business – a critical mass of progressives depart from the neo-Brandeisians.

Just as New Brandeis blossomed, coronavirus hit the world, and the deadly pandemic has the world in its grip. Heads of government are reaching out to collaborate with big business, and nations are lowering the bar to antitrust violations. We live in a time of stress. We believe that now we need power more than constraints on power; that government in combination with big

business can save us from the looming health and economic crises. With trepidation and resignation, or no forethought, or eyes wide closed, we sidle up to inflection perspective 3. Meanwhile (but is it a detail?), the power of big tech grows every day of the pandemic, especially in the retail sector, as brick and mortar businesses shutter their stores and we shift to almost complete dependence on the e-economy.

I tell the story as a political economy story; a narrative of history repeating itself with a difference. We move from one inflection perspective to another as the dominant one of the time. We only dimly remember the lessons that should have been learned from leaning too heavily on any one of the three pillars, and particularly on pillar 3. Perhaps ironically, and surely as an unintended consequence, pillar 2 has fostered the growth of powerful business that, under pillar 3, stands to be co-opted by government for authoritarian ends, surveillance among them. A body of work on cautions against trusting power over markets appeared in the wake of the 2007-08 financial crisis and good new work is appearing today. Competition agencies around the world are, in large part, being thoughtful and productive in announcing rules that allow forms of collaboration that are important for the production and delivery of emergency supplies and services including health care, providing advice and guidelines, and suggesting limits and sunsets to relaxations of antitrust. They may or may not prevail on their governments to recognize that competition is one of the best tools for incentivizing production, assuring delivery, and keeping prices low. It is time to read again Giuliano Amato's book, *Antitrust and the Bounds of Power: The Dilemma of Liberal Democracy in the History of the Market* (1997), and Mario Monti's keynote speech at the American Antitrust Institute in June 2009, *Competition Authorities of the World, Unite!*

¹ Walter J. Derenberg Professor of Trade Regulation, New York University School of Law. This article was first published in *Concurrentialiste* as Eleanor M. Fox, *POWER: Trust and Distrust* (April 6, 2020) <https://leconcurrentialiste.com/eleanor-fox-power/>. The author thanks Thibault Schrepel and Daniel Crane for helpful insights.