

POWER: Trust and Distrust

Power has many dimensions. In this reflection, I contemplate power and markets, the kinds and uses of power that we want to contain, and, sometimes, the power that (we think) we want to support.

There is government sovereign and economic power and there is private economic power. Antitrust, or competition law, is designed to contain private economic power, and in some jurisdictions, it is used to contain government misuses of economic power as well.

There are three forces which are in constant tension.

Force 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.

Force 2) A commitment to laissez-faire; keeping government out of the business of business; a belief that the free market unhampered by governments (apart from cartels, even antitrust) will deliver the most welfare to people,.

Force 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.

I observe that the three forces have existed throughout modern times.

When the Sherman Act was adopted in 1890, the USA was fearful of the power of the big trusts. It was the time of muckraking and Ida Tarbell, the pioneering 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 it was condemned as anticompetitive by the US Supreme Court. The judicial opinion is dry and convoluted and elides the picturesque predations. For those, 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 US 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 was decided, 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 governments to save them. So governments 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. President Franklin Roosevelt's New Deal was 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, as history would have it, 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 United States shifted to a fight against economic concentration to assure that America would not tip towards tyranny, either fascist or communist. Congress had already formed the Temporary National Economic Committee. 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 several 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, sometimes called an economic constitution. Ordoliberalism was seen as a check on both fascism and socialism..

In Europe, when the war ended, foresightful thinkers prominently including 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. The development of the competition law of the European Communities was deeply influenced by ordoliberalism.

In the United States, 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, the Court showed little concern for claims of efficiency, and through the next decade 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 were pouring into the United States from abroad, 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 United

States on a shrink-government ticket and won. The late 1970s' shift in the juridical foundations for antitrust analysis was consolidated. Force 2 ascended and took a tight grip.

The world financial crisis of 2007-08 brought back the industrial policy node 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 regained footing. It flourished. Mergers marched through the agencies' gates, no less the acquisition sprees of ventilator producers Medtronic and Covidien, leaving the production of supplies critical to saving lives of persons inflicted with respiratory infection highly concentrated. Moreover, data began to link increasing business concentration with increasing inequality. There was and is a growing feeling among ordinary people that the deck is stacked against them.

No small piece of this picture is the big tech/big data giants, who found their footing and soared. At first non-transparently and later as exposed by the Ida Tarbells of the tech age, they acquired power (through innovative products but also network effects, data grabs, and attention capture) and began to exercise their power over numerous facets of our lives, triggering (with other forces such as unconscionably high prices of life-saving drugs) a backlash against big business and high concentration.

The populist front guard of Force 1 expresses itself most loudly and clearly in the New Brandeis movement, which insists that antitrust is much more than microeconomic rationality; it is an intertwined mixture of social, political and economic policy with a human face, it stresses diversity as a value, and it embraces competition as the safeguard of liberal values against power, political and economic. The neo Brandeisians call for breaking up big tech and aggressively controlling business power. On these points – the goals and the remedies — the neo Brandeisians and many but not all progressives depart.

Just as New Brandeis blossomed, coronavirus hit the world. Heads of government are reaching out to collaborate with big businesses, and various countries are lowering the bar to antitrust violations. We live in a time of stress. We, or some of us, want to believe that now we need power more than we need 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 embrace Force 3. Meanwhile, it is hard to ignore that the power of big tech grows astronomically every day of the pandemic, as anyone would predict from the sad closures and failures of brick and mortar businesses and the shift to almost absolute dependence on the e-commerce economy.

I tell the story as a political economy story; a narrative of history repeating itself with a difference. We move from one Force 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 governments for authoritarian ends, surveillance not least 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 providing advice and guidelines, and suggesting limitations and sunsets to relaxations of antitrust as necessary to produce and deliver emergency supplies and services. They may or may not prevail on their governments to recognize that competition

is one of the best tools for delivery. 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!*

END

This is my adaptation of an article by Prof. Eleanor Fox. The original article is cited below. Apart from some deletions, my main change has been to replace her 'inflection perspectives' with 'forces' – not a perfect substitution but it improves readability for non-academic readers.

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